

plaintiffs' complaint. The requests for entries of default are therefore denied. Since no default has been entered, the plaintiffs' motion for a default judgment must also be denied.

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FSM SUPREME COURT TRIAL DIVISION

AMANTO MARSOLO, in his official capacity as the Mayor )  
of Tolensom Municipality, TOLENSOM MUNICIPALITY, )  
WESLEY W. SIMINA, in his official capacity as Governor )  
of Chuuk State, and STATE OF CHUUK, )

CIVIL ACTION NO. 2011-1000

Plaintiffs, )

vs. )

KISAUO ESA, LORENZO FARAWAY, MARCELINO ELIAS )  
ROSE NAKANAGA, individually and in her official )  
capacity as the Acting Secretary of the FSM Department )  
of Finance & Administration, MANNY MORI, in his official )  
capacity as President of the FSM, MAKETO ROBERT, )  
individually and in his official capacity as the Secretary of )  
the Department of Justice, LEONITO BACALANDO, JR., )  
individually and in his official capacity as Assistant )  
Attorney General of the Department of Justice, FABIAN )  
NIMEA, individually and in his official capacity as the )  
Director of the Office of Statistics, Budget and Economic )  
Management, FSM NATIONAL GOVERNMENT, FSM )  
DEPARTMENT OF FINANCE AND ADMINISTRATION, )  
FSM DEPARTMENT OF JUSTICE, and FSM OFFICE OF )  
STATISTICS, BUDGET AND ECONOMIC MANAGEMENT, )

Defendants. )

KISAUO ESA, in his official capacity as Mayor of )  
Tolensom, and TOLENSOM MUNICIPALITY, )

Counterclaimants, )

vs. )

WESLEY W. SIMINA, in his official capacity as Chuuk )  
State Governor, CHUUK STATE, AMANTO MARSOLO, as )  
an individual, and FEDERATED STATES OF MICRONESIA, )

Counterdefendants and Cross-defendant. )

ORDER DISQUALIFYING CHUUK ATTORNEY GENERAL FROM REPRESENTING TWO PLAINTIFFS

Dennis K. Yamase  
Associate Justice

481  
Marsolo v. Esa  
17 FSM Intrm. 480 (Chk. 2011)

Decided: April 18, 2011

APPEARANCES:

For the Plaintiffs:	Joses R. Gallen, Esq. Attorney General Office of the Chuuk Attorney General P.O. Box 1050 Weno, Chuuk FM 96942
For the Defendants: (Esa, Faraway, & Elias)	Stephen V. Finnen, Esq. P.O. Box 1450 Kolonias, Pohnpei FM 96941
For the Defendants: (all FSM gov't agencies & officials)	Lorrie Johnson-Asher, Esq. Assistant Attorney General FSM Department of Justice P.O. Box PS-105 Palikir, Pohnpei FM 96941

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HEADNOTES

Attorney and Client – Disqualification of Counsel; Criminal Law and Procedure – Prosecutors

Disqualification for an emotional interest because it causes a conflicting interference with the lawyer's exercise of public responsibility is limited to prosecutors since prosecutors are held to a higher standard. Marsolo v. Esa, 17 FSM Intrm. 480, 484 n.1 (Chk. 2011).

Attorney and Client – Disqualification of Counsel

Courts must view with caution any motion to disqualify opposing counsel because such motions can be misused as a harassment technique. Marsolo v. Esa, 17 FSM Intrm. 480, 484 (Chk. 2011).

Attorney and Client – Disqualification of Counsel

Resolving conflict-of-interest questions is primarily the responsibility of the lawyer undertaking the representation, but a court may, in civil litigation, raise the question when there is reason to infer that the lawyer has neglected the responsibility. Marsolo v. Esa, 17 FSM Intrm. 480, 484 (Chk. 2011).

Attorney and Client – Disqualification of Counsel

When an FSM court has not previously construed an FSM ethical rule, such as the issue of standing to move to disqualify opposing counsel for violating a Model Rule which is identical or similar to a U.S. rule, it may consult U.S. sources for guidance. Marsolo v. Esa, 17 FSM Intrm. 480, 484 n.2 (Chk. 2011).

Attorney and Client – Disqualification of Counsel; Constitutional Law – Case or Dispute – Standing

Although generally only a client or a former client has standing to move to disqualify counsel in a civil case on the basis of a conflict of interest, even then a non-client may seek disqualification when the ethical breach so infects the litigation in which disqualification is sought that it impacts the moving party's interest in a just and lawful determination of her claims since she may have the constitutional standing needed to bring a motion to disqualify based on a third-party conflict of interest. Marsolo v. Esa, 17 FSM Intrm. 480, 484-85 (Chk. 2011).

Attorney and Client – Disqualification of Counsel; Constitutional Law – Case or Dispute – Standing

Opposing counsel may have standing to seek counsel's disqualification even though they are not representing an aggrieved client or former client because bar members have an ethical obligation and are authorized to report any ethical violations in a case. Marsolo v. Esa, 17 FSM Intrm. 480, 485 (Chk. 2011).

Attorney and Client – Disqualification of Counsel; Attorneys General

No sound basis is apparent for disqualifying the Chuuk Attorney General's Office from representing the State of Chuuk when it has a statutory duty to represent the state and when the state asserts an absolute right to possession (at least temporarily) of certain funds that the national government has held and is disbursing. That the state also holds a particular view about which of the competing rivals is the duly elected mayor of Tolensom does not alter this since the case is not an election contest or an action in the nature of a petition for a writ of quo warranto challenging the right of a person to hold a particular office. The same principles apply to a suit by the Chuuk Governor in his official capacity since a claim against a government officer in his official capacity is, and should be treated as, a claim against the entity that employs the officer, thus a claim by a government officer in his official capacity is, and should also be treated as, a claim by the entity that employs the officer. Marsolo v. Esa, 17 FSM Intrm. 480, 485 (Chk. 2011).

Civil Procedure – Parties

A suit by a party "in his official capacity" is, and should be treated as, a suit by the entity that employs him. Marsolo v. Esa, 17 FSM Intrm. 480, 485-86 (Chk. 2011).

Attorney and Client – Disqualification of Counsel

A lawyer cannot represent multiple clients with conflicting or potentially conflicting interests in the same matter unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation must include explanation of the implications of the common representation and the advantages and risks involved. Marsolo v. Esa, 17 FSM Intrm. 480, 486 (Chk. 2011).

Attorney and Client – Disqualification of Counsel; Attorneys General

Even though the Chuuk Attorney General's Office followed the proper procedure and had a consultation with all the plaintiffs and after the consultation, they all consented to the multiple representation, the court can still conclude that it must disqualify the Chuuk Attorney General's Office from representing two of the plaintiffs because, while the interests of all the plaintiffs are certainly aligned on what, in their view, constitutes the lawful Tolensom municipal government, it is by no means clear that their interests could be aligned on the pivotal issue of whether the lapsed CIP funds must pass through the Chuuk state general fund and the Chuuk appropriation process before arriving in the Tolensom municipal coffers and with the existence of a rival Tolensom municipal government, it is even less clear that the Chuuk Attorney General's Office is statutorily authorized to represent as plaintiffs one rival Tolensom mayor and government. Marsolo v. Esa, 17 FSM Intrm. 480, 486 (Chk. 2011).

Attorney and Client – Disqualification of Counsel; Attorneys General

A party-plaintiff represented in his official capacity by the Chuuk Attorney General would need separate counsel to defend against a counterclaim when he is sued in his individual capacity since the Chuuk statute does not authorize the Chuuk Attorney General's Office to represent officials in their individual capacities or to litigate their personal interests and because the Chuuk Attorney General's brief asserts that his office only represents the party in his official capacity as Tolensom mayor. Marsolo v. Esa, 17 FSM Intrm. 480, 486 n.3 (Chk. 2011).

Attorney and Client – Disqualification of Counsel; Attorneys General

When the statute authorizes the Chuuk Attorney General's representation of Chuuk subdivisions only when appropriate; when it is unclear whether two plaintiffs even qualify as a Chuuk subdivision or that the representation would be appropriate; and when to rule that they do would be to implicitly decide (in the plaintiffs' favor) one of the two major issues of the case before the adversary process has gotten underway, the fairness of the proceeding could reasonably be questioned if the Chuuk Attorney General's Office continued to represent a rival plaintiff Tolensom mayor and municipal government. Since the Chuuk Attorney General's Office will remain counsel for the state plaintiffs, it will not be precluded from raising any issues, introducing any evidence, or advancing any arguments that it would otherwise have been able to do. The matter's timely disposition would also not be delayed. Marsolo v. Esa, 17 FSM Intrm. 480, 486-87 (Chk. 2011).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

There are two major issues raised by the plaintiffs' complaint: 1) whether the FSM national government can release former Compact Capital Improvement Project ("CIP") funds directly to Chuuk municipalities, such as Tolensom, without going through the Chuuk state government and, if so, 2) which body of persons or entity is the duly constituted Tolensom municipal government to which those funds should be remitted. Plaintiffs' counsel is the Chuuk Attorney General's Office. The plaintiffs that office alleges it represents are the State of Chuuk; the Governor of the State of Chuuk; Tolensom Municipality, a subdivision of the State of Chuuk; and Amanto Marsolo in his official capacity, which capacity, it is alleged, is the Mayor of Tolensom Municipality.

On March 10, 2011, defendants Kisauo Esa, Lorenzo Farawey, and Marcelino Elias (and counterclaimants Esa and Tolensom Municipality) ("Esa defendants") filed their Brief Regarding Conflict Issues. On March 28, 2011, defendants Rose Nakanaga, President Manny Mori, Maketo Robert, Leonito Bacalando, Jr., Fabian Nimea, FSM national government, FSM Department of Finance and Administration, FSM Department of Justice, and the FSM Office of Statistics, Budget and Economic Management ("FSM defendants") filed their Brief on Conflict Issues. And on April 1, 2011, the Chuuk Attorney General's Office filed a Brief in Support of Attorney General's Representation of Plaintiffs. The Esa defendants filed a Supplemental Brief Regarding Conflict Issues on April 8, 2011.

I. PARTIES' POSITIONS

The Chuuk Attorney General contends that his representation is authorized by law. By statute, the Chuuk Attorney General's Office may provide "legal representation when appropriate of the State Government, its agencies, instrumentalities and political subdivisions." Chk S.L. No. 190-07, § 11 (as amended by Chk. S.L. No. 2-94-10, § 3). Tolensom municipality is a political subdivision of the State of Chuuk and the State asserts that Amanto Marsolo is its mayor and that the Attorney General's Office represents him only in his official mayoral capacity.

The Esa defendants contend that the Chuuk Attorney General's Office should be disqualified from representing any plaintiff in this action. They contend that, under the statute, Marsolo does not, and has never, qualified for Chuuk Attorney General representation because, in their view, Marsolo has never been legally elected Tolensom mayor and that the only reason for the Chuuk Attorney General's Office's representation is to influence Tolensom municipal elections and to impermissibly involve the

state government in internal municipal affairs.<sup>1</sup> They also assert that this suit improperly advances Marsolo's personal interest in being recognized as the Tolensom mayor. The Esa defendants further contend that ethical considerations would require Marsolo, even if he were Tolensom mayor, and the state to have separate counsel because Tolensom and the state have potentially adverse claims over CIP funds, especially since, as a cross-claimant, Tolensom Municipality has made claims against the state for substantial additional Tolensom CIP funds that it alleges have gone missing in state custody.

The FSM defendants contend that the Chuuk Attorney General's Office ought to be disqualified from representing any plaintiff except Chuuk Governor Wesley Simina because plaintiff Marsolo and defendant Esa have been long-time rivals for the Tolensom mayoralty. The FSM defendants further contend that there is an inherent conflict between whoever is Tolensom mayor and Tolensom on one side and the state and its officials on the other side because if, in the FSM defendants' view, the funds are disbursed to the state, Chuuk state law would not permit the entire amounts to then be remitted onward to Tolensom.

The Chuuk Attorney General's Office contends that not only is its representation authorized by law but also that its sole interest in this matter is in ensuring the fair and democratic administration of the state through fair, independent elections and the lawful distribution of government funds. It asserts that its disqualification would jeopardize the timely disposition of this matter; that the conflict rules should not be used as a litigation tactic especially against governmental entities with limited resources; and that there is no unwaivable conflict between the plaintiffs because their interests are similarly aligned. It further asserts that the defendants lack standing to seek its disqualification as plaintiffs' counsel and that any potential for future conflict is speculative and can be addressed when and if an unwaivable conflict ever arises.

## II. ANALYSIS

### A. General Principles

Courts must view with caution any motion to disqualify opposing counsel because such motions can be misused as a harassment technique. McVey v. Etscheit, 14 FSM Intrm. 207, 210 (Pon. 2006). Resolving conflict-of-interest questions is primarily the responsibility of the lawyer undertaking the representation. Nix v. Etscheit, 10 FSM Intrm. 391, 396 (Pon. 2001). But a court may, in civil litigation, raise the question when there is reason to infer that the lawyer has neglected the responsibility. *Id.*

Many courts have held that only a client or a former client has standing to move to disqualify counsel in a civil case on the basis of a conflict of interest, *e.g.*, O'Connor v. Jones, 946 F.2d 1395, 1399-1400 (8th Cir. 1991) (court may act on motion of an aggrieved party or may act *sua sponte* to disqualify); In re Yarn Processing Patent Validity Litig., 530 F.2d 83, 90 (5th Cir. 1976) ("To allow an unauthorized surrogate to champion the rights of the former client would allow that surrogate to use the conflict rules for his own purposes where a genuine conflict might not really exist."); Griffen v. East

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<sup>1</sup> The Esa defendants also argue that the Chuuk Attorney General's Office should be disqualified because it has an "emotional interest" in the outcome as a result of its taking sides in a partisan electoral contest. Disqualification for an emotional interest because it causes a conflicting interference with the lawyer's exercise of public responsibility is limited to prosecutors since prosecutors are held to a higher standard. *See, e.g.*, FSM v. Wainit, 12 FSM Intrm. 376, 380 (Chk. 2004); FSM v. Wainit, 12 FSM Intrm. 360, 363-64 (Chk. 2004); FSM v. Wainit, 12 FSM Intrm. 172, 178 (Chk. 2003). If it were not, many criminal defense counsel and counsel for public and private civil litigants would be frequently disqualified.

Prairie Sch. Dist. No. 2, 945 F. Supp. 1251, 1253-54 (E.D. Mo. 1996) (test met since attorney-client relationship existed because party had consulted but not retained opposing counsel on related matter); see also United States v. Rogers, 9 F.3d 1025, 1031 (2d Cir. 1993) (employee of former client was in privity with former client so his joinder on motion to disqualify conferred standing),<sup>2</sup> but even then a non-client may seek disqualification when "the ethical breach so infects the litigation in which disqualification is sought that it impacts the moving party's interest in a just and lawful determination of her claims, she may have the constitutional standing needed to bring a motion to disqualify based on a third-party conflict of interest," Coyler v. Smith, 50 F. Supp. 966, 971-72 (C.D. Cal. 1999).

Other courts have held that opposing counsel has standing to seek counsel's disqualification even though they are not representing an aggrieved client or former client because bar members have an ethical obligation and are authorized to report any ethical violations in a case. *E.g.*, Kevlik v. Goldstein, 724 F.2d 844, 847-48 (1st Cir. 1984) (court has duty and responsibility of supervising attorneys who appear before it); Melamed v. ITT Continental Baking Co., 592 F.2d 290, 294 & n.2 (6th Cir. 1979) (right, and arguably duty, to bring conflict issue to judge's attention); United States v. Clarkson, 567 F.2d 270, 271 n.1 (4th Cir. 1977) (any bar member aware of facts justifying counsel's disqualification is obligated to call it to the court's attention).

As a reflection of this case's confused nature, it is not at all clear which counsel represents Tolensom. Tolensom is one of the parties (as a cross-claimant and a counterclaimant) that objects to the Chuuk Attorney General's Office's representation of the plaintiffs, which include Tolensom. That office represents or has, at some point, represented Tolensom in other or related matters. If an aggrieved client were needed for standing but were not present, the tangled nature of this case would still make it necessary to, sua sponte if need be, address the readily apparent conflict issues. It is thus unnecessary to decide in this case exactly what standing a party needs to move to disqualify opposing counsel.

#### B. *Plaintiffs State of Chuuk and Governor Simina*

No sound basis is apparent for disqualifying the Chuuk Attorney General's Office from representing the State of Chuuk. It has a statutory duty to represent the state. In this suit, the state asserts an absolute right to possession (at least temporarily) of certain funds that the national government has held and is disbursing. The argument that the Chuuk Attorney General's Office should not be permitted to represent the state in such a suit is groundless. That the state also holds a particular view about which of the competing rivals is the duly elected mayor of Tolensom does not alter this. This is not an election contest or an action in the nature of a petition for a writ of quo warranto challenging the right of a person to hold a particular office. That action is in another court.

The same principles apply to a suit by the Chuuk Governor in his official capacity. Since a claim against a government officer in his official capacity is, and should be treated as, a claim against the entity that employs the officer, Herman v. Bisalen, 16 FSM Intrm. 293, 295-96 (Chk. 2009), a claim by a government officer in his official capacity is, and should also be treated as, a claim by the entity

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<sup>2</sup> Although the court must first consult FSM sources of law, FSM Const. art. XI, § 11, rather than start by reviewing other courts' cases, when an FSM court has not previously construed an FSM ethical rule which is identical or similar to a U.S. rule, it may consult U.S. sources for guidance. See, e.g., *In re* Extradition of Jano, 6 FSM Intrm. 26, 27 n.1 (App. 1993) (Model Rules of Professional Conduct); *Etscheit v. Santos*, 5 FSM Intrm. 35, 38-39 (App. 1991) (Code of Judicial Conduct). The issue of standing to move to disqualify opposing counsel for violating the Model Rule, FSM MRPC R. 1.7, governing attorney conflicts of interest has not been addressed.

that employs the officer. Thus, a suit by Governor Simina in his official capacity is the same as a suit by the state.

Thus, the court will not disqualify the Chuuk Attorney General's Office from representing the State of Chuuk and Governor Wesley W. Simina.

*C. Plaintiffs Marsolo and Tolensom*

That leaves the other two named plaintiffs, Tolensom Municipality and Amanto Marsolo in his official capacity as the Mayor of Tolensom Municipality. As just stated, a suit by a party "in his official capacity" is, and should be treated as, a suit by the entity that employs him, ostensibly Tolensom Municipality. Plaintiff Marsolo and plaintiff Tolensom Municipality stand in the same position and are essentially identical. (Confusing matters here, is the counterclaim against Marsolo in his individual capacity by "counterclaimant" Tolensom Municipality and by cross-claimant and counterclaimant Kisauo Esa in his official capacity as the Mayor of Tolensom.)

The Chuuk Attorney General's Office contends that its representation is proper based on its statutory authority to represent Chuuk subdivisions (municipalities) and the alignment of interest between the [two groups of] plaintiffs and its reasonable belief that there is no conflict or, at least, no disqualifying unwaivable conflict. This could be persuasive if it were clear that plaintiff Marsolo was, in fact, the rightful Mayor of Tolensom and was able to speak for it. Unfortunately, that is not so. (Nor is it necessarily clear that Kisauo Esa is the rightful Mayor of Tolensom and able to speak for it.) It is clear, however, that Tolensom is either directly adverse to the State of Chuuk (if Esa speaks for Tolensom) or potentially adverse (if Marsolo speaks for it) to the state.

A lawyer cannot represent multiple clients with conflicting or potentially conflicting interests in the same matter "unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." FSM MRPC R. 1.7(b). The Chuuk Attorney General's affidavit avers that he had such a consultation with all the plaintiffs (Marsolo and Tolensom presumably included) and that, after such a consultation, they all consented to the multiple representation.

Even though the Chuuk Attorney General's Office followed the proper procedure, the court still concludes that it must disqualify the Chuuk Attorney General's Office from representing plaintiffs Marsolo<sup>3</sup> and Tolensom. While the interests of all the plaintiffs are certainly aligned on what, in their view, constitutes the lawful Tolensom municipal government, it is by no means clear that their interests could be aligned on the pivotal issue of whether the lapsed CIP funds must pass through the Chuuk state general fund and the Chuuk appropriation process before arriving in the Tolensom municipal coffers. Additionally, because of the existence of a rival Tolensom municipal government, it is even less clear that the Chuuk Attorney General's Office is statutorily authorized to represent these two particular plaintiffs.

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<sup>3</sup> Marsolo would need separate counsel anyway to defend against the counterclaim because he is sued in his individual capacity and the Chuuk statute does not authorize the Chuuk Attorney General's Office to represent officials in their individual capacities or to litigate their personal interests and because the Chuuk Attorney General's brief asserts that his office only represents Marsolo in his official capacity as Tolensom mayor.

The statute authorizes representation of Chuuk subdivisions only "when appropriate." It is unclear whether these two plaintiffs even qualify as a Chuuk subdivision or that the representation would be appropriate. To rule at this stage that they do would be to implicitly decide (in the plaintiffs' favor) one of the two major issues of this case before the adversary process has gotten underway. Considering all the circumstances, the fairness of the proceeding could reasonably be questioned if the Chuuk Attorney General's Office continued to represent Marsolo and the plaintiff Tolensom. Since the Chuuk Attorney General's Office will remain counsel for the state plaintiffs, it will not be precluded from raising any issues, introducing any evidence, or advancing any arguments that it would otherwise have been able to do. The matter's timely disposition would also not be delayed.

III. CONCLUSION

Accordingly, the motions to disqualify the Chuuk Attorney General's Office from representing the State of Chuuk and Governor Wesley Simina are denied; the motion to disqualify the Chuuk Attorney General's Office from representing Amanto Marsolo and plaintiff Tolensom Municipality is granted; and 30 days from the entry of this order is allowed for counsel to appear on behalf of Amanto Marsolo and plaintiff Tolensom Municipality and to file and serve any further papers or pleadings deemed needed.

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CHUUK STATE SUPREME COURT TRIAL DIVISION

JOHANNES JACKSON,	)	CSSC CIVIL ACTION NO. 029-2011
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CHUUK STATE ELECTION COMMISSION,	)	
	)	
Defendant,	)	
	)	
vs.	)	
	)	
SEASON JACKY,	)	
	)	
Real Party in Interest.	)	
_____	)	

ORDER DENYING INJUNCTIVE RELIEF AND DISMISSING PETITION FOR DECLARATORY JUDGMENT

Midasy O. Aisek  
Associate Justice

Chamber Conference: April 14, 2011  
Decided: April 14, 2011