

ROP v. Taunton, 15 ROP 170 (Tr. Div. 2008)
REPUBLIC OF PALAU,
Plaintiff,

v.

MACK TIMOTHY TAUNTON, WILBERT KAMERANG, TADAO NGOTEL, IRENE FRANCISCO, MARIO G. GULIBERT, MARGO LLECHOLCH, ELBUHEL SADANG, PRESLEY ETIBEK, EVENCE IMETENGEL, DEBORAH RENGHL, LEO BEN TERIONG, HIDEO TEMETEET, NAOMI UEKI, KOICHI WONG, EMORY MESUBED, JOHN WONG,
Defendants.

CRIMINAL CASE NO. 08-018

Supreme Court, Trial Division
Republic of Palau

Decided: April 29, 2008

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ARTHUR NGIRAKLSONG, Chief Justice:

On April 28, 2008, the Court conducted a hearing on pending motions. The Court denied Defendants' Motions to Dismiss and Motion for Bill of Particulars. The Court also took up the issues of conflicts of interest in the representation of the Civil Service Pension Plan ("CSPP") Defendants, as raised in the motions of the ROP. Counsel were asked to respond to three questions: (1) Does a conflict exist?; (2) If so, has there been an effective waiver?; and (3) Is the Court bound by any such waiver? The Court has carefully reviewed the record and has considered the arguments of counsel fully. For the reasons set forth below, the Court finds that conflicts exist and that to the extent they have been waived, such waiver is rejected.

DISCUSSION

A. Conflicts Implicated

Two aspects of the representation of the CSPP Defendants are cause for concern, and both fall under Rule 1.7 of the ABA Model Rules of Professional Conduct. Subpart (a) of the rule defines a concurrent conflict of interest and subpart (b) sets forth a protocol for proceeding with the representation in spite of a conflict. Counsel for CSPP Defendants takes the position that the representation does not even fall under Rule 1.7(a) because there is no "proof" that there are directly adverse interests at stake. As an initial matter, Counsel seems to have completely ignored an entire subsection of the rule.¹

¹ In any event, since inquiry into potential conflicts is within the inherent power of the Court, Counsel's assertion that the Republic must meet some burden of proof is simply incorrect. The Court likewise rejects Counsel's assertion, made in its "Memorandum in Support of Joint Representation," that there is a standing requirement to be met. The cases cited in support

Rule 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of **¶172** one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.7, Annotated ABA Model Rules of Professional Conduct (6th ed. 2007).

Rule 1.7(a)(2) makes clear that it is not only an existence of directly adverse interests that creates a conflict of interest. Rather, the possibility that the interests may become adverse or that the lawyer's representation of one will be materially limited by the responsibilities to another also amounts to a conflict to be avoided. Counsel for CSPP Defendants asserts that even if a conflict exists, it has effectively been waived by the "Declaration of Joint Representation," which was filed prior to the hearing. The Court will analyze the two areas of conflict separately.

B. Conflict between Individual Board Members and Plan in Different Actions

Counsel submits that no conflict arises out of the simultaneous representation of individual board members (in this case) and of the Plan itself (in a related civil action). Counsel argues that the interests of the individuals are the same as the interests of the Plan: to prove there

involve civil matters and are distinguishable on that basis. Because this is a criminal matter, and thus, we tread into constitutional right-to-counsel territory, both the Court and the ROP have an interest in ensuring the protection of that right and maintaining the integrity of the proceedings.

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was no illegal activity and to recover the \$1 million. Based on this assumption that the interests are identical, Counsel urges that representing the individual defendants in this matter actually furthers the interests of the Plan. This is simply not true, as Counsel overlooks the important distinction between the Plan as an entity and the board members as individuals.

The Plan itself is not a defendant in this matter and does not face criminal charges. If Defendants are convicted on all counts of the Information, the conduct charged in this matter may not be imputed to the entity. Among the charges are Misconduct in Public Office, 17 PNCA 2301, which involves a wilful neglect to perform the duties of one's office. And, as articulated by counsel for the ROP, the prosecution does not claim the Plan committed illegal acts, but rather these board members acted illegally, in abuse of their positions, and to the detriment of the Plan. Thus, the Plan's only interest would seem to be recovering the \$1 **1.173** million dollars, whether from the depositor distributions of the Receiver or from any individuals adjudged to be criminally responsible for its loss. On the other hand, the interest of the individual board members can only necessarily be defending themselves against a potential criminal conviction and failing that, obtaining a lenient sentence.

While at first blush the two interests may not seem diametrically opposed, the possibility that during the course of this trial, they could become directly adverse is not something this Court can ignore. The individual defendants, if convicted, may face restitution. In that event the interests of the Plan in recovering the entire \$1 million are directly in conflict with the individuals' interests in receiving a lenient order of restitution or in obtaining a stay of execution of any restitution order pending any appeal. Even absent an order of restitution, the Plan may wish or need to seek civil remedies against anyone convicted in this proceeding. This situation would fall more appropriately under subsection (2) of Rule 1.7(a), but the result is the same: a conflict exists.

Moreover, even assuming the individual defendants are acquitted of all charges, Counsel maybe forced to cross-examine a current client (the Plan) in the form of the current board members which the ROP intends to call as witnesses. As Counsel for the ROP noted, those witnesses represent the victim. Whether their testimony would be relevant under the Rules of Evidence during trial on the merits is another matter entirely, and the Court will not, at this stage of the proceedings, attempt to question the trial strategy of the prosecution. Suffice it to say, the possibility that a witness representing the Plan may be called by the ROP presents yet another "significant risk" that representation of one of the clients may be materially limited.

Having concluded that a conflict exists under Rule 13(a), the Court also finds that the conflict has not been effectively waived under Rule 1.7(b). The Rule requires that *each* affected client give informed consent in writing. There is no indication in the record, nor in Counsel's statements at the April 28 hearing that the Plan itself gave informed, written consent to this arrangement. Even assuming that the alleged consent of the CSPP defendants is valid and even assuming the Court were inclined to accept such consent, the Court cannot overlook the absence of consent by the Plan. As such, this is a conflict of interest which precludes the continued representation of the CSPP defendants by attorneys Long and Nakamura.

C. Conflict among Defendants in Criminal Case

Counsel also urges that, as between each other, all seven CSPP defendants have identical interests in this matter. The Information charges the eight CSPP defendants with one count of Cheating, two counts of Forgery, two counts of Misconduct in Public Office, two counts of Conspiracy, and one count of Money Laundering. Additionally, the Affidavit of Probable Cause filed with the Information alleges that one CSPP defendant was also a board member of the Financial Institutions Commission and signed the FIC's August 25, 2006 "Order Imposing Restriction on Operation." The inference is that this individual knew of the prohibitions against Pacific Savings Bank accepting certain deposits over \$10,000 and against the bank pledging its assets as security for any deposit. This highlights some very important ¶174 issues concerning joint representation in this matter, issues which Counsel seems to have ignored.

Potentially different levels of culpability among co-defendants could render the defendants' interests adverse as against one another. If this is true as between two jointly-represented co-defendants, it must be a significantly greater risk as between eight defendants. Likewise is the risk that the government could pursue plea negotiations with any of the eight defendants, and Counsel's loyalty would be strained. Again, the risk increases as does the number of jointly represented codefendants. Finally, should any of the eight CSPP defendants actually make a deal with the prosecution, Counsel would unquestionably be in a position of representing directly adverse interests. The Court believes these risks are even higher in light of the fact that the defendants are charged with conspiracy.

Once again, at the very least the situation falls under the "significant risk" of material limitation of representation set forth in Model Rule 1.7 (a)(2). Co-defendants charged with conspiracy may eventually have divergent interests, whether in the face of plea offers in exchange for testimony or simply in defense strategy such as whether or not a defendant wishes to testify. The universe of potential instances of conflict is not even fully ascertainable at this stage of the proceedings, but the Court wishes to avoid the need for a backward-looking examination of whether this arrangement deprived any of these eight defendants the right to effective assistance of counsel.

Again, Counsel asserts that "the "Declaration of Joint Representation" acts as a waiver of any conflict of interest. The document does not reveal whether and to what extent Counsel explained to each of the eight defendants all of the various ways in which a conflict of interest may arise, nor did Counsel's argument in Court. Moreover, Counsel asserted in the April 28 hearing that, should a conflict arise during these proceedings or should any of the CSPP defendants change his mind regarding the representation, the "waiver" would be binding nonetheless. Counsel is simply incorrect. *See, e.g.,* Rule 1.7 *supra*, cmt. 21. In fact, many courts in the United States have entertained claims of ineffective assistance of counsel due to counsel's conflicts of interest, even in the face of a valid waiver. *See, e.g., United States ex rel. Tonaldi v. Elrod*, "716 F.2d 431, 436-37 (7th Cir. 1983); *United State v. Vowteras*, 500 F.2d 1210, 1211 (2d Cir. 1974).

Defense Counsel failed to answer the Court's third question in the April 28 hearing, which was whether the Court is bound to accept a waiver. The Court believes the answer is

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“no,” given its responsibility to ensure the fairness of its proceedings and to uphold the integrity of the judicial system. The United States Supreme Court, in interpreting a defendant’s right to counsel, has held that even after a voluntary, knowing and intelligent waiver is established, the trial court does not have to accept the waiver. *See Wheat v. United States*, 108 S.Ct. 1692, 1698-99 (1988). While in general, a defendant has a presumptive right to counsel of his choosing, that right has its limits.² Recognizing ¶175 the legitimate interest of trial courts in ensuring that their judgments stand up on appeal and the fact that the “likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict,” the U.S. Supreme Court in *Wheat* held that a defendant’s waiver is not binding on a court. The *Wheat Court* stated that trial courts “must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.” *Id.* at 1699. This Court adopts the holding of *Wheat*.

CONCLUSION

Due to the number of defendants involved and the nature of the charges against them, the Court believes the potential for conflicts which inheres in any situation of joint representation of criminal defendants is significantly multiplied in this case. This is true to such a degree that the potential for disruption, delay, or deprivation is overwhelming. For these reasons, this Court is not inclined to permit the joint representation of all eight CSPP defendants by the same counsel, even in the face of a purported waiver.

Accordingly, it is hereby ordered that Counsel for the CSPP defendants are disqualified by virtue of conflicts of interest. Defendants shall have thirty days from the date of this order to obtain new counsel and file an entry of appearance.

² By way of dicta, *Wheat* “suggests that among those limits, for example, is that a defendant may not insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party like the government.