COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-11789

GARY WONG and OTHERS

v.

GEORGE V.H. LUU and OTHERS

On Direct Appellate Review of a Judgment of the Suffolk Division of the Superior Court Department

BRIEF OF THE BOSTON BAR ASSOCIATION AS AMICUS CURIAE

Debra Squires-Lee (BBO# 633619)
Jessica Gray Kelly (BBO# 666846)
SHERIN AND LODGEN LLP
101 Federal Street
Boston, MA 02110
Tel: 617-646-2000
Fax: 617-646-2222
dsquires-lee@sherin.com
jgkelly@sherin.com

February 13, 2015

Counsel for the Boston Bar Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

INTEREST OF THE AMICUS CURIAE

The **Boston Bar Association (BBA)** traces its origins to meetings convened by John Adams in 1761, distinguishing it as the oldest bar association in the United States. The BBA works to advance the highest standards of excellence for the legal profession, to facilitate access to justice, and to serve the community at large. From its beginning, the BBA and its members have played active roles in government and public service and have participated in legal and policy discussions and debates. Many of the BBA's members practice in the trial courts of the Commonwealth, and the BBA has an interest in the proper functioning of the Massachusetts courts and in the just and correct interpretation of the power of Massachusetts trial courts to sanction attorneys who practice before them.

This case concerns the power of the Superior Court to sanction lawyers in the exercise of its inherent authority for conduct that did not violate a court order and which took place outside the purview of the court. It involves the intersection between this Court's exclusive jurisdiction over attorney discipline and a trial court's "inherent power to do

whatever may be done under the general principles of jurisprudence to insure to the citizen a fair trial. . . ." Beit v. Probate & Family Court Dept., 385 Mass. 854, 859 (1982).

The BBA believes that this Court should articulate a clear rule that strikes a balance between a trial court's power to sanction attorney misconduct, the Commonwealth's well-established system of attorney discipline, and the rights of lawyers who litigate in the courts of the Commonwealth.

ISSUES DISCUSSED

1. Whether, and in what circumstances, the Superior Court can sanction an attorney for violating an "assumption of confidentiality" in connection with an emerging global settlement where there was no court order of confidentiality or enforceable confidentiality agreement.

2. Whether the Superior Court was required to hold an evidentiary hearing prior to assessing sanctions against an attorney for conduct that occurred outside the presence of the court and was not a violation of a court order.

The BBA takes no position on any other issue raised in this case.

STATEMENT OF THE CASE

This case is before this Court on appeal of an order of the Superior Court (Macdonald, J.) entered on April 19, 2011 and amended August 9, 2011 (the "Sanctions Order"). The Sanctions Order, as amended, granted in part and denied in part certain parties' motions for sanctions and other relief against Richard Goren, Esq. ("Attorney Goren"), counsel for plaintiff Cheng Lee Co. ("Cheng Lee"). The Court granted Attorney Goren's application for direct appellate review on December 10, 2014 and solicited amicus briefs on December 29, 2014.

STATEMENT OF THE FACTS

The consolidated cases before the Superior Court arose out of the attempted sale of a Boston-based Asian supermarket chain, Super 88. ADD1.[1] The plaintiffs included: (1) vendors (referred to as "Trade Creditors"); (2) former employees asserting wage claims (the "Workers"); and (3) aggrieved

[1] "ADD" refers to the Addendum to the Brief of Appellant Richard Goren filed with the Supreme Judicial Court. Because the BBA takes no position on the factual disputes in the underlying matter, the relevant facts recited here are taken primarily from the Sanctions Order. Where necessary, additional citation is to the record appendix, using the prefix "A".

attempted purchasers of certain stores (the "Asset Purchasers"). ADD1. Attorney Goren's client, Cheng Lee, was one of the Trade Creditors. Id.

In December 2010, the parties appeared for a Rule 16 conference but engaged instead in substantive settlement discussions. ADD2. After several hours, the parties reported to the Superior Court that "a potential framework for settlement had been reached." Id. Counsel requested a continuance of the Rule 16 conference and motions hearing to finalize the settlement. ADD2.

The parties next appeared on March 18, 2011. ADD2. Counsel informed the court that the settlement had "foundered." ADD2. The stated reason was that Attorney Goren had sent written solicitations to Super 88's other trade creditors, at least some of whom were also plaintiffs in the case, informing them that he had obtained a settlement for his unnamed client of 100 cents on the dollar, and inviting them to contact him if they were interested in his services. ADD2-3.

According to the court:

> Because certain of the Trade Creditors had earlier agreed to compromise their claims as part of the settlement structure, the Goren-induced prospect of a better deal caused some to rescind their agreement to settle.

ADD3.

Counsel for other parties urged sanctions against Attorney Goren; the court ordered Attorney Goren to explain his conduct and gave a deadline for any sanctions motions. ADD3. Many of the parties filed such motions, without supporting affidavits or other evidence. On the morning of the hearing, Super 88 submitted an affidavit from Michael T. Sheehan, the president of some of the Super 88 entities ("Sheehan Affidavit"). A621-23.

The court held a hearing on the sanctions motions on April 8, 2011. A555-605. The court heard argument from counsel but took no evidence or testimony, other than previously filed affidavits of Attorney Goren and the Sheehan Affidavit. Id.

The court found that it had the inherent power to sanction an attorney who "delays the adjudication of legitimate claims and defenses, unnecessarily increases clients' litigation expenses, and squanders judicial resources." ADD3. The court found delay where it had "placed on hold its earlier effort to move the consolidated cases to prompt trial on counsel's representation in December, joined by Goren,

that they had agreed on a settlement framework but that time was needed to finalize it." ADD4. The court said it had "relied on the good faith of all counsel, as officers of the Court, in representing to the Court that they were engaged diligently in the global settlement effort." Id.

The court concluded that Goren violated the Rules of Professional Conduct, namely, Rule 4.2, as amended, 437 Mass. 1303 (2002), which prohibits communications with persons represented by counsel; Preamble 2, which requires attorneys to have honest dealings with others; and Rule 3.3, 426 Mass. 1383 (1998), which requires candor towards the tribunal. ADD5. The court also held that Goren violated the "assumption of confidentiality," which was "central to the prospect of achieving settlement." ADD5. The court premised the assumed duty of confidentiality on the parties' supposed knowledge of: (i) potential additional claimants; (ii) a finite amount of money; and (iii) the risk that if such claimants learned of the settlement "a bankruptcy petition could be triggered that would have left all the plaintiffs without a practical remedy." ADD4-5.

On those grounds, the court ordered Attorney Goren and his client to reimburse "all parties in the consolidated cases their necessary and reasonable attorneys[']] fees and expenses incurred from December 10, 2010 through April 8, 2011 in connection with the effort to settle the litigation." ADD5-6.

After a second hearing on July 28, 2011, the court amended its Sanctions Order to the extent it imposed monetary sanctions against Cheng Lee, but ordered Attorney Goren to pay $239,928.40 in attorneys' fees, plus interest. ADD12, 16.

ARGUMENT

I. THE COURT SHOULD CLARIFY THE SCOPE OF A SUPERIOR COURT'S INHERENT AUTHORITY TO SANCTION AN ATTORNEY FOR OUT-OF-COURT CONDUCT NOT IN VIOLATION OF A COURT ORDER.

"Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." Roadway Exp. v. Piper, 447 U.S. 752, 764 (1980).[2] "In this day and age, sanctions are a badge of reprobation that can haunt an attorney throughout his or her career. They can have

[2] A federal court's inherent powers, like those of the Commonwealth's trial courts, are those "necessary to the exercise of all others." Roadway, 447 U.S. at 764.

ramifications that go far beyond a particular case." In re Plaza-Martinez, 747 F.3d 10, 14 (1st Cir. 2014). In addition, "[d]ue process requires that attorneys, like anyone else, not be subject to laws and rules of potential random application or unclear meaning." In re Discipline of Attorney, 442 Mass. 660, 668 (2004).

The BBA respectfully submits that an attorney cannot be sanctioned for violating an "assumption of confidentiality" by disclosing the existence of an emerging global settlement to non-parties, where there was no confidentiality order or evidence in the record of a confidentiality agreement. Rather, a sanction based on a trial court's inherent authority, for out-of-court conduct that did not violate a court order, must be based on express findings that (1) the conduct concerned the case in controversy; (2) the conduct prejudiced the administration of justice; and (3) the attorney acted in bad faith.[3]

A. There Is No Assumed Duty Of Confidentiality.

The Superior Court should not sanction an attorney for violating an "assumption of

[3] This Amicus Brief does not address a trial court's statutory or rule-based power to sanction. This brief addresses only the scope of and limitations on a trial court's inherent powers.

confidentiality." Settlement negotiations and settlement agreements are not automatically confidential. To the contrary, litigants effectuate a confidential settlement in one of two ways: they obtain a court order sealing the settlement agreement, or they agree to keep the negotiations confidential and include a confidentiality provision in a settlement agreement that is not filed with the Court. See, e.g., Pansy v. Borough of Stroudsburg, 23 F.3d 772, 788 (3d Cir. 1994) ("[I]f parties cannot demonstrate good cause for a court order of confidentiality over the terms of settlement, they have the option of agreeing privately to keep information concerning settlement confidential, and may enforce such an agreement in a separate contract action"); Kratky Dore, Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement, 74 Notre Dame L. Rev. 283, 385 (1999)("To the extent that confidentiality is a settlement objective, litigants will provide for it in various ways in their agreement."); Shawger McCord, The Secret to Keeping Settlements Secret, 33 No. 4 Litigation 45 (ABA 2007) (lawyers should not "presuppose that all

plaintiffs or parties will willingly stipulate to confidentiality of the settlement").

The BBA has not located a case in which a court sanctioned a litigant or counsel for violating an "assumption of confidentiality" of settlement negotiations. To the contrary, cases imposing sanctions for disclosing allegedly confidential information all involved a court order of confidentiality or an enforceable confidentiality agreement. E.g., Baella-Silva v. Hulsey, 454 F.3d 5, 11 (1st Cir. 2006) (affirming sanctions award for violating confidentiality clause of settlement agreement); Toon v. Wackenhut Corr. Corp., 250 F.3d 950, 953 (5th Cir. 2001) (affirming sanctions where plaintiffs' counsel disregarded confidentiality provision); Frank v. L.L. Bean, 377 F. Supp. 2d 233, 240 (D. Me. 2005) (sanctions for deliberate disclosure of information subject to confidentiality agreement); Microsoft Corp. v. Taiwan Trade Center, 989 F. Supp. 80, 83 (D.P.R. 1997) (plaintiffs issued press release despite knowledge of pending motion to seal and court's admonition that "all settlement negotiations were to be kept as confidential as possible and the agreement was to be sealed").

This Court has previously declined to sanction a lawyer for disclosing litigation information not protected by a confidentiality order or agreement. In In re Discipline of Attorney, 442 Mass. 660 (2004), an attorney sent the deposition transcript of a state police officer to the trooper's supervisor because the lawyer believed the transcript demonstrated the trooper's incompetence. Id. at 662-663. The issue was whether that conduct violated the ethical prohibition against engaging in "conduct that is prejudicial to the administration of justice." Because "the respondent's conduct violated no specific statute, rule, order, regulation, or established norm of professional conduct," the Court held that the conduct was not "the kind of 'egregious' interference with the administration of justice inherent in activities that unquestionably violate DR 1-102(A)(5), 'such as bribery, perjury, [or] misrepresentations to a court.'"[4] Id. at 670-71 (quoting Matter of the Discipline of Two Attorneys, 421 Mass. 619, 628, (1996)).

[4] DR 1-102(A)(5) is now codified in the Rules of Professional Conduct. Mass. R. Prof. C. 8.4(d).

In so holding, this Court refused to accept the "open-ended rule" urged by bar counsel, permitting sanctions for any "behavior that 'by-passes' judicial oversight." In re Discipline of Attorney, 442 Mass. at 668. In particular, this Court did not want to "render potentially sanctionable any attorney communication with any third party during the course of litigation" or permit sanctions for "laws and rules of potential random application or unclear meaning." Id. (citing In re Ruffalo, 390 U.S. 544, 554-56 (1968) (White, J. concurring) ("an attorney [may not be deprived] of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct" (emphasis added)).

In addition, while the Rules of Professional Conduct impose certain duties on lawyers governing their relationship with adversaries and the court,[5]

---

[5] For example, lawyers have a duty of candor to the tribunal and a duty of fairness to the opposing party and counsel. Mass. R. Prof. C. 3.3, 426 Mass. 1383 (1998), 3.4, 426 Mass. 1389 (1998). The rules also address trial publicity, but prohibit only "public communications" that a lawyer knows or should know "will have a substantial likelihood of materially

they do not impose a duty of confidentiality owed to a lawyer's adversaries or their counsel.[6] This Court should decline to articulate such an assumed duty, particularly because it may conflict with the lawyer's duty to his or her client. See Lamare v. Basbanes, 418 Mass. 274, 276 (1994) (the "court will not impose a duty of reasonable care on an attorney if such an independent duty would potentially conflict with the duty the attorney owes to his or her client"); Spinner v. Nutt, 417 Mass. 549, 553 (1994) (refusing to impose a duty on trustee's attorney to the trust beneficiaries because "conflicting loyalties could impermissibly interfere with the attorney's task of advising the trustee").

Imposing an assumed duty on counsel to refrain from discussing a pending settlement agreement when there is neither an order nor agreement of confidentiality has the potential to conflict with the duty owed to the client.[7] One can imagine many

---

prejudicing an adjudicative proceeding." Mass. R. Prof. C. 3.6(a), 426 Mass. 1392 (1998).

[6] The Rules comprehensively address a lawyer's duty to keep client confidences. See Mass. R. Prof. C. 1.6, 426 Mass. 1338 (1998).

[7] The BBA takes no position on whether Attorney Goren had good reason to disclose the impending settlement. Rather, the BBA's concern is the

situations in which disclosure of a forthcoming settlement would serve the client's interest, including: disclosure in parallel proceedings such as divorce proceedings; disclosure to creditors or insurers; and disclosure to regulatory authorities.[8]

Here, nothing in the record suggests that the court ordered or the parties agreed that the settlement negotiations would remain confidential. The Superior Court appeared to base its "assumption of confidentiality" on a professional duty that Attorney Goren owed to other parties, their counsel, and the Court. As set forth above, there was no such duty, and the Superior Court abused its discretion in holding otherwise.[9]

---

potential impact of a broad policy rule that could improperly constrain lawyers throughout the Commonwealth and affect their duty of loyalty to their clients. Further, as this Court has articulated, it is the potential for conflict, and not an actual conflict, that must be weighed. Spinner, 417 Mass. at 554.

[8] Indeed, when lawyers are negotiating with distressed entities there may be circumstances - for example if a lawyer learns the entity's financial status is declining or a creditor seeks to advantage itself by putting a lien on property - when the lawyer may have a duty to his or her client to disclose what he or she has learned and locate and join with other creditors to force a bankruptcy petition or seek a receiver or trustee in bankruptcy.

[9] The BBA takes no position on whether, on remand, the parties would be able to introduce evidence that

B. The Trial Court Has No General Jurisdiction To Enforce The Rules Of Professional Conduct.

While the BBA takes no position on whether Attorney Goren's behavior violated any of the Rules of Professional Conduct, the trial court was not authorized (short of a finding of a violation of a court order) to impose discipline absent explicit findings that Goren's conduct was in bad faith and prejudiced the administration of justice.[10] "Any attorney admitted to, or engaging in, the practice of law in this Commonwealth shall be subject to [the Supreme Judicial Court's] exclusive disciplinary jurisdiction and the provisions of these rules…." Matter of Fordham, 423 Mass. 481, 485 (1996) (quoting SJC Rule 4:01, § 1(1), as amended 430 Mass. 1319

---

they had reached an agreement to keep the negotiations confidential.

[10] Thus, Appellees' argument that Attorney Goren violated his duties to his client, Cheng Lee, does not alter the rule the Amicus urges the Court to adopt. Even a violation of a duty to a client is not grounds for sanctions under a trial court's inherent authority unless the attorney acted in bad faith and prejudiced the administration of justice. Clients have other mechanisms to protect their rights under the Rules of Professional Conduct, including complaining to the Board of Bar Overseers or filing a claim for legal malpractice if the breach constituted negligence. Moreover, if Attorney Goren truly did breach a duty to Cheng Lee, the appropriate course would be to compensate Cheng Lee, not to compensate other parties, as the Sanctions Order here did.