IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN RE THE MATTER OF STEPHEN C. WOODRUFF,
Respondent-Appellant.

SUPREME COURT NO. 2013-SCC-0030-CIV
SUPERIOR COURT NO. 13-0017

ORDER GRANTING MOTION TO DISQUALIFY

Cite as: 2014 MP 9

Decided August 26, 2014

Stephen C. Woodruff, Saipan, MP, Respondent, Pro Se
Thomas E. Clifford, Saipan, MP, for Petitioner CNMI Bar Disciplinary Committee

BEFORE: PERRY B. INOS, Associate Justice.

INOS, J.:

¶ 1 Following a default judgment in a disciplinary proceeding, Respondent-Appellant Stephen C. Woodruff ("Woodruff") was disbarred. On appeal, Woodruff filed a motion seeking, among other things, the disqualification of Disciplinary Counsel Thomas E. Clifford ("Clifford") because Clifford was simultaneously representing two of the complainants in a related small-claims suit. For the following reasons, this Court disqualifies Clifford, voids his motion to dismiss, and orders the appointment of a new disciplinary counsel to prosecute all of the disciplinary complaints.

I. Factual and Procedural Background

¶ 2 Kenneth and Wanlapha Warfle (collectively, "the Warfles") hired Woodruff to file Wanlapha's application for resident alien immigration status. Later, the Warfles claimed Woodruff botched the application and took two actions against Woodruff: They filed a disciplinary complaint with the CNMI Bar and a small-claim suit with the court. For the small-claims suit, the Warfles hired Clifford, who ultimately represented the couple pro bono. The small-claims suit is ongoing, though it has been taken off calendar because the parties are negotiating a settlement.

¶ 3 Following the start of the small-claims suit, Clifford was appointed as disciplinary counsel to prosecute nine disciplinary complaints against Woodruff, including the complaint filed by the Warfles.

¶ 4 Pursuant to his appointment, Clifford filed a formal disciplinary complaint and, shortly thereafter, a First Amendment Complaint ("FAC"). The FAC stated that: (1) the NMI Rules of Civil Procedure governed the timeline for answering the FAC; and (2) that under those rules, Woodruff had ten days from receipt of the FAC to file an answer. Woodruff missed the deadline, so Clifford filed a motion for default judgment, which was granted. The default judgment formed the basis for disbarring Woodruff.

¶ 5 After the disbarment, the trial court compelled Woodruff to deposit funds with the court that would sit in trust pending the resolution of additional matters, including the determination of appropriate compensation for the complainants. Later, the court issued an order of distribution dispensing the funds to the complainants. Some of that distribution went to the Warfles.

II. Discussion

¶ 6 Against that factual backdrop, Woodruff claims disqualification of Clifford is necessary because Clifford's representation of the Warfles in the related small-claims suit constitutes a conflict of interest. Clifford disagrees, arguing that his representation of the Warfles does not create a conflict of interest because the value of the Warfles' small-claims suit is small. Additionally, he was not compensated for representing the Warfles, and the purpose of his representation in the Warfle matter and this matter are the same: to minimize Woodruff's future harm to the public.

A. *Disqualification*

¶ 7 This Court's cases have repeatedly held that prosecuting attorneys are "servants of the law . . . [who] must serve truth and justice first and foremost." *Commonwealth v. Jing Jin Xiao*, 2013 MP 12 ¶ 42. Consequently, "[t]heir 'job isn't just to win, but to win fairly, staying well within the rules.'" *Id.* (quoting *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993)). To meet that job description, prosecutors cannot prosecute cases in which they have a conflict of interest. *See Commonwealth v. Oden*, 3 NMI 186, 204 (1992) (evaluating whether the defendant's allegations constituted a conflict of interest that would compel the disqualification of the special prosecutor).

¶ 8 The rule against conflicts also applies to counsel appointed by the court. *See Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 804 (1987). In *Young*, a corporation alleged another company was illegally manufacturing counterfeit goods. *Id.* at 790. The parties agreed to a settlement that enjoined the company from reproducing the corporation's products. *Id.* Later, the corporation discovered that the other company was still making counterfeit goods. *Id.* at 791. The enjoining court then appointed the corporation's counsel as a special prosecutor to prosecute the company for criminal contempt. *Id.* at 792. The United States Supreme Court reversed the conviction because the appointment of an interested party's counsel (the corporation's counsel) to conduct the contempt proceedings was improper. *Id.* at 814. It reasoned that "a private attorney appointed to prosecute a criminal contempt . . . certainly should be as disinterested as a public prosecutor who undertakes a prosecution." *Id.* at 804.

¶ 9 Consistent with *Young*, courts generally agree that when a prosecutor's private interests and official obligations collide, the prosecutor cannot pursue both simultaneously. *See Sinclair v. Maryland*, 363 A.2d 468, 477 (Md. 1976) (collecting cases).

¶ 10 For example, in *In re Ridgely*, 106 A.2d 527 (Del. 1954), a man bought a seemingly new car from an auto dealership. *Id.* at 528. In fact, the previous owner had driven the car about 800 miles, been in an accident, and then traded it in. *Id.* The man was referred to an attorney who, similar to here, served as both a prosecutor and a private attorney. *Id.* at 529. The attorney agreed that the facts warranted criminal proceedings but "sought to dissuade [the man] from immediate prosecution because he thought such a course would delay a civil settlement." *Id.* Later, the attorney sent the man to the Attorney General's Office to reduce his statement into writing. *Id.* Following this, the attorney swore out warrants but told the clerk of court not to serve them because serving the warrants would have impeded the man's ability to receive compensation. *Id.* When the man finally settled, the attorney asked for attorney fees. *Id.* at 530. The attorney's dual representation, according to the Delaware Supreme Court, was wrong because when an attorney is both a private practitioner and a prosecutor, "[h]is private interest must yield to the public one." *Id.* at 531. Dual representation violates the spirit of that duty because it "necessarily tends to destroy the confidence of the public" in the administration of justice. *Id.* at 532. That was true even though there

was no evidence that the attorney threatened the dealership with criminal prosecution or intentionally used his powers in office to obtain money. *Id.*

¶ 11 Similarly, in *Sinclair*, 363 A.2d at 470, The Great Oak Lodge ("Lodge") bought a shipment of meat. When the meat was delivered, the seller was paid with bad checks signed by the defendant. *Id.* When the checks bounced, the prosecutor filed a criminal information. *Id.* The defendant responded with a motion to disqualify the prosecutor because of a conflict of interest flowing from the prosecutor's representation of several of the Lodge's creditors in matters involving the defendant. *Id.* at 471. The trial court denied the motion, reasoning that a consistently adverse interest did not lead to a conflict of interest. *Id.* at 472 n.3. On appeal, Maryland's highest court rejected the trial court's reasoning. Extrapolating from precedent barring public officials from participating in matters where they held "'a personal or pecuniary interest, direct or indirect, in the outcome,'" *id.* at 475 (quoting *Montgomery Cnty. v. Walker*, 180 A.2d 865, 868 (Md. 1962)), the court held that if a reasonable person would believe that the prosecutor had "any pecuniary interest or a significant personal interest[1] in a civil matter" that might affect his prosecutorial obligations, then, as a matter of public policy, the prosecutor must be disqualified. *Sinclair*, 363 A.2d at 475.

¶ 12 Like the previous courts, this Court holds that a prosecuting attorney must be disinterested. This proposition is a natural corollary to the long-settled principle that the justice system must avoid even the appearance of impropriety. Allowing prosecutors to prosecute criminal or quasi-criminal cases when they have an interest in a related civil proceeding would do the exact opposite. Such representation would trigger suspicion each time a prosecutor wielded his or her extensive discretion to investigate and prosecute. That suspicion, in turn, would undermine the public's faith in the justice system. Consequently, to maximize faith in the judicial process, prosecuting attorneys must be disinterested from the start of the appointment through the close of the representation. To disqualify a prosecutor on this ground, the party seeking disqualification must show through clear and convincing evidence[2] that the prosecuting attorney possesses any pecuniary interest or a significant personal interest in a related civil matter that might give rise to an appearance of impropriety.

¶ 13 Here, as in *Young*, *In re Ridgely*, and *Sinclair*, Clifford represented an interested party in a civil matter and served as the prosecutor in a related proceeding. The representation of the Warfles in their small-claims suit against Woodruff meant that Clifford was not, and could not, be disinterested in the concurrent disciplinary proceeding founded in part on the Warfles' disciplinary complaint. *See Ganger v.*

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[1] The Delaware Supreme has held that a significant personal interest includes representing a victim in a related matter. *In re Ridgely*, 106 A.2d 527, 530-31 (Del. 1954) ("[A prosecutor's] representation of the [victim] at once gives him a personal interest in the matter that disables him from the proper performance of his official duty.").

[2] *Cf. United States v. Kahre*, 737 F.3d 554, 574 (9th Cir. 2013) (holding that "proof of a conflict must be clear and convincing to justify removal" and then discussing cases placing that burden on the defendant).

Peyton, 379 F.2d 709, 714 (4th Cir. 1967) (holding that a public prosecutor cannot "attempt[] at once to serve two masters," one the public, the other a client who had a particular interest in the prosecution). Because Clifford is not disinterested, disqualification is necessary.[3]

B. *Effect of Filing Motion for Disqualification for the First Time on Appeal*

¶ 14 Because Clifford has prosecuted this disciplinary proceeding from the onset, the next question is whether his disqualification requires reversal of the entire matter.

¶ 15 That answer depends on when the motion was first filed. If a party files a motion that is denied at the trial level but granted on the appellate level, reversal is necessary. *Young*, 481 U.S. at 809-10 (stating that "some errors are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case.") (internal quotations omitted). If, on the other hand, a party files a motion to disqualify for the first time on appeal, then the defendant must show prejudice. *United States v. Lorenzo*, 995 F.2d 1448, 1453 (9th Cir. 1992) (quoting *United States v. Heldt*, 668 F.2d 1238, 1277 (D.C. Cir. 1981)). *See also United States v. Turner*, 651 F.3d 743, 747-48 (7th Cir. 2011) (applying plain-error review, which requires prejudice and more, when a party raises disqualification as an issue for the first time on appeal). The temporal distinction is grounded in sound public policy: Requiring prejudice for tardy motions encourages defendants to file motions at the beginning of the prosecution, not months or years later during the appeal. In contrast, not requiring prejudice would reward defendants for withholding their challenge because they could wait and see how their trial went before deciding whether to file a motion to disqualify. If their trial went well, they would not file a motion. If it went poorly, they would file a motion and get a new trial. In other words, not requiring prejudice would invite attorneys accused of misconduct to waste judicial resources and squander taxpayer funds by withholding a disqualification challenge until after a first conviction. That is an invitation this Court declines to extend.

¶ 16 Here, there was no prejudice. Woodruff alleged one point of potential prejudice: A statement from Clifford that he may have filed a default motion quicker than he normally might in non-disciplinary cases. This statement, however, is not prejudicial for three reasons. First, lawyers have a duty to "act with reasonable diligence and promptness." MODEL RULE OF PROF'L CONDUCT 1.3. Following this command normally is not grounds for prejudice. Second, the statement does not suggest what Woodruff claims it does—that Clifford acted quickly because of his relationship with the Warfles. Instead, the context of that statement suggests Clifford acted quickly for a different reason: To minimize the litigation costs of taxpayers (who pay half Clifford's fees) and the Bar (which pays the other half). Third, Clifford's alleged inconsistency is not the product of a conflict of interest, but rather that of the different forms of client Clifford represents in the two situations. In non-disciplinary cases, Clifford needs to consult a client

[3] Although Clifford is disqualified because of a conflict of interest, the disqualification in no way implies that he acted improperly in carrying out his duties as disciplinary counsel.

before filing a default motion. That consultation can take time and, ultimately, is decided by the client. Thus, Clifford might not file a motion for default on the first day available (or even at all) depending on how quickly the client responds and what that response authorizes. By contrast, in disciplinary cases, Clifford cannot consult his client (the public) about whether to file; thus, he need not wait.

¶ 17 Because there was no prejudice, this appeal will continue forward.

C. *Scope of the Disqualification*

¶ 18 Having determined that the matter will move forward, the next question is the scope of Clifford's disqualification. Clifford was appointed to prosecute nine complaints, only one of which was brought by the Warfles. As a result, the Court must decide whether to disqualify Clifford from prosecuting the entire case or just from prosecuting the Warfles' complaint.

¶ 19 To resolve this question, the parties did not offer, and the Court did not identify, any compelling authority. Nonetheless, prudential concerns counsel in favor of full disqualification. Specifically, there is no need (or benefit) to split representation because the appellate issues for the Warfles and the other complainants are identical. However, there is a cost. Splitting representation would create additional briefing, hearings, orders, and opinions. This additional process would expend extra time, money, and resources from all involved. It would also harm parties beyond this case by delaying the decisions in their cases. *See Commonwealth v. Guerrero*, 2014 MP 4 ¶ 11 (Slip Opinion, April 1, 2014) ("[T]ime consumed relitigating one case subtracts from the time available to litigate others.") (internal quotation omitted).

¶ 20 Because split representation would increase costs without achieving a corresponding benefit, this Court disqualifies Clifford from the entire matter.

D. *Effect of Disqualification on DC's Other Motions*

¶ 21 That leaves one issue: the status of the motions Clifford filed following Woodruff's motion to disqualify.

¶ 22 The Sixth Circuit has decided this question under different circumstances. In *Bowers v. Ophthalmology Group*, 733 F.3d 647, 649 (6th Cir. 2013), Bowers filed a lawsuit against his former employer seeking relief for retaliation and gender discrimination. The employer filed a motion to dismiss, which was converted to a motion for summary judgment. *Id.* at 650. Bowers replied with a motion to disqualify his employer's lawyer because the lawyer's firm had previously represented Bowers in two other matters. *Id.* The trial court granted the employer summary judgment and then dismissed Bower's motion to disqualify as moot. *Id.* On appeal, the Sixth Circuit reversed. *Id.* at 649. In so doing, the Sixth Circuit held that a trial court "must rule on a motion for disqualification of counsel prior to ruling on a dispositive motion because the success of a disqualification motion has the potential to change the proceedings entirely." *Id.* at 654. If the disqualification is granted, "a court should not reach the other questions or motions presented to it through the disqualified counsel." *Id.* In such cases, a court should

not reach these unanswered issues because the disqualified attorney could have used confidential information to "infect the evidence presented to the [] court." *Id*

¶ 23 Although *Bowers* differs from this case in a key respect—there is no danger of confidential information infecting the evidence—the process followed in *Bowers* strikes this Court as appropriate for three reasons. First, the court handling the case cannot know to what extent the disqualified counsel's conflict colored the pending motions; thus, it is safest to give replacement counsel a chance to make an independent judgment.[4] Second, because the motion has not been decided, it seems equitable to permit replacement counsel the option whether to adopt the disqualified counsel's pending motions. Third, providing replacement counsel with this option preserves judicial resources by freeing the court from deciding motions the replacement counsel chooses not to pursue.

¶ 24 Therefore, courts must decide disqualification motions before dispositive motions. If the disqualification motion is granted, pending motions filed by the now-disqualified counsel are void. If, however, the voided motions likely are not infected by evidence garnered through confidential information, then later counsel may renew the motions.

¶ 25 Applying these rules here, this Court has disqualified Clifford; thus, Clifford's motion to dismiss the appeal because Woodruff's brief allegedly was not in substantial compliance with the NMI Supreme Court Rules is void. Because, however, the motion is based on publicly available information (i.e., the brief Woodruff filed), there is little risk that the motion is infected with confidential information. Therefore, the next prosecuting attorney may renew the motion.

III. Conclusion

¶ 26 For the reasons above, this Court disqualifies Clifford and voids his motion to dismiss. Following this order, the Court will appoint new counsel to prosecute the appeal, which shall continue from its present point. After that appointment, the Court will also issue a new due date for the response brief.

SO ORDERED this 26th day of August 2014.

/s/

PERRY B. INOS
Associate Justice

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[4] This Court declines to extend this opportunity to motions already decided for two reasons. First, declining to do so encourages a party to file its motion to disqualify promptly. Second, relitigating motions already decided would waste judicial resources and slow litigation not only for the parties in the present case, but also parties in other cases waiting for the Court's attention. *Guerrero*, 2014 MP 4 ¶ 11.