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

ELIZABETH BLANCO MATSUNAGA,
Plaintiff-Appellant/Cross-Appellee,

v.

CYNTHIA MATSUNAGA, DOUGLAS F. CUSHNIE, and JOHN DOE, REPRESENTATIVE OF THE ESTATE OF FRANCISCO MATSUNAGA,
Defendants.

DOUGLAS F. CUSHNIE,
Defendant-Appellee/Cross-Appellant.

Supreme Court Appeal Nos. 04-0019-GA & 04-0020-GA
Superior Court Case No. 97-0043

FOR PUBLICATION

OPINION

Cite as: *Matsunaga v. Matsunaga*, 2006 MP 25

Argued and submitted on June 30, 2005
Saipan, Northern Mariana Islands

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BEFORE: MIGUEL S. DEMAPAN, *Chief Justice*; JOHN A. MANGLONA; *Associate Justice*; and JESUS C. BORJA, *Associate Justice pro tempore*

DEMAPAN, Chief Justice**:**

¶1 Elizabeth Blanco Matsunaga ("Mrs. Matsunaga") appeals and Douglas F. Cushnie ("Cushnie") cross-appeals the trial court's Findings of Fact and Conclusions of Law. Originally, these parties began their relationship as attorney and client. This lawsuit involved an attorney's duty to account, duty as a fiduciary to handle a loan transaction, and the reasonableness of attorney's fees. In its order, the trial court held that Cushnie breached his duty to provide Mrs. Matsunaga with a timely accounting and also breached his duty by taking $8500 from a trust account before the contingency on which his fee was based had occurred. The trial court also held that while Cushnie's fee was reasonable, he was required to forfeit or disgorge $50,000 because he failed to account properly; $8,500 which he took as an advance; and $2,008.50 in fees that he never repaid pursuant to a previous order. We affirm the decision below, but reverse the trial court's finding that 2 CMC §4941 and 2 CMC §4942 are unconstitutional. In addition, we find that the trial court did not abuse its discretion by denying Cushnie's motion for sanctions and referral of Mrs. Matsunaga's attorneys, William Fitzgerald and Paul Lawlor ("Fitzgerald and Lawlor"), to the disciplinary committee. Lastly, we affirm the trial court's denial of the jury demand.

I. FACTS AND PROCEDURAL BACKGROUND

A. Background Litigation

¶2 This litigation arose in the context of the Matsunaga-Diamond Hotel litigation. Manases Matsunaga entered into an agreement to lease 2.2 hectares of land to Diamond

Hotel Co., Ltd. ("Diamond"). Diamond had an option to extend its lease ("Lease") for an additional 30 years. When Manases died, the property passed to his sister Elizabeth Blanco Matsunaga, the Plaintiff-Appellant/Cross Appellee ("Mrs. Matsunaga").

¶3 Diamond sought a declaratory judgment that the Lease, particularly the 30-year renewal option, did not violate Article XII of the Commonwealth Constitution. Mrs. Matsunaga contested the action, and her son Francisco engaged Douglas Cushnie, Esq. to represent her. Francisco had a general power of attorney for Mrs. Matsunaga and he managed her financial affairs.

¶4 Mrs. Matsunaga prevailed and obtained an order which voided the lease. Diamond appealed. The Supreme Court found that the 30-year renewal option did violate Article XII, but it allowed the clause to be severed, preserving the 55-year lease. Cushnie appealed to the Ninth Circuit Court of Appeals, but that appeal was dismissed.

¶5 In August, 1996, Cushnie negotiated a settlement with Diamond. Diamond agreed to cancel the lease and Mrs. Matsunaga agreed to sell one hectare of the property for $500,000 to a corporation controlled by Diamond's attorney, Juan T. Lizama. The remaining 1.2 hectares remained the property of Mrs. Matsunaga.

B. Current Litigation

¶6 The current litigation involves the attorney's fees collected by Cushnie as well as his role in the transfer of $150,000 to Francisco and Francisco's wife Cynthia. The $150,000 was a loan from Mrs. Matsunaga to Francisco and Cynthia so that Francisco, who was terminally ill, could go to the Philippines for medical treatment. Francisco died in late 1996.

¶7 In January, 1997, Mrs. Matsunaga filed an action against Cynthia and the estate of Francisco seeking repayment of the $150,000 loan. Cushnie originally represented Mrs.

Matsunaga, but was later disqualified and ordered to repay any fees received in connection with that particular litigation. The fees, totaling $2,008.50, were never repaid. Mrs. Matsunaga then retained new counsel who filed an amended complaint on February 5, 1999 and named Cushnie as a Defendant ("Second Complaint"). The Second Complaint included the following: 1.) a demand for an accounting of legal work done and fees paid; 2.) a claim for damages for legal malpractice for breaches of fiduciary duty; and 3.) a claim for damages for legal malpractice for a breach of the duty of diligence for failing to counsel Mrs. Matsunaga or provide documentation for the loan to Cynthia and Francisco.

¶8 Originally, Cushnie had been compensated on an hourly basis. However, on July 6, 1993, Cushnie and Mrs. Matsunaga agreed that he would work on a contingency basis for 30% of any recovery. Cushnie waived any fees he had not yet collected at that time.

¶9 After the contingency fee agreement was made, but before the Diamond litigation was completed, the Commonwealth legislature passed 2 CMC §4942. Section 4942 provides that attorneys may not charge more than a 20% contingency fee on Article XII related cases. Cushnie did not inform his clients of the change in the law and he did not offer to modify his contingency agreement.

¶10 During the course of the Diamond litigation, the court released $103,000 to Cushnie which represented rent payments on the lease which had been paid into Court. Cushnie was supposed to pay his client, but he retained $8,500 and placed the rest in his client trust account for Mrs. Matsunaga.

¶11 After the 1996 settlement, Cushnie received the sale price of $500,000, took $150,000 as his fee, and put the balance into his client trust account. Cushnie did not provide any type of accounting of services rendered or explanation for the calculation of this fee until 1998. In

the 1998 accounting, Cushnie claimed that he was entitled to calculate the contingency fee based not only on the sale price of $500,000 for the one hectare, but also on the value of the 1.2 hectares freed from the lease. Eventually, Cushnie conceded that he could not claim a contingency on the 1.2 hectares that were already owned in fee simple as Mrs. Matsunaga had only recovered the value of future rentals. The trial court, however, did accept Cushnie's final accounting, which showed that the total number of recovery that could be used to calculate the contingency fee was $878,030, for a total of $263,409. Cushnie waived $104,909 of that fee.

¶12 Of the remaining $350,000 from the sale price, $150,000 was deposited in Cynthia's account as a loan for Francisco's care. While at least two of Cushnie's agents were aware of the $150,000 loan, there were no loan documents drafted and Mrs. Matsunaga was never counseled regarding the loan.

¶13 In 2003, a settlement was reached between Mrs. Matsunaga and defendants Cynthia and the Estate of Francisco Matsunaga. A stipulation dismissing this action with prejudice as to Cynthia and the Estate of Francisco was not presented in the excerpts of record before this Court and the terms of the stipulation have not been disclosed.

¶14 The trial court found that Mrs. Matsunaga was entitled to recover under her claim that Cushnie breached his fiduciary duty by failing to provide a timely accounting of his fees and improperly transferring $8,500 from his trust account to his general account without explanation or notice to his client. The Court found that these breaches of fiduciary duty were done with knowledge and constituted unethical behavior. Accordingly, the Court ordered Cushnie to forfeit $50,000 of his fee as well as the $8,500 he improperly transferred for a total of $58,500. In addition, the Court entered a judgment for the $2,008.50 plus pre-

judgment interest which had previously been ordered to be paid. The trial court denied Mrs. Matsunaga's claim regarding the loan of $150,000. It also denied Cushnie's motion for sanctions against Mrs. Matsunaga's attorneys, Fitzgerald and Lawlor, for filing a frivolous claim (the third cause of action that Cushnie should not have authorized the release of $150,000); filing a frivolous motion for summary judgment; unethically obtaining former Justice Atalig as an expert witness; and acting in bad faith by deceiving the Court by omission and misrepresentation. Finally, the trial court denied Cushnie's jury demand (by separate order) because it was filed late.

¶15 During the course of the trial at issue on appeal, former Justice Pedro M. Atalig, who had participated in court decisions in the underlying case, was permitted to testify as an expert witness on behalf of Mrs. Matsunaga. Former Justice Atalig had previously written a concurring opinion in the Matsunaga-Diamond Hotel Litigation, the underlying litigation to this action. *Diamond Hotel Co. v. Matsunaga,* 4 N.M.I. 213 (1995), concurring at 221-27. In addition, he sat as a panel member on the extraordinary writ petition brought by Cushnie to disqualify Judge Alberto C. Lamorena III from sitting as the trial court judge on this action. *Matsunaga v. Cushnie*, Original Action No. 99-009, *Order Denying Writ of Mandamus*, July 21, 1999. Former Justice Atalig's testimony related to the reasonableness of Cushnie's fee.

II. JURISDICTION

¶16 This Court has jurisdiction from a final order of the Commonwealth Superior Court pursuant to Article IV, Section 3 of the Commonwealth Constitution and Title 1, Section 3102(a) of the Commonwealth Code. The appeal is timely pursuant to Rule 4 of the Commonwealth Rules of Appellate Procedure.

III. ANALYSIS

1. The Commonwealth statute limiting attorney's fees is constitutional.

¶17 An appeal involving the application of a provision of the U.S. or N.M.I. Constitution is reviewed *de novo*. *Commonwealth v. Bergonia*, 3 N.M.I. 22 (1995). Mrs. Matsunaga argues that the Superior Court erred in finding that 2 CMC §4941 and 2 CMC §4942 (the "Statute") were unconstitutional. We agree and find that the Statute is constitutional. While the Attorney General should have been noticed below pursuant to Com. R. Civ. P., Rule 24(c), in the interest of judicial economy we waive the requirement.[1] See Com. R. App. P., Rule 2.

¶18 2 CMC § 4942 limits attorney's fees awarded in land cases brought under Art. XII of the N.M.I. Constitution to the lesser of:

> (1) 20 percent of the fair market value of the real property; or (2) 20 percent of the amount actually received by the client for the property in whatever transaction, legal proceeding, or settlement the attorney represented him or her in; or (3) the amount of time in hours spent by the attorney on the case, multiplied by $700 per hour.

The Statute applies to any "action at law, lawsuit, court hearing...or similar proceeding to determine legal rights and interests, which proceeding has not been reduced to final judgment as of October 29, 1993." 2 CMC §4941.

¶19 In enacting this legislation, the Legislature found that citizens of the CNMI needed to be protected from exploitation by attorneys who represent parties in Article XII cases. PL 8-32, §1 (effective Oct. 29, 1993, published as part of the Law Revision Commission Comment). Article XII provides that only citizens of Northern Marianas descent may hold freehold land interests and leasehold land interests of more than fifty-five years. N.M.I.

[1] The Attorney General will be served with a copy of our decision when it is issued and will have an

Const. art. XII. While recognizing the value of contingency fees, the Legislature also found that it has the power to ensure that attorney's fees are reasonable. PL 8-32 §1 (effective Oct. 29, 1993, published as part of the Law Revision Commission Comment).

¶20 "Statutory laws and constitutional provisions apply prospectively unless there is a clear manifestation of intent that they should be applied retroactively." *In re Estate of Aldan*, 2 N.M.I. 288, 298 (1991). If there is a clear legislative intent regarding retroactivity, then that language controls statutory construction. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990). Here, 2 CMC §4942 clearly states that it shall apply to any litigation which hasn't been reduced to judgment as of October 29, 1993. Accordingly, the Legislature has made its intent clear that 2 CMC §4942 shall be applied retroactively to October 29, 1993.

¶21 The question then becomes whether the retroactive application of 2 CMC §4942 violates the constitutional right against interference in private contracts. The Contract Clause of the U.S. Constitution as applied through Section 501 of the Covenant, while it prohibits interference in private contracts, must also accommodate the State's inherent police power to guard its citizens. U.S. CONST. art. I, sec. 10, cl. 1; *Energy Reserves Group, Inc. v. Kansas Power and Light, Co.*, 459 U.S.400 (1983). "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Energy Reserves Group, Inc.*, 459 U.S. at 401, citing in part *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978).

¶22 The court will examine the severity of the impairment so that it can direct the appropriate amount of scrutiny toward the law in question. *Energy Reserves Group, Inc.*, 459 U.S. at 411-12 (1983). Examining the statutory restriction on its face, attorneys in

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opportunity to file a motion to intervene and request a rehearing until such time as the mandate is issued.

Article XII cases are entitled to a 20% contingency fee or an amount equal to $700.00 per hour. This amount of remuneration for an attorney is reasonable.

¶23 To aid in its examination of the severity of the impairment, the court must also consider whether the subject industry has been regulated in the past. *Id.* at 411. The practice of law requires a license and is regulated by the state. *See* 1 CMC §3601; *In re Blankenship*, 3 NMI 209 (1992); *Hwang Jae Corp. v. Marianas Trading & Dev. Corp.*, 4 NMI 142 (1994). Furthermore, attorneys' contingency fees have been regularly limited by state statutes and common law. *See, e.g.*, 27 V.I.C. sec. 166f [medical malpractice contingency fee not to exceed 25%]; 26 LPRA sec. 4111 [medical malpractice contingency fee sliding scale from 33% to 20%]; *Baskerville v. Baskerville*, 246 Minn. 496, 75 N.W.2d 762 (1956) [contingency fee prohibited in divorce actions].

¶24 Considering the fact that the Statute provides for adequate attorney's fees, and considering the fact that attorneys and their contingency fees have been the subject of state regulation in the past, we find that the Statute does not operate to substantially impair contractual relationships between attorneys and clients in Article XII cases. Even if we were to find that the Statute operated as a substantial impairment of a contractual relationship, however, we would still find it constitutional. A statute which contains a substantial impairment is constitutional if the State has a significant and legitimate public purpose in enacting the statute. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 247, 249 (1978). Remedying a social or economic problem is a legitimate public purpose. *Id.* Here, the NMI Legislature detailed its plan to remedy the unstable real estate market while protecting its citizens. These goals, especially in the context of Art. XII, which itself gives special protection to CNMI citizens, are worthy and important.

¶25 If a legitimate public purpose is identified, then the last inquiry is whether the adjustment of the rights and responsibilities of the contracting parties is appropriate in relation to the public purpose which justifies the adoption of the legislation. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977). Unless a State is involved as a contracting party, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* at 22-23. Here, the parties affected by the Statute are private citizens: the attorney and the client. Therefore, we defer to the Legislature and find that its plan to remedy a social and economic problem is reasonable. Accordingly, even if we had found that the Statute had substantially impaired attorneys' rights to contract, we would find that it is constitutional.

¶26 Even though we reverse the trial court's holding regarding the constitutionality of the Statute, i.e., 2 CMC §§ 4941 and 4942, and by that reversal the holding that 30% was a reasonable fee, our reversal does not affect the outcome below. See *In re Estate of Dela Cruz*, 2 N.M.I. 1, 17 (1991)(judgment may be affirmed even if substantive law applied was incorrect). Although the retainer contract, which was drafted before the implementation of 2 CMC §§ 4941 and 4942, provided for a fee of 30%, Cushnie did not actually take a fee of 30%. He took a fee of 20%, an amount allowable under the Statute. Therefore, the fact that the Statute is retroactive and constitutional is not a basis to disturb the trial court's decision, even though we reverse both the finding that Cushnie's right against interference in private contracts was violated by the Statute and the finding that 30% was a reasonable fee.

2. It was not an abuse of discretion for the trial court to hear testimony on the theory of accounting/equitable disgorgement and find that Cushnie must disgorge $50,000 in legal fees plus the $8,500 advance and $2008.50 offset.

¶27 We review *de novo* the legal issue of whether a trial court erred in applying common law. *Bolalin v. Guam Publications, Inc.*, 4 N.M.I. 176 (1994). Reasonableness of attorney's fees are reviewed on appeal for abuse of discretion. 4 CMC 5101 *et seq.*; *Wabol v. Camacho*, 4 N.M.I. 388 (1996); *Reyes v. Ebeteur*, 2 N.M.I. 418 (1992).

¶28 Cushnie argues that Mrs. Matsunaga did not plead equitable disgorgement or forfeiture in her Second Complaint and therefore it was an abuse of discretion for the trial court to hear testimony on the theory of accounting/equitable disgorgement. Examining the Second Complaint itself reveals the Second Cause of Action, which is that Cushnie violated his fiduciary duty and "43. As a result of the violations of fiduciary duties, Elizabeth has lost substantial sums of money, which cannot be accurately determined until a full accounting is given." While not artfully plead, this language indicates that Mrs. Matsunaga seeks to be made whole through an equitable accounting.

¶29 The trial court in its decision addressed the issue in a footnote where it found that allowing the claim of disgorgement to be heard was proper under Com.R.Civ.P. 15(b). Rule 15(b) provides that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The trial court found that "both parties argued extensively about the propriety of forfeiture. Furthermore, the elements necessary to prove breach of fiduciary duty are essentially the same as those used to argue for forfeiture. Therefore, allowing such a claim to be heard and decided does not put Mr. Cushnie at any substantial disadvantage."

¶30 An equitable accounting is a remedy which prevents unjust enrichment by requiring disgorgement of profits a fiduciary receives as a result of a breach of the duty of loyalty. *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1009 (8th Cir. 2004); *Newby v.*

Enron Corp., 188 F.Supp.2d 684, 706 (S.D. Texas, 2002). "An accounting for profits as an equitable remedy for breach of fiduciary duties forces a defendant to disgorge gains improperly obtained by breach of fiduciary duty…." *Newby,* 188 F.Supp.2d at 706. The term "accounting" can engender confusion because it can have two meanings: (1) an equitable remedy known as an accounting for profits which is designed to avoid unjust enrichment by forcing a fiduciary-defendant to account for and disgorge any gains improperly attained; and (2) a discovery document for the purpose of forcing a defendant to produce books or other data. *Golden Pacific Bancorp v. FDIC*, 2002 WL 31875395 at 13 (SDNY 2002)(not published in F.Supp.2d).[2] When pleadings are not specific as to which type of accounting is requested, the court may consider which type of accounting is sought. *Id*. In modern cases, an accounting as discovery is disfavored. *Id*. at 14. In fact, here, the accounting document reviewed by the trial court was obtained in 1998. Accordingly, it was proper for the trial court to consider the term "accounting" to refer to an accounting for profits.[3]

¶31 The trial court framed its legal analysis in terms of an attorney's fiduciary duty to a client and used the term "forfeiture" as defined by the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37. It correctly stated that a reviewing court should consider "the gravity and timing of the violation, its willfulness, [and] its effect on the value of the lawyer's work for the client" when deciding whether fee forfeiture is appropriate. *Matsunaga v. Cushnie*, Civil Action No. 97-0043 (Lamorena, J. 2004) at 13, ln. 16, citing to the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37. The Court then held that

[2] While this court does not accept unpublished citations as precedent from practitioners under Com.R.App.Pro., Rule 51, we may cite unpublished decisions to support our own developing precedent in the CNMI.

[3] The case of *Manglona v. Tenorio*, 2004 MP 17 is distinguishable because in that case the Superior Court allowed amendment of a complaint after a trial. Here, there was no amendment; rather, the petition though

Cushnie failed to notify Mrs. Matsunaga of the $8500 retained in his general account as an advance on a contingency fee and failed to notify Mrs. Matsunaga that he was claiming his contingency fee based on the value of the 1.2 hectares freed from the leasehold. This conduct was found to be a serious violation of Cushnie's duty of loyalty. We agree, and find that it was within the Superior Court's discretion to award Mrs. Matsunaga $50,000 in legal fees plus the $8,500 advance and $2008.50 offset, including the award of prejudgment interest.

3. Former Justice Atalig's testimony as an expert witness was harmless error which did not prejudice the outcome of the trial.

¶32 Cushnie argues that the Superior Court erred in permitting former Justice Atalig to testify as Matsunaga's expert after former Justice Atalig had participated in the court decisions in the underlying case. This is a mixed question of law and fact, in that Cushnie questions the trial court's findings of fact which supported the court's legal conclusion as to the propriety of his legal fees as well as their partial forfeiture. *See Santos v. Santos,* 6 N.M.I. 113, 115 (2000). Mixed questions of law and fact are reviewed *de novo* on the law, but the trial court's findings of fact are reviewed for clear error. *Id.; Sattler v. Mathis,* 2006 WL 897140 (N. Mariana Islands 2006). We do not reverse trial court findings of fact unless we have a firm and definite conviction that a mistake has been made. *Id.* We find that while the trial court interpreted the law correctly, it should not have allowed former Justice Atalig to testify. We also find, however, that the testimony of former Justice Atalig did not prejudice the outcome of the trial or lead to clear error by the trial court in its findings of fact and therefore decline to disturb the ruling of the trial court.

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inartfully plead, did include a cause of action for an accounting for profits.

¶33 Former Justice Atalig was an associate justice of the Commonwealth Supreme Court when it entered its decision on the underlying case in this litigation, *Diamond Hotel Co. v. Matsunaga*, 4 N.M.I. 213 (1995), wherein he wrote a concurring opinion. *Diamond Hotel Co.*, 4 N.M.I. at 221-27. In addition, former Justice Atalig sat as a panel member on the extraordinary writ petition brought by Cushnie to disqualify Judge Lamorena from sitting in the Superior Court on this action. *Matsunaga v. Cushnie*, Original Action No. 99-009, Order Denying Writ of Mandamus, July 21, 1999. Cushnie by a motion *in limine* filed April 29, 2003 moved to exclude the testimony of former Justice Atalig. The issue of the propriety of former Justice Atalig's subsequent testimony as an expert witness was therefore properly raised before the trial court and we address it on this appeal.

¶34 While we are reluctant to declare a *per se* rule which might declare an entire class of witnesses incompetent, we also recognize that it is preferable that a judge or former judge not testify in a case where he or she has participated in the past as adjudicator. The problem with a judge or former judge testifying is that the parties might interpret it as judicial favoritism which would lead to at best an appearance of judicial impropriety. *See Merritt v. Reserve Ins. Co.*, 34 Cal.App.3d 858, 883 (2nd Dist. 1973). In addition, by subsequently testifying as an expert for one party, the judge or former judge may appear to be "throwing the weight of his position and authority behind one of two opposing litigants." *Id.*

¶35 The Commonwealth Rules of Evidence provide that "[t]he judge presiding at the trial may not testify in that trial as a witness." Com. R. Evid., Rule 605. Our rules, however, do not state whether a judge or former judge who is no longer presiding can be called subsequently as a witness. "There is no legal principle that absolutely prevents a judge from testifying as a witness about matters arising in a former trial over which that judge presided."

Sansone v. Garvey, Schubert & Barer, 71 P.3d 124, 126 (Oregon, 2003). *See United States v. Frankenthal,* 582 F.2d 1102, 1108 (7th Cir. 1978). Most commonly, this situation arises in cases of attorney malpractice, where calling a judge or former judge who presided over the trial in question could be highly relevant.

¶36 The Commonwealth Rules of Evidence further provide that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice…." Comm. R. Evid. 403. Allowing a judge or former judge to testify as an expert makes it difficult to avoid prejudice. It is possible, however, for a trial court to successfully tailor evidence and use limiting instructions where a jury is involved. *See Sansone,* 71 P.3d at 124. In addition, it would be problematic to declare an entire class of witnesses to be incompetent when, first, the rules do not do so, and second, there are other members of a community who because of social stature or professional position might be regarded as more believable (such as members of the clergy, for example) who are not automatically prevented from testifying as witnesses. *See Id.* at 131-2.

¶37 Looking at former Justice Atalig's testimony, it is clear that he did not add anything to the evidence before the court. The court had access to Cushnie's accounting as well as the amounts charged as legal fees. Considering that this was a bench trial, it is unlikely that former Justice Atalig's opinion that the fees were excessive with nothing more could have swayed the court. That being said, we find that the trial court should not have allowed former Justice Atalig to testify in this case as an expert witness in favor of a former litigant. Because the testimony constituted harmless error, however, we find that this is not a ground to reverse the lower court's decision.

¶38 While errors do occur in contested trials, a litigant is assured of a fair trial, not a perfect one. *Commonwealth of Northern Mariana Islands v. Lucas,* 6 N.M.I. 564, 567 (N. Mariana Islands, 2003). The concept of "harmless error" assures that minor errors which are non-critical to the outcome of a trial will not result in a reversal. *Id.* Accordingly, an appellate court may excise evidence which has been improperly admitted at trial and examine the untainted evidence to determine whether the same result would occur. *Id.*

¶39 Excising the testimony provided by former Justice Atalig and examining the untainted evidence alone, we determine that the same result would have occurred. We find, therefore, that while it was error for the trial court to allow the testimony of former Justice Atalig, it was harmless error, and we do not disturb the lower court's decision on appeal.

4. Cushnie's motion for sanctions and to refer Fitzgerald and Lawlor to the disciplinary committee was properly denied.

¶40 At the outset, we note that Cushnie devoted 33 pages of his brief to the sanctions issue.[4] This Court addresses all of the arguments on appeal which have merit. Here, the volume of Cushie's argument cannot make up for the high standard of abuse of discretion which he fails to overcome, and accordingly we affirm the trial court's denial of Cushnie's motion for sanctions and to refer Fitzgerald and Lawlor to the disciplinary committee.

¶41 Com. R. Civ. P. 11 provides that when an attorney or unrepresented party submits a pleading or written motion, that party is

> certifying that, to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

[4] This Court granted Cushnie's application for leave to file a brief in excess of fifty pages by order dated February 9, 2005.

> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

On appeal, the standard of review of a Rule 11 determination is whether the trial court abused its discretion. *Lucky Development Co., Ltd. v. Tokai, U.S.A., Inc.,* 3 N.M.I. 79, 84 (1992); *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990). "A trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principals [sic] of law and practice to the substantial detriment of a party or litigant." *Fitial v. Kim Kyung Duk,* 6 N.M.I. 276, 278 (2001).[5]

¶42 Rule 11 imposes an "objective reasonableness" standard. *Tenorio v. Superior Court*, 1 N.M.I. 112, 122 (1990); *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.,* 498 U.S. 533, 554 (1991). When deciding whether to impose sanctions, a court may consider the circumstances of a particular case, including the time available for filing and the complexity of information presented. *Tenorio,* 1 N.M.I. at 122. The purpose of Rule 11 is to deter baseless filings and curb abuses; not to reward a party who might have been victimized by litigation. *Business Guides, Inc.,* 498 U.S. at 553.

¶43 Cushnie argues that the Superior Court abused its discretion by refusing to impose Rule 11 sanctions on Fitzgerald and Lawlor because it failed to consider a long list of deficiencies which he lists in his brief. Examining the decision, the trial court clearly states

[5] While the trial court's cite to Com.R.Civ.P. Rule 11 incorporates a summarization of the statute's language

that it has considered Cushnie's assertions, including that declarations were not in proper form and exhibits were not properly authenticated. The trial court considered the circumstances of the case as well as the nature of the deficiencies when making its decision. In addition, while we agree that the basis for the third cause of action may have been questionable, it is within the discretion of the trial court to consider the merits of a legal argument. We do not find that the decision constituted an abuse of discretion.

¶44 Cushnie's arguments about unethical behavior by Fitzgerald and Lawlor in regard to former Justice Atalig are disingenuous at best. Cushnie argues that Fitzgerald and Lawlor put former Justice Atalig in an "embarrassing" situation where they were prevailing on him to behave "unethically" and possibly violate the "Code of Judicial Conduct." Further, Cushnie argues that Fitzgerald and Lawlor unethically filed a "racist" declaration of former Justice Atalig that in Chamorro society, a person receiving a large sum of money will be asked by family members for financial assistance. It is shocking to this Court that Cushnie could patronize former Justice Atalig so grossly by questioning his capability to make his own declaration. We have already found that a former judge or justice is not automatically disqualified as an expert witness. While we agree with Cushnie that in this case, the court should not have granted Fitzgerald and Lawlor's request to have former Justice Atalig testify, there was no settled law in this jurisdiction preventing him from doing so. Accordingly, the actions of Lawlor and Fitzgerald in retaining former Justice Atalig and the submission of former Justice Atalig's declaration did not warrant sanctions.

¶45 Finally, Cushnie's argument that Fitzgerald and Lawlor acted in bad faith with intent to deceive the trial court was found on the facts to be without merit.[6] In fact, the trial court

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within a quote, the substance is wholly correct.

[6] Because the conduct at issue in this case relates to an attorney's legitimate efforts at zealous advocacy for the

went so far as to find that Cushnie's allegations themselves "could be construed as frivolous and sanctionable." *Matsunaga v. Matsunaga,* Civil Action No. 97-0043, page 9 (N.M.I. Super. Ct. Feb. 12, 2002). Clearly the trial court examined the facts before it and it was in a far better position to make a determination. There is nothing in the trial court's decision which indicates an abuse of discretion. All other arguments by Cushnie on the issue of the denial of sanctions and referral of Fitzgerald and Lawlor to the disciplinary committee are without merit.

5. Cushnie's jury demand was properly denied.

¶46 The standard of review for the denial of a jury demand is *de novo*. *Santos v. Nansay Micronesia, Inc*., 4 N.M.I. 155 (1994). A jury is not required under the Seventh Amendment for equitable claims which are restitutionary in nature. *See Santos v. Nansay Micronesia, Inc*., 4 N.M.I. 155 (1994); *Feltner v. Columbia Pictures Television, Inc*., 523 U.S. 340, 347-348 (1998). An accounting/equitable disgorgement claim is an equitable claim. *See Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry,* 494 U.S. 558, 570 (1990). Cushnie has not presented anything to this court which would show his entitlement to a jury trial. Accordingly, we affirm the trial court's decision denying the jury demand.

V. CONCLUSION

¶47 For the foregoing reasons, we REVERSE the Superior Court's holding that Cushnie's right against interference in private contracts was violated by 2 CMC §§ 4941 and 4942 and the Superior Court's finding that 30% was a reasonable fee.

¶48 We AFFIRM the decision of the Superior Court which entered a judgment for $2,008.50 plus pre-judgment interest at a rate of 9% per annum and an additional $58,500

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client, under the court's inherent powers there would have to be a finding of bad faith to justify sanctions. *See Matsunaga v. Matsunaga*, 6 N.M.I. 285 (2001).

with interest pursuant to 7 CMC § 4101 against Cushnie. We also AFFIRM the Superior Court's denial of Cushnie's motion for sanctions and the Superior Court's denial of both Cushnie's demand for a jury trial and renewed demand for a jury trial.

SO ORDERED this ___ day of December, 2006.

_____
MIGUEL S. DEMAPAN
Chief Justice

_____
JOHN A. MANGLONA
Associate Justice

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JESUS C. BORJA
Associate Justice *pro tempore*