

FILED DEC 31 2018



LYNN K. McDONALD
CLERK OF COURT

TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION

STATE OF MINNESOTA

James Van Nguyen,

Movant,

vs.

Court File No 890-18

Gary Debele and Jessica Ryan,

Respondents.

MEMORANDUM OPINION AND ORDER

In this proceeding, brought under Rule 3(d) of this Court's Rules of Civil Procedure, the Movant, James Van Nguyen, asks the Court to revoke or suspend the licenses to practice before this Court of the Respondent attorneys, Gary Debele and Jessica Ryan, contending that in two earlier proceedings in this Court, a Child Welfare matter and a Conservatorship, both attorneys failed to comply with their professional obligations, and that in a marriage dissolution proceeding presently pending before the Court Mr. Debele both made misleading statements to the presiding Judge and behaved improperly in connection with the proceeding's filing.

For the reasons set forth below, the Court finds that no evidence supports the Movant's charges, and therefore denies his motion.

Procedural Background

Initial proceedings.

In pertinent part, Rule 3(d) of our Rules of Civil Procedure provides:

A license issued by the Tribal Court may be revoked or suspended by the Tribal Court upon the Tribal Court's own motion or the written motion of another. The Tribal Court will only revoke or suspend a license to practice in the Tribal court after issuing written notice of the motion to the licensee and holding a hearing before a judge of the Tribal Court. The Tribal Court may suspend or revoke a license

to practice upon a finding that the licensee (1) has been disbarred or suspended from the practice of law by any Tribal Court of the United States, any state, or any Tribe, (2) has filed a false affidavit with the Tribal Court (including the affidavit to become licensed), (3) has engaged in conduct that would be subject to sanction in any other jurisdiction in which he or she is licensed to practice, or (4) has been held in contempt of Tribal Court by the Tribal Court. ...

This matter, under Rule 3(d), began on July 20, 2018 when Mr. Nguyen, who then was *pro se*, filed a “Motion to Revoke the License to Practice of Gary Debele and Jessica Ryan”, and a “Motion for Certification by a Three Judge Panel”. His motions were accompanied by a Declaration, signed by Mr. Nguyen, setting out in one hundred and six numbered paragraphs the allegations that he believed the Court should consider. Many – indeed most – of those paragraphs did not relate, directly or indirectly, to any action or inaction by Mr. Debele or by Ms. Ryan, but instead concerned Mr. Nguyen’s view as to the appropriateness of, and/or the legality of, Child Welfare and Conservatorship proceedings in which Mr. Nguyen and his family had been involved, in this Court, in 2014 and 2015.

Mr. Debele and Ms. Ryan filed responsive pleadings, and the Court, having considered the state of the file at that point, held a hearing under Rule 16 of our Rules of Civil Procedure with the aim of narrowing and clarifying the issues between the parties. On the day of that hearing, Mr. Jason Juran appeared as legal counsel for Mr. Nguyen.

During the hearing, the Court stressed the fact that Mr. Nguyen’s initial filing contained very large amounts of material which would not under any circumstances be cognizable in a Rule 3(d) proceeding. The Court therefore directed Mr. Juran to file an amended motion under Rule 3(d), not later than October 18, 2018.

The October 17 Motion and Exhibits. On October 17, 2018, Mr. Juran did file an Amended Motion (hereafter, “the October 17 Motion”); and then, on October 18, 2018, Mr. Juran asked the Court to permit him to withdraw from these proceedings – a request that the Court granted.

The October 17 Motion, in its words, asks the Court –

1. For an Order of this Court taking judicial notice in this file of the evidence and findings in the case captioned: The matter of [REDACTED]
[REDACTED];
2. For an Order of this Court taking judicial notice in this file of the evidence and findings in the case captioned: Conservatorship of Amanda Gustafson, Conservatee Court File No. 618-08.
3. For the Court to take action pursuant to SMSC Tribal Court Rule of Civil Procedure 3(d) toward Gary Debele and Jessica Ryan that it deems just and appropriate under the facts and circumstances presented;
4. For an Order of this Court to vacate the Order denying Petitioner's Motion to Dismiss;
5. For an Order of this Court that the findings and orders in the case of Court File No. [REDACTED] be vacated with prejudice;
6. For an Order of this Court rescinding declaration of Petitioner's minor child [REDACTED] as a Ward of this Court;
7. For an Order of this Court declaring all cases wherein Patricia Foley had been party to, be investigated for fraud, illegalities, and other improper behavior, and that such cases be reopened upon either parents' consent. Should either parent consent after being personally served notice, declaring all reasonable attorney fees to be paid for by the SMSC;
8. For an Order of this Court declaring all cases wherein Jessica Ryan had been party to, be investigated for fraud, illegalities, and other improper behavior, and that such cases be reopened upon either parents' consent. Should either parent consent after being personally served notice, declaring all reasonable attorney fees to be paid for by the SMSC.
9. For an Order of this Court to discover continuing, in camera review, from the SMSC Child and Family Services, Jessica Ryan and Gary Debele, of any and all SMSC documents, emails, text messages, phone

records, correspondence with outside legal counsel and Minnesota Bar Association and any material directly related to the Community's review of Ms. Ryan's and Ms. Foley's misconduct, violation of law, ethics violations that led to their dismissal, and include any materials relating to Amanda Gustafson, Petitioner's Minor Child [REDACTED], James Nguyen, Amanda Gustafson's family, law enforcement, outside investigators, acts in family court and interviews related to parties herein;

10. For such and further relief as this Court deems just and equitable under the circumstances.

So, once again, the Court was, and is, presented with requests that clearly fall completely outside the scope of any Rule 3(d) proceeding. The Court therefore will not act upon any aspects of the October 17 Motion except those which directly pertain to alleged acts of Mr. Debele and/or Ms. Ryan.

Accompanying the October 17 Motion, Mr. Juran filed three Exhibits, denominated Exhibit A, Exhibit B, and Exhibit C.

Exhibit A consists of thirty-seven pages of copies of what appear to be text messages, apparently dating from 2014 and 2015, variously originating from and/or being sent to, Mr. Nguyen, and/or his then-wife Ms. Amanda Gustafson, and/or Ms. Patricia Foley, who at that time was employed as a Child Welfare Officer of the Shakopee Mdewakanton Sioux Community. No affidavit specifying the source, or the accuracy, or the completeness of the materials in Exhibit A was or has been filed with the Court, and there is no indication when or how Mr. Nguyen came to have access to those of the messages that were not sent by or to him.

Exhibit B is a copy of the transcript of a July 13, 2018 hearing before Judge Henry M. Buffalo, Jr., in this Court, in the presently pending marriage dissolution proceeding captioned In Re the Marriage of Amanda Gustafson and James Van Nguyen, File No. 867-17.

Exhibit C is a copy of a Child Welfare Officer report prepared by Ms. Foley for a January 23, 2015 hearing in a Shakopee Mdewakanton Sioux Community's Children's Court proceeding captioned In the Matter of [REDACTED] File No. [REDACTED]

which involved the welfare of the girl, whose initials are [REDACTED] and who is Mr. Nguyen's and Ms. Gustafson's daughter.

Taken at face value, the materials in Exhibit A appear to establish that, early in January, 2015, at a time when Mr. Debele was representing Ms. Gustafson in at least three proceedings where Mr. Nguyen also was a party – a divorce proceeding in this Court, a separate divorce proceeding that Mr. Nguyen had initiated in Minnesota District Court, and the above-noted Child Welfare proceeding involving [REDACTED] in this Court – Ms. Gustafson had secretly obtained access to e-mail correspondence between Mr. Nguyen and Mr. Adam Blahnik, an attorney who was representing Mr. Nguyen at that time.

The materials in Exhibit A also appear to establish that Ms. Gustafson hoped to somehow use that e-mail correspondence to her advantage in the Children's Court proceedings by providing copies of it to Ms. Foley. Specifically, the materials appear to establish that on January 8, 2015, and again on January 9, 2015, Ms. Gustafson sent copies of correspondence between Mr. Nguyen and Mr. Blahnik to Ms. Foley.

The materials also appear to establish that on January 15, 2015, Ms. Gustafson sent the following message to Ms. Foley, informing her that when Mr. Debele had learned of Ms. Gustafson's activity he had instructed her to immediately cease it:

Gary [Debele] told me I can't go in [Mr. Nguyen's] email anymore either. So I can't get anymore info. He said it's illegal. He thought I was reading old emails.

Nguyen Exhibit A (October 17,
2018) at 17.

Notwithstanding the instruction which Ms. Gustafson says Mr. Debele had given to her, the materials in Exhibit A appear to indicate that Ms. Gustafson nonetheless did attempt, on one additional occasion, to obtain access to Mr. Nguyen's e-mail correspondence, though it is unclear whether that attempt was successful. There is, however, no indication in the materials in Exhibit A, or in any materials filed in this proceeding, that Mr. Debele knew or had any reason to know of, or to suspect, that Ms. Gustafson had made any additional attempt to gain access to Mr. Nguyen's e-mail in direct contravention of his instruction.

The October 17 Motion argues that the materials in Exhibit A demonstrate that, in 2014 and 2015, Ms. Foley was conniving with Ms. Gustafson, seeking to assist Ms. Gustafson in the Children's Court proceeding involving AJN, and to create barriers and problems for Mr. Nguyen, and that Ms. Ryan must have been aware of those efforts. But there is nothing in the materials before the Court indicating either that Ms. Ryan was aware of any connivance between Ms. Gustafson and Ms. Foley, or that Ms. Ryan acted improperly with respect to Mr. Nguyen.

The October 17 Motion calls the Court's attention to messages in Exhibit A which indicate that, at least on some occasions, Mr. Debele and Ms. Ryan communicated with each other without including Mr. Nguyen's attorney, Mr. Blahnik, in the communications – arguing that such communications are evidence that Mr. Debele and Ms. Ryan were improperly colluding to damage Mr. Nguyen. But again nothing before the Court suggests any improper motive in those attorney-to-attorney contacts, or that any damage to Mr. Nguyen resulted from the contacts.

The materials in Exhibit B, accompanying the October 17 Motion, apparently are provided to substantiate Mr. Nguyen's claim that on July 13, 2018 Mr. Debele misled Judge Buffalo during a hearing in the marriage dissolution proceeding that Mr. Debele had filed on behalf of Ms. Gustafson in 2017. In that proceeding, Mr. Nguyen had refused to answer certain interrogatories and to provide certain documents that Mr. Debele sought in the discovery process on behalf of Ms. Gustafson. Mr. Nguyen's written responses, in multiple instances, said:

Respondent objects to this interrogatory as this Court has demonstrated bias in favor of Petitioner by way of unfair Orders designed to intimidate and harass Respondent, ignored Orders of this Court violated by Petitioner with impunity, violation of Respondent's due process rights, neglect to parties minor child in favor of Petitioner and claiming the parties minor child was a "ward of the court" to illegally obtain exclusive jurisdiction only to disregard federal law and the intention of Congress. Moreover, Petitioner committed a federal crime in this Court violating the Wire Tap Act, A FEDERAL CRIME, with Respondent's personal information including but not limited to communications between Respondent and his attorney, all known by multiple officers of this court and registered attorneys of this court including Gary Debele

who has misled this court by way of affirmative misrepresentations thus violating the Minnesota rules of Professional Conduct.

Affidavit of Gary A. Debele, (Nov. 30, 2018) Exhibit 2, at 12 -31.

During the July 13, 2018 hearing, Mr. Debele told Judge Buffalo that he did not know what the basis was for the assertions by Mr. Nguyen, that he – Mr. Debele – had violated his ethical duties. Mr. Debele said:

There's some very unusual objections where he's raising issues about ethics complaints being filed against me. I've never been served with anything. I don't even know what the basis of this is. He references the Minnesota Rules of Professional Conduct that I somehow violated. And then he cites Rule 3 of this court's code of conduct. I don't know what I've done. He references in some of his objections some wire tapping thing or something. Again, I don't know what that's based on, and I'm not sure what relevance it has to the discovery responses.

Transcript at 9:4 - 15, In re the Marriage of Amanda Gail Gustafson and James Van Nguyen, .Civil No. 867-17 (Court of the SMSC, July 13, 2018).

In response, Mr. Nguyen argued to Judge Buffalo, and he now contends in his October 17 Motion, that Mr. Debele must have been aware of the allegedly improper actions involving Mr. Nguyen's e-mails in 2015, and that what Ms. Gustafson did was a crime, and that what Mr. Debele had said to Judge Buffalo was knowingly false.

MR. NGUYEN: ...And I do have good cause for not having a desire to fully cooperate with Mr. Debele on the legal basis he should not have a license to practice law in this court for violation of Rule 3 of the Rules of Civil Procedure. I ask this Court – I ask that this Court ask Mr. Debele at this moment on the record to simply admit or deny that on or about January 15th, 2015, while we were engaged in an adjudicative process, he was made aware of Ms. Gustafson's illegal activity regarding my personal electronic communication and, in fact Mr. Debele informed Ms. Gustafson she was committing a crime.

Ibid, 36:15 – 37:5.

The materials in Exhibit C evidently are intended to establish that although Ms. Foley was aware of Ms. Gustafson's unauthorized access to Mr. Nguyen's e-mails, neither she nor Ms. Ryan, who at that time was legal counsel for the Shakopee Community, informed the Court of Ms. Gustafson's actions – and also to establish that Ms. Foley sought to aid Ms. Gustafson at Mr. Nguyen's expense. The October 17 Motion essentially says that Ms. Ryan violated of the applicable Rules of Professional Conduct occurred (i) when she learned, from Ms. Foley, that Ms. Gustafson had obtained some of Mr. Nguyen's e-mails and she then did not relay that information either to the Court or to any law enforcement agency, (ii) when, in connection with the Children's Court proceeding involving [REDACTED], Ms. Ryan had the aforementioned communications with Mr. Debele to which Mr. Blahnik was not a party, and (iii) when, during a Children's Court hearing, Ms. Ryan told the Court that a hair follicle test to which Mr. Nguyen had been subjected was invalid because the length of the hair follicle he provided was not sufficiently long.

Responses to the October 17 Motion. Responding to the October 17 Motion and the accompanying Exhibits, Mr. Debele submitted an affidavit which said, *inter alia*:

14. In January 2015, back during the first divorce go around between Mr. Nguyen and Ms. Gustafson, Mr. Nguyen's attorney at the time, Adam Blahnik, informed me that Ms. Gustafson was reading Mr. Nguyen's email.

15. On January 9, 2015, I had a phone conversation with Mr. Gustafson in which we discussed the email accusation.

16. During that conversation I confirmed that the three (3) photos Ms. Gustafson had already provided to me (and which had also been used by her as exhibits to Affidavits we had filed and served) had been obtained appropriately. She confirmed that she had obtained those exhibits from a joint computer, back when she was residing with Mr. Nguyen, and before the divorce proceedings had commenced. Those exhibits consisted of a picture of an email dated May 16, 2014, wherein Mr. Nguyen was requesting that a title person be available to retitle Ms. Gustafson [sic] property in both their names jointly which was then done immediately following their marriage ceremony. Another was a picture of text

messages sent before Ms. Gustafson married Mr. Nguyen wherein Mr. Nguyen was asking questions of a non-lawyer friend or relative about gaining custody of Ms. Gustafson's unborn daughter. The last was a picture of a May 24, 2014 text in which Mr. Nguyen requested that his cousin help him screen some hookers when Ms. Gustafson was out of town.

17. During our conversation on January 9, 2015, as to the claim Ms. Gustafson was reading Mr. Nguyen's email, I informed her that she could not eves drop [sic] on Mr. Nguyen's current email communications. I told her it was similar to tapping a phone call, was likely illegal, and if she was logging Mr. Nguyen's email account, it had to stop immediately.

18. During our conversation on January 9, 2015, Ms. Gustafson left me with the sound impression that she understood she could not log into Mr. Nguyen's email account and read his emails, and that she would not do so.

19. Following our conversation on January 9, 2015, I believed that Ms. Gustafson would not log into Mr. Nguyen's email account or read his emails.

20. Until Mr. Nguyen filed Exhibit A, no one had provided me a copy of any paper or electronic communication between Mr. Nguyen and an attorney representing him.

21. I have never communicated with Ms. Foley about the existence or content of the text messages purported to be represented in Mr. Nguyen's Exhibit A.

22. I have never communicated with Jessica Ryan about the existence or content of the text messages purported to be represented in Mr. Nguyen's Exhibit A.

23. I have never communicated with anyone else about the existence or content of the text messages purported to be represented in Mr. Nguyen's Exhibit A, until after they were filed in this matter.

24. Until receiving Exhibit A, it was my understanding and belief that Ms. Gustafson had not logged into Mr. Nguyen's email account following my discussion with her on January 9, 2015.

25. The first time Mr. Nguyen accused me of violating a Rule of Professional Conduct was in his blanket objection to 36 discovery

requests seeking his financial information in the pending divorce proceeding in Tribal Court. I have attached that discovery response of Mr. Nguyen as Exhibit 2.

26. On July 13, 2018, in a motion to address, in part, Mr. Nguyen's refusal to provide any financial information in the pending divorce proceeding in Tribal Court, I made the following statement which is an accurate representation of what I knew and understood at the time regarding the 36 blanket objections Mr. Nguyen had made to discovery seeking his financial information:

There's some very unusual objections where he's raising issues about ethics complaints being filed against me. I've never been served with anything. I don't even know what the basis of this is. He references the Minnesota Rules of Professional Conduct that I somehow violated. And then he cites Rule 3 of this court's code of conduct. I don't know what I've done. He references in some of these objections some wire tapping thing or something. Again, I don't know what that's based on, and I'm not sure what relevance it has to the discovery responses.

27. Mr. Nguyen has been represented by different attorneys over the course of the divorce proceedings, and he is again presently being represented by Adam Blahnik.

28. None of the attorneys who have represented Mr. Nguyen in any of the divorce proceedings have accused me of violating any Rule of Professional Conduct.

Affidavit of Gary A. Debele, Nov.
30, 2018.

In her response to the October 17 Motion, Ms. Ryan also submitted an affidavit. In it, she described the initiation of the Child Welfare proceeding involving [REDACTED] and her parents, and averred, in part, the following:

15. During the child welfare case [involving [REDACTED]], I did not supervise or oversee Patricia Foley. Prior to receipt of the Amended Motion [i.e., the October 17 Motion] I had not seen the text messages attached as Exhibits to the Amended Motion that purport to be correspondence between Ms. Foley and Ms.

Gustafson, I have no knowledge as to whether those text messages are accurate, whether they are complete, or whether there have been any modifications to such. I was generally aware that Ms. Foley would utilize text messages in communicating with individuals receiving services from SMSC FCS, but I did not have any specific knowledge regarding these messages or their content. I did not draft, or direct Ms. Foley to draft, any of the communications attached to Petitioner's Amended Motion.

16. At some point during the pendency of the child welfare matter, Ms. Foley informed me that Ms. Gustafson had information regarding Petitioner that was obtained when Ms. Gustafson viewed communications between Petitioner and his counsel. I immediately informed Ms. Foley that she was not permitted to review those communications, and that we would not be using any information obtained from Ms. Gustafson's analysis of those communications in the child welfare matter or otherwise. I did not review that information and did not use any such information in litigating any matter. I have no knowledge of how, when, or why Ms. Gustafson obtained those communications, and did not direct Ms. Foley, Ms. Gustafson, or any other person to obtain information from Petitioner in that manner.

17. After my conversation with Ms. Foley I then communicated to Gary Debele, counsel to Ms. Gustafson, and informed him that Ms. Gustafson had purportedly gained access to communications between Petitioner and his counsel. I requested that Mr. Debele immediately address this issue with his client and informed him that SMSC would not be reviewing those communications or utilizing them in any proceeding.

18. Following my conversation with Mr. Debele, I again communicated with Ms. Foley and her supervisor, reiterating that any information Ms. Gustafson had obtained could not be used and to not review or accept such information. To my knowledge, Ms. Gustafson obtained those communications on her own and without any involvement of any employee of SMSC. After taking these actions, the issue was never raised to me again, including by Petitioner's counsel, Mr. Blahnik, until the initiation of this matter approximately three and a half years later.

19. At no point have I ever directed Ms. Foley to request privileged or private information relating to Petitioner. To the extent that Ms. Foley overtly or indirectly requested any such information, it was without my knowledge, involvement, or authorization. I do not understand the allegation in the Amended

Motion that I sought to “trade” information in an attempt to impact the course of litigation involving Petitioner, but I unequivocally deny any improper conduct.

...

21. Based on the reports submitted by Ms. Foley during the child welfare matter, as well as the conduct that I observed during the case, I did not believe that Ms. Foley evidenced a bias against Petitioner. Rather, she presented a neutral and balanced approach, detailing strengths and area [sic] of struggle for both parents. I believed that Ms. Foley believed that the child would benefit from support and intervention for services provided to both parents. Had I been presented evidence that I believed showed that Ms. Foley had a bias against either Petitioner or Ms. Gustafson, I would have addressed the issue with her supervisor to ensure her supervisor could determine an appropriate course of action.

...

23. As is customary in my legal practice, during the course of the child welfare matter I communicated with opposing counsel in that matter on various issues. It is not my practice to ensure that I speak an equal number of times to opposing parties, rather I generally respond to inquiries from opposing parties and I initiate contact when I determine it is necessary and appropriate.

...

25. Petitioner also alleges I made false statements to the Court regarding a hair follicle test. I have no recollection of those statements, or of Petitioner’s hair follicle test.

Affidavit of Jessica L. Ryan (Dec. 3, 2018).

Mr. Debele and Ms. Ryan also submitted legal arguments to the Court. Mr. Debele called the Court’s attention to Ethics Opinion 945 from the Committee on Professional Ethics of the New York Bar Association, which held that an attorney’s knowledge that a client has been reading spousal e-mails is “confidential information” and is subject to the attorney’s confidentiality duty:

The lawyer should admonish the client to refrain from this conduct. However, absent an exception to the general duty to preserve a client’s confidential information, the lawyer may not disclose the client’s conduct to the court or opposing counsel.

Ethics Opinion 945, Committee On
Professional Ethics, NY Bar Ass’n.
(Nov. 7, 2012), ¶2

The Committee also discussed what the lawyer's obligation is if the client's conduct might arise to a crime:

Because this Committee interprets only the Rules of Professional Conduct and not other law, we do not express an opinion whether the client's conduct in reading the spouse's lawyer-client e-mail communications rises to the level of a crime or fraud. If it does, the lawyer's duty is to "take reasonable remedial measures" which do not necessarily include disclosure of client confidences. Since the lawyer has not gained access to the e-mails or their contents, it may be a sufficient remedial measure for the lawyer to persuade the client to cease the misconduct.

Ibid ¶7

Mr. Debele argued that even if he ethically could have disclosed Ms. Gustafson's actions to Mr. Nguyen's attorney the disclosure would have been pointless because Mr. Debele had learned of the actions from Mr. Blahnik¹. And he vigorously asserted that no Rule of Professional Conduct was violated if or when he had conversations with Ms. Ryan, without Mr. Blahnik participating.

Ms. Ryan's legal memorandum argued that she, too, responded promptly and appropriately when she learned, from Ms. Foley, of Ms. Gustafson's having obtained Mr. Nguyen's e-mails: she argued that her immediate and express direction to Ms. Foley, to the effect that under no circumstances should the e-mails be used or considered by the Shakopee Mdewakanton Sioux Community, which was reinforced by her communication of that direction to Ms. Foley's supervisor, and was coupled with her informing Mr. Debele of his client's improper actions, complied with all of her obligations under the applicable Minnesota Rules of Professional Conduct.

The Movant's December 10 Filings, and the December 13 Hearing. On December 10, pursuant to the Court's Scheduling Order, Mr. Nguyen replied to the responses of Mr. Debele

¹ During the December 13, 2018 hearing in the instant file, Mr. Nguyen disputed Mr. Debele's assertion that the information concerning Ms. Gustafson's actions had come from Mr. Blahnik. He told the Court that neither he nor Mr. Blahnik were aware of Ms. Gustafson's actions until some later date, which he did not specify. In any case, however, Mr. Debele's position is that when he admonished Ms. Gustafson and directed her to cease her actions, that was the "reasonable remedial measure" that the Rules require.

and Ms. Ryan by filing a two-page Memorandum of Law, a Responsive Declaration, and four Exhibits². In his Declaration he argued that Mr. Debele's responsive affidavit, where Mr. Debele said "I have never communicated with Jessica Ryan about the existence or content of the text messages purported to be represented in Mr. Nguyen's Exhibit A", is directly contradicted by Ms. Ryan's assertion, in her affidavit, that when she learned of Ms. Gustafson's actions she telephoned Mr. Debele and told him of them. But Mr. Debele's affidavit does not say that he did not hear from Ms. Ryan about Ms. Gustafson's actions: it says nothing whatever about any contact he may have had from Ms. Ryan with respect to Mr. Nguyen's e-mails. Instead, it says that he never "communicated with Jessica Ryan about the existence or content of the text messages" in Exhibit A. His affidavit certainly acknowledges that in 2015 he knew of Ms. Gustafson's having obtained Mr. Nguyen's e-mails, and it specifies how he acted on that knowledge. But it says that he learned of the text messages which comprise Exhibit A to the October 17 Motion only when he received Exhibit A in these proceedings; and there is nothing in Ms. Ryan's affidavit or anything else in the record that contradicts that assertion.

Much of the remainder of Mr. Nguyen's Responsive Declaration concerns the marriage dissolution proceeding now pending before Judge Buffalo. Mr. Nguyen apparently contends that, for reasons relating to Ms. Gustafson's residency, the petition was brought in bad faith. The Exhibits that accompanied the Declaration are mixed. Exhibit A is a one-page letter to him from the Health and Human Services Division of Scott County, Minnesota, dated July 10, 2018, informing him that it had concluded that a maltreatment determination should and would be made against Mr. Gustafson because of two domestic assaults that she had committed against him while [REDACTED] was present. Exhibit B is a December 5, 2018 affidavit that Mr. Nguyen filed in the marriage dissolution proceeding now pending before Judge Buffalo, which appears to attach, but does not describe or discuss, multiple documents, some apparently from that proceeding,

² On November 29, 2018, four days before Mr. Debele and Ms. Ryan were scheduled to file their responses to the October 17 Motion, Mr. Nguyen by letter asked the Court to postpone the December 13 hearing on his Motion in order to permit him to serve subpoenas to compel testimony from Ms. Foley, and her former supervisor, and another former employee of the Shakopee Mdewakanton Sioux Community, and the [REDACTED] former court-appointed Guardian *ad litem*. In its October 29, 2018 Scheduling Order the Court had told the parties that it would decide whether testimony would be appropriate once it had received Mr. Debele's and Ms. Ryan's responsive materials. On December 4, one day after receiving those filings, the Court concluded that testimony would not be helpful, and the Court therefore denied Mr. Nguyen's postponement request.

others from an earlier Conservatorship proceeding involving Ms. Gustafson, and still others from the Children's Court proceeding that involved [REDACTED]. Exhibit C is the transcript of a January 23, 2015 hearing in that Children's Court proceeding, during which Mr. Nguyen was represented by Mr. Blahnik, who argued that the proceedings should be dismissed, and during which Ms. Ryan made reference to a hair follicle test that Mr. Nguyen had provided. Exhibit D is a copy of a December 18, 2014 report from Omega Laboratories, on a hair follicle provided by Mr. Nguyen, that was negative for all drugs on which testing had been sought, noting that the hair follicle was 1.5 inches long.

The December 13 hearing. During the Court's hearing in this matter on December 13, 2018, Mr. Nguyen was *pro se*. A portion of the argument he made to the Court pertained to the marriage dissolution proceeding that was filed in 2017 and that remains pending, between him and Ms. Gustafson, before Judge Buffalo. He argued that Mr. Debele overtly misled the Court in that proceeding when, on July 13, 2018, he told Judge Buffalo that he did not know what the basis was for Mr. Nguyen's claims relating to his alleged ethical breaches. And he argued that Mr. Debele had acted in bad faith in 2017 when he filed the current marriage dissolution proceeding:

Taking into consideration Mr. Debele's consistently misleading this court in the past and present in this action, it is my position Mr. Debele submitted Ms. Gustafson's present petition for dissolution in bad faith with respect to her residency. Ms. Gustafson's present petition for dissolution – or Ms. Gustafson did not reside on the reservation within the time required per the domestic code, and I know this because I have firsthand of Ms. Gustafson's residency, and this is why Ms. Gustafson began contact with Mr. Debele on his cell phone on June 21, 2018, three days after she was arrested and later convicted of felony drug possession while traveling with her daughter. Mr. Debele waited until July 20th, 2017 to file the petition.

Ms. Gustafson's phone records show two calls to Mr. Debele's phone, cell phone, on June 21st, which is included in my exhibit.

Transcript, 9:14 – 10:4, James Van Nguyen v. Gary Debele and Jessica

Mr. Nguyen also argued that Mr. Debele and Ms. Ryan committed fraud on the Children's Court when, after each had become aware that Ms. Foley had received Mr. Nguyen's e-mails from Ms. Gustafson, neither informed the Court of that fact during a January 23, 2015 hearing, when a report from Mr. Foley was received which said, *inter alia*, that Mr. Nguyen had exhibited paranoid behaviors toward the Shakopee Mdewakanton Sioux Community.

And, as is noted above, Mr. Nguyen averred that Mr. Blahnik did not know, in January, 2015, of Ms. Gustafson's having obtained Mr. Nguyen's e-mails, and therefore Mr. Debele lied in his responsive affidavit when he said that he learned of Ms. Gustafson's actions from Mr. Blahnik in early January, 2015.

Finally, Mr. Nguyen set forth a number of contentions relating to his claim that Ms. Foley and Ms. Ryan were deeply biased against him – that Ms. Foley had exaggerated the nature of his earlier difficulties with law enforcement authorities, had ignored or minimized the criminal charges that had been filed against Ms. Gustafson – and that Ms. Ryan and Mr. Debele effectively conspired with Ms. Foley to damage him during the Children's Court proceedings involving their daughter. But Mr. Nguyen was a party to those proceedings, and therefore was able to be present during any hearing. He received copies of all documents that were submitted to the Court. For most of those Court's hearings he was represented by counsel, and he or his counsel could at any time, in writing or orally, have expressed any views relating to the fairness, accuracy, and completeness of anything that another party had said or given to the Court.

Legal Analysis. Rule 3(d) of this Court's Rules of Civil Procedure provide that an attorney's license to practice before this Court can be suspended or revoked if the attorney "has engaged in conduct that would be subject to sanction in any other jurisdiction in which he or she is licensed to practice". Hence, since Mr. Debele and Ms. Ryan each are licensed to practice in the State of Minnesota, the Court will consider whether anything presented in the instant proceeding would be cause for their discipline under the Minnesota Rules of Professional Conduct.

With respect to the events of 2014 and 2015, the critical facts are:

1. As to Mr. Nguyen's e-mails that were obtained by Ms. Gustafson, there is nothing in the record to indicate that either Mr. Debele or Ms. Ryan were aware of Ms. Gustafson's actions until after she had taken them. Mr. Debele says that he learned of Ms. Gustafson's actions from Mr. Blahnik. Mr. Nguyen says that isn't true. Ms. Ryan says she told Mr. Debele. Mr. Debele doesn't mention that in his affidavit, but there certainly is nothing in the record that suggests Ms. Ryan's statement is incorrect. At this date, almost four years after the fact, it seems entirely possible that Mr. Debele could have learned of his client's actions both from Mr. Blahnik and Ms. Ryan.
2. All of the evidence before the Court indicates that when Ms. Ryan learned of Ms. Gustafson's actions, she acted promptly and properly. She instructed her client that Ms. Gustafson should be told that she must cease her activity, and that under no circumstances would the materials she had obtained be used by the Shakopee Mdewakanton Sioux Community in any court proceedings; and she informed Mr. Debele of his client's actions.
3. All of the evidence before the Court also indicates that when Mr. Debele learned of Ms. Gustafson's actions, whether from Mr. Blahnik or from Ms. Ryan or from each of them, he also did the proper thing. Ms. Gustafson's contemporaneous statement to Ms. Foley, which Ms. Nguyen provided to the Court, establishes that Mr. Debele promptly and clearly instructed Ms. Gustafson to discontinue her attempts to obtain her husband's e-mails.
4. The assertion, made by Mr. Nguyen, that Ms. Gustafson's actions violated the Federal Wiretap Act, as amended by the Electronic Communication Privacy Act, 18 U.S.C. §§2511(a) and 2520a), and therefore that each attorney had a legal obligation to report her activity to the Children's Court and to other governmental authorities, is incorrect. Ms. Gustafson's actions did not involve the contemporaneous interception of electronic or telephonic communications to and from Mr. Nguyen, and contemporaneity is required for any such access to be violative of the Wiretap Act. United States v. Steiger, 318 F. 3d 1039 (11th Cir. 2003); Fraser v. Nationwide Mut. Ins. Co., 352 F. 3d 107, 113 (3rd Cir. 2004), as amended (Jan. 20, 2004); Cardinal

Health 414, Inc. v. Adams, 582 F. Supp. 2d 967, 979-80 (M.D. Tenn. 2008); and Bruce v. McDonald, No. 3:13-CV-00221-MHT-WC, 2014 WL 931522 (M.D. Ala. 2014). Indeed, were Mr. Nguyen's assertion legally correct, then presumably any attorney that he employed would have the same legal obligation that he asserts Mr. Debele and Ms. Ryan had.

5. Mr. Nguyen and Ms. Gustafson reconciled in 2015. Both of the marriage dissolution proceedings that had been pending between at that time – the proceeding in this Court and the one in Minnesota District Court – were dismissed, and shortly thereafter the Children's Court proceeding involving their daughter was closed, with physical and legal custody of the parents' child being restored to them. Therefore, there is no evidence in the record suggesting that Mr. Debele had any reason to further consider the nature or effect of Ms. Gustafson's having obtained Mr. Nguyen's e-mails in early 2015 until Mr. Nguyen raised the issue in his May 22, 2018 *pro se* discovery responses, in the marriage dissolution proceeding before Judge Buffalo.
6. The instant proceeding under Rule 3(d) began with the filing of Mr. Nguyen's first motion on July 20, 2018. Therefore, on July 13, 2018, when Mr. Debele told Judge Buffalo "I've never been served with anything. I don't even know what the basis of this is. He references the Minnesota Rules of Professional Conduct that I somehow violated. And then he cites Rule 3 of this court's code of conduct. I don't know what I've done. He references in some of this objections some wire tapping thing or something. Again, I don't know what that's based on", Mr. Debele's statements were not disingenuous. More than three years had passed since Mr. Debele had learned of Ms. Gustafson's actions and had told her to cease them; and so far as the record before this Court discloses, until May 22, 2018, nothing had been done or said, by Mr. Nguyen, or by any attorney for Mr. Nguyen, or by anyone else, to Mr. Debele or to any court or to regulatory body, that objected to, or even referenced, those events.
7. Nothing in the record before the Court suggests that any aspect of the materials obtained by Ms. Gustafson was used in any way in the Children's

Court proceedings involving Mr. Nguyen's and Ms. Gustafson's child, or in any other proceedings.

8. Nothing in the record indicates that there were any unethical actions by Ms. Ryan or Mr. Debele in the Children's Court proceeding involving Mr. Nguyen's and Ms. Gustafson's child. To the extent that the two attorneys communicated with each other when Mr. Nguyen's attorney was not participating, they violated no rule. Nothing requires that attorneys have equal amounts of communication with all other attorneys in a given proceeding.
9. Mr. Nguyen argues that Ms. Ryan made inaccurate statements to the Children's Court with respect to the results of a hair follicle that he had submitted for substance abuse testing. He filed a copy of the testing results (Exhibit D to his December 10, 2018 filing), indicating that the test was negative for all substances as to which testing was done. The portions of the transcript of the proceeding that he has highlighted (Exhibit C to the December 10, 2018 filing, page 24, lines 4 – 14) indicate that Ms. Ryan made it clear to the Court that Mr. Nguyen had, in fact, submitted to the testing, and asserted that the follicle was not long enough to permit testing for substance abuse more than two months earlier. Nothing in the record before the Court indicates that Ms. Ryan's statement was inaccurate, much less that it intentionally misrepresented the facts.
10. With respect to the filing of the currently pending marriage dissolution proceeding in 2017, the Court sees nothing in the record suggesting that any ethical violations were committed. Mr. Nguyen asserts that Mr. Debele improperly counselled Ms. Gustafson before the commencement of those proceedings, but he has provided no explanation of the assertion and no documentation supporting the assertion

The October 17 Motion does not identify any specific rule or rules of the Minnesota Rules of Professional Conduct that he contends Mr. Debele and Ms. Ryan violated, but during

the December 13 hearing he asserted that Minnesota Rules 3.3(b), 4.4(a), and apparently 1.2(d)³, were applicable.

Minnesota Rule 3.3(b) provides:

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

In interpreting similar language in its Model Rules of Professional Conduct, the American Bar Association's Standing Committee on Ethics and Professional Responsibility has described informing the pertinent tribunal as "the final option", which is to be used if all else fails – that is, if there is nothing else that can be done to remedy the situation and stop the improper behavior. ABA Comm. On Ethics and Professional Responsibility, Formal Opinion 91-376 (Aug. 6, 1993). Here, both attorneys did take reasonable remedial measures. Ms. Ryan told her clients that they were not to utilize the products of Ms. Gustafson's actions, and nothing in the record indicates they disobeyed that instruction; and Ms. Ryan told Mr. Debele about Ms. Gustafson's actions. Mr. Debele told his client that her actions must cease, Ms. Gustafson confirmed that instruction in her message to Ms. Foley, and the record is void of anything which would have suggested to Mr. Debele that his instruction was not followed. There is no evidence in the record that suggests that Ms. Gustafson's actions in any way affected the outcome of the Children's Court proceeding or any other matter.

Minnesota Rule 1.2(d) provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

³ During the December 13 hearing Mr. Nguyen stated that "Rule 4.2(d)" had been violated, but the Minnesota Rules do not contain a Rule 4.2(d). The Court therefore assumes that he was referring to Rule 1.2(d).

Here, there is nothing in the record suggesting that either Mr. Debele or Ms. Ryan ever counselled their clients to engage in an improper act, or assisted their clients in engaging in an improper act. Indeed, all of the evidence is exactly to the contrary.

Minnesota Rule 4.4(a) provides:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Here, again, there is no evidence that either attorney acted to embarrass, delay, or burden Mr. Nguyen, or that either used “methods of obtaining evidence that violate[d]” his rights. Each attorney took prompt and appropriate steps when they learned of Ms. Gustafson’s improper actions by one of the parties. Nothing suggests that Mr. Nguyen was improperly burdened in the proceedings before the Children’s Court – a conclusion that is reinforced by his silence, with respect to his treatment in that Court for a period of more than three years thereafter.

ORDER

For sanctions to be imposed on attorney, the Minnesota Rules of Professional Conduct require that there must be clear and convincing evidence of that attorney’s misconduct. Here, the Court finds no evidence, much less any clear and convincing evidence, of misconduct by either Mr. Gary Debele or Ms. Jessica Ryan. Therefore the motion for sanctions against Mr. Debele and Ms. Ryan, under Rule 3(d) of this Court’s Rules of Civil Procedure is DENIED.

December 31, 2018



John E. Jacobson, Chief Judge
Court of the Shakopee Mdewakanton
Sioux Community