IN THE SUPREME COURT OF GUAM

GUAM BAR ETHICS COMMITTEE
Petitioner-Appellee

vs.

LEON G. MAQUERA
Respondent-Appellant

OPINION

Filed: September 26, 2001

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Supreme Court Case No.:CVA00-011
Superior Court Case No.:SP0075-94

Appeal from the Superior Court of Guam
Submitted on the briefs on rehearing, September 21, 2001
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice (Acting)[1]; JOHN A. MANGLONA, Designated Justice; and RICHARD H. BENSON, Justice *Pro Tempore*.[2]

CARBULLIDO, J.:

[1] Leon G. Maquera ("Maquera") accepted a transfer of real property from Pedro Castro ("Castro") as payment for past legal services. The Guam Bar Ethics Committee ("Ethics Committee") instituted attorney disciplinary proceedings against Maquera for alleged misconduct in regard to this transfer. After conducting a full hearing on the matter, the Ethics Committee found that Maquera violated Rules 1.5 and 1.8(a) of the Guam Rules of Professional Conduct and recommended to the Superior Court of Guam that Maquera be suspended from the practice of law and make restitution to Castro. The Superior Court accepted the Ethics Committee's factual findings and legal conclusions and entered judgment accordingly. The trial court entered an Amended Judgment upon granting the Ethics Committee's Motion to Amend Judgment and denying Maquera's motions to Dismiss, Set Aside, and Alter or Amend Judgment. Maquera appeals the Amended Judgment arguing that the lower court erred in: (1) finding the existence of an attorney-client relationship; (2) valuing the real property at issue; (3) ordering restitution; (4) denying his Motion to Dismiss on the ground that the judgment was fraudulently procured; and (5) granting the

[1] The Chief Justice recused himself from this case and as the only full-time justice on the panel, Justice Carbullido was appointed Acting Chief Justice.

[2] The panel heard oral arguments in this case on May 14, 2001. Prior to issuing an opinion, and due to the fact that Justice Benson's term as Designated Justice expired, the court *sua sponte* scheduled the case for rehearing and appointed Justice Benson to act *pro tempore* on the matter. Oral arguments were thereafter conducted on September 21, 2001, at which time the parties agreed to submit the appeal on the briefs.

Ethics Committee's Motion to Amend.[3] We are not persuaded by Maquera's arguments. However, we find that the trial court's calculation of restitution should be reduced by the amount awarded in a related civil case and we therefore modify the judgment, and affirm the judgment as modified.

I.

[2] During the years of 1982 through 1987, Maquera, a licensed attorney at the time, provided legal representation to Castro. On December 21, 1987, Castro executed a quitclaim deed to a parcel of real property ("property") as compensation for past legal services. The value of legal services performed was $45,000.00. At the time of the transfer, the owner of the property was Edward Benavente ("Benavente"), who bought the property for $500.00 at a public auction conducted pursuant to a judgment against Castro for the unpaid balance of an outstanding debt owed to Benavente. On January 4, 1988, Maquera, as Castro's grantee, exercised Castro's one-year right of redemption, and satisfied the outstanding debt to Benavente in the amount of $525.00. Title to the property was thereafter put in Maquera's name. On December 30, 1988, Maquera sold the property to C.S. Chang and C.C. Chang ("Changs") for $320,000.00.

[3] In support of his arguments presented on appeal, Maquera incorporates by reference briefs submitted in the lower court. This manner of briefing directly violates Rule 13(s) of the Guam Rules of Appellate Procedure which prohibits parties from "append[ing] or incorporat[ing] by reference, briefs submitted to the Superior Court or refer[ing] this court to such briefs for their arguments on the merits of the appeal." Guam R. App. P. 13(s). This court looks unfavorably on such manner of briefing and parties before the court should not take lightly that a violation of this nature may result in a dismissal of their appeal. GRAP 13(s), 13(u), 17(d).

[3] On January 15, 1994, the Ethics Committee concluded hearings regarding Maquera's alleged misconduct with regard to the transfer of the property as payment for legal services, and issued Findings of Facts and Conclusions of Law. The Ethics Committee specifically found that at the time of the transfer of the property, Maquera was the attorney for Castro. Further, as attorney, Maquera provided no billing statements, time records, or invoices to Castro and continued to represent him without having entered into a written fee agreement. The Ethics Committee found that the land transfer was oral, with the exception of the execution of the deed, and that Maquera failed to advise Castro to seek the advice of independent counsel before transferring the property. The Ethics Committee further found that the total value of legal services performed by Maquera was $45,000.00, that the fair market value of the lot at the time of the transfer was $248,220.00, and that Maquera sold the property one year later for $320,000.00. Based on these findings, the Ethics Committee concluded that Maquera violated Rules 1.5 (requiring that attorney's fees be reasonable) and 1.8(a) (requiring that an attorney entering into a business transaction with a client reduce the transaction to writing and advise the client to receive independent counsel) of the Guam Rules of Professional Conduct. The Ethics Committee recommended, among other things, that Maquera be suspended from the practice of law for two years, and that he make restitution to Castro in the amount of $273,975.00.[4]

[4] This amount represents the price for the sale of the property to the Changs ($320,000.00) minus the value of legal services rendered and owed ($45,000.00), the amount Maquera paid to Benavente upon exercising the right of redemption ($525.00), and the value of other services performed by Maquera for Castro ($500.00).

[4] On April 8, 1994, the Ethics Committee filed a special proceedings petition in the Superior Court of Guam requesting that the Court discipline Maquera in accordance with its Findings of Fact and Conclusions of Law. A panel of the Superior Court judges issued a Decision and Order on May 7, 1996, agreeing with the Ethics Committee's factual findings, legal conclusions, and recommendations.[5] The panel issued a Judgment on June 12, 1996.

[5] The Ethics Committee filed a motion to Alter or Amend Judgment and Revoke Probation. Maquera concurrently made motions to Set Aside Judgment pursuant to Rule 60(b) of the Guam Rules of Civil Procedure, Alter or Amend Judgment pursuant to Rule 59(e) of the Guam Rules of Civil Procedure, and Dismiss. After hearing arguments on the post-judgment motions, a new panel[6] of judges granted the Ethics Committee's Motion to Amend and denied each of Maquera's motions in a Decision and Order filed on January 4, 2000. *See* Transcript, vol. - - (Hearing, Aug. 20, 1999). An Amended Judgment was filed on April 5, 2000, and entered on the docket on April 6, 2000. Maquera filed a timely Notice of Appeal on April 24, 2000.

II.

[6] This court has jurisdiction over the appeal of final judgments of the Superior Court of Guam pursuant to Title 7 GCA §§ 3107 and 3108 (1994).

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[5] The original panel consisted of three judges of the Superior Court of Guam.

[6] The new panel consisted of entirely new judges, one from the Superior Court of Guam and two from the Saipan courts.

III.

A. The Existence of an Attorney-Client Relationship.

[7] Maquera argued in a post-judgment motion that the Judgment should be amended pursuant to Rule 59(e) of the Guam Rules of Civil Procedure on the ground that the court erred in finding of an attorney-client relationship between Maquera and Castro at the time Castro transferred the property to Maquera. The lower court rejected this argument and denied Maquera's motion.

[8] A denial of a Rule 59(e) motion is reviewed for an abuse of discretion. *See Ward v. Reyes*, 1998 Guam 1, ¶ 10; *Merchant v. Nanyo Realty Inc.*, 1998 Guam 26, ¶ 6. A court abuses its discretion "when the decision is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *Midsea Indus., Inc. v. HK Eng'g, Ltd.*, 1998 Guam 14, ¶ 4. We will only reverse a lower court's decision if we have "a definite and firm conviction the trial court committed clear error of judgment in its conclusion." *J.J. Moving Services, Inc. v. Sanko Bussan (Guam) Co.*, 1998 Guam 19, ¶ 14. (citations omitted).

[9] Rule 59(e) of the Guam Rules of Civil Procedure provides: "Motion to Alter or Amend Judgment. A motion to alter or amend judgment shall be served not later than 10 days after the entry of the judgment." Guam R. Civ. P. 59(e). The rule allows a court to reconsider and amend a previous order, but is an "extraordinary remedy, to be used sparingly in the interest of finality and conservation of judicial resources." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir, 2000) (citation omitted). A Rule 59(e) motion may be granted (1) if the movant

demonstrates that it is necessary to prevent manifest errors of law or fact upon which the judgment is based; (2) to allow the moving party to present newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; or (4) if there is an intervening change in controlling law. *See Ward v. Reyes*, 1998 Guam 1 at ¶ 10; *see also* 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2810.1 (citations omitted); *Kona Enterprises*, 229 F.3d at 890. Motions made under Rule 59(e) are aimed at reconsideration, not initial consideration, and thus cannot be used to present a new legal theory, raise arguments for the first time, or present evidence for the first time when they could have reasonably been raised earlier. *See Ward*, 1998 Guam 1 at ¶ 13; *F.D.I.C. v. World University Inc.*, 978 F.2d 10, 16 (1st Cir. 1992); *Kona Enterprises*, 229 F.3d at 890. Further, Rule 59(e) motions are both "procedurally and substantively deficient" if they simply reiterate in greater detail arguments previously made before the court. *Merchant*, 1998 Guam 26 at ¶¶ 8-9. "Supplementing and further detailing previous arguments are not sufficient bases for reconsideration [under Rule 59(e)]." *Id.* at ¶ 9.

[10] The lower court's Decision and Order of May 7, 1996, reveals that Maquera initially argued to the court that the attorney-client relationship between himself and Castro ended on December 14, 1987, when Castro's case was settled. *See* Petitioner-Appellee's Excerpts of Record, Tab B (Decision and Order, May 7, 1996). Maquera contended that at the time of the land transfer, December 17, 1987, there was no attorney-client relationship and therefore no violation of the Rules of Professional Conduct. The court rejected this argument. *See id.* In his Motion to Amend,

Maquera posed the exact same argument. Because reconsideration of a prior judgment under Rule 59(e) is not proper when the movant simply repeats prior arguments, the trial court did not abuse its discretion in denying Maquera's motion. *See Merchant*, 1998 Guam 26 at ¶¶ 8-9.

[11] Moreover, a review of the record reveals that the lower court's finding of the existence of an attorney-client relationship is supported by the evidence. Guam Rule of Professional Conduct 1.8 prohibits certain business transactions between an attorney and client. Rule 1.8(a) provides:

> **Conflict of Interest: Prohibited Transactions.** (a) A *lawyer* shall not enter into a business transaction with *a client* or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to *a client* unless:
>
> > 1. the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
> > 2. the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
> > 3. the client consents in writing thereto.

RULES OF PROFESSIONAL CONDUCT Rule 1.8(a) (1994). Thus, in order for Maquera to be held to the requirements of Rule 1.8(a), there must be a finding of an attorney-client relationship between Maquera and Castro at the time of the property transaction.

[12] We must therefore decide what constitutes an attorney-client relationship for purposes of Rule 1.8(a). While an active ongoing relationship clearly falls within the definition of an attorney-client relationship, we hold that an attorney-client relationship exists for purposes of Rule 1.8(a) so long as the client places trust in the attorney as a result of *prior representation*. *See Hunniecutt v.*

State Bar of California, 44 Cal.3d 362, 370-71, 748 P.2d 1161, 1166 (Cal. 1988). In *Hunniecutt*, the State Bar of California instituted disciplinary proceedings against the defendant for violation of State Bar Rule of Professional Conduct 5-101, which is virtually identical to the Rule 1.8(a) of the Guam Rules of Professional Conduct. *See id.*, 44 Cal.3d at 366, 748 P.2d at 1163. The defendant argued that the business transaction with his client did not take place until after the personal injury representation of the client had ended. *See id.*, 44 Cal.3d at 370, 748 P.2d at 1165. The court rejected the defendant's assertion that an attorney-client relationship did not exist, stating that Rule 5-101 was meant to prevent overreaching by the attorney, especially in a case where the client places his trust in the attorney with regard to investing proceeds of a judgment or settlement. The court held:

> Accordingly, when an attorney enters into a transaction with a former client regarding a fund which resulted from the attorney's representation, it is reasonable to examine the relationship between the parties for indications of special trust resulting therefrom. ***We conclude that if there is evidence that the client placed his trust in the attorney because of the representation, an attorney-client relationship exists for the purposes of rule 5-101 even if the representation has otherwise ended***.

Id., 44 Cal.3d at 370-71, 748 P.2d at 1166 (emphasis added).

[13] While the *Hunniecutt* court announced the rule in the context of an attorney's investment of money the client received from the representation, the policy behind the rule has been adopted in other contexts. For instance, this court has adopted the policy in *Gayle v. Hemlani*, 2000 Guam 25. In *Gayle*, the issue was whether an attorney breached his fiduciary duty to his client. The court held

that an attorney's duty of good faith arises out of the confidential relationship. Therefore, in determining whether there is a fiduciary duty owed to a former client, the test is whether "the influence of the relation still exists at the time of the transaction." *Id.* at ¶ 28.[7] The court held that if there is a finding of influence, then the attorney's fiduciary duty to the client remains and transactions with the client during this time must be scrutinized for unfairness. *See Id*.

[14] Following our reasoning in *Gayle* and that set forth in *Hunniecut*, we conclude that attorneys should be held to the same duty to act cognizant of a former client's interests where the former client remains trusting of the attorney as a direct result of the prior formal relationship. Therefore, we hold that an attorney-client relationship exists for purposes of Rule 1.8(a) if the attorney's influence remains even after the formal relationship has ended.

[15] The record contains evidence which supports the lower court's finding that an attorney-client relationship existed between Maquera and Castro at the time of the land transfer. The existence of an attorney-client relationship is a question of fact. *See* RULES OF PROFESSIONAL CONDUCT Preamble (1994) ("Whether a client-lawyer relationship exists for any specific purpose can depend upon the circumstances and may be a question of fact."); *Stender v. Vincent*, 992 P.2d 50, 58 (Hawaii 2000); *DiLuglio v. Providence Auto Body, Inc.*, 755 A.2d 757, 766 (R.I. 2000); *Dietz v. Doe*, 935 P.2d 611, 615 (Wash. 1997) (citation omitted); *cf. Interstate Commerce Comm'n v. Holmes Trans., Inc.*, 983 F.2d 1122, 1128 (1st Cir. 1993) (holding that the existence of an attorney-

[7] Note that *Gayle* is distinguishable in that it involved a claim of breach of fiduciary duty, and *not* a violation of the rules of professional responsibility.

client relationship is a question of fact, or at most, a mixed question of law and fact, and thus reviewed for clear error). We review a trial court's factual findings for clear error. *Yang v. Hong*, 1998 Guam 9, ¶ 4. "A finding is clearly erroneous when, even though some evidence supports it, the entire record produces a definite and firm conviction that the court below committed a mistake." *Yang*, 1998 Guam 9 at ¶ 7.

[16] The original panel found an attorney-client relationship based on the following facts: (1) Maquera had handled various matters on behalf of Castro for a period of five years, (2) Maquera represented to the Committee that he and Castro were very close friends; and (3) at the time Maquera exercised Castro's right of redemption and obtained title to the property, Maquera still held some of Castro's funds in trust, and he received these funds in his capacity as Castro's attorney after the December 1987 settlement of CV0525-83. *See* Petitioner-Appellee's Excerpts of Record, Tab B, pp. 9-10 (Decision and Order, May 7, 1996). Further, the panel found that the evidence showed that Castro subjectively thought that Maquera was his attorney. *See Bohn v. Cody*, 832 P.2d 71, 75 (1992) ("The existence of the relationship turns largely on the client's [reasonable] subjective belief that it exists.") (citation omitted).

[17] The facts the lower court relied upon support a finding that the influence of the prior active representation of Castro remained at the time of the land transaction. The facts support a finding that Castro remained trusting of Maquera even after the formal relationship may have ended. These facts sufficiently show the existence of an attorney-client relationship for purposes of Rule 1.8(a).

Therefore, the trial court's finding was not clearly erroneous.

B. Valuation of the Property

[18] Maquera made motions pursuant to Rules 59(e) and 60(b) of the Guam Rules of Civil Procedure, arguing that the judgment be reconsidered in light of the court's erroneous valuation of the property in question. *See* Petitioner-Appellee's ER, Tab D, p. 4 (Decision and Order, Jan. 4, 2000). The lower court denied both motions.

[19] Because the valuation issue was disposed of in Maquera's Rule 59(e) and 60(b) motions below, we review the lower court's denial of these motions. The denials of both a Rule 59(e) motion and 60(b) motion are reviewed for an abuse of discretion. *See Merchant v. Nanyo Realty Inc*., 1998 Guam 26, ¶ 6 (determining that a court's denial of reconsideration pursuant to a rule 59(e) motion is reviewed for an abuse of discretion); *Midsea Indus., Inc. v. HK Eng'g, Ltd.*, 1998 Guam 14 at ¶ 4 (determining that a Rule 60(b) motion is reviewed for an abuse of discretion). A court abuses its discretion if it relies on a clearly erroneous assessment of the facts. *People v. Tuncap*, 1998 Guam 13, ¶ 13 (citation omitted). "Similarly, when the record contains no evidence supporting a court's decision, the standard is violated." *See id*.

[20] The lower court denied Maquera's Rule 59(e) Motion to Amend on the ground that Maquera could have raised the argument regarding valuation previously. Because Rule 59(e) motions cannot be used to raise arguments that could have been raised previously, the court did not abuse its discretion in denying the motion. *See Kona Enterprises*, 229 F.3d at 890. Maquera himself posits

that he knew of the lack of evidence regarding valuation even before the original panel issued its opinion. Thus, with this knowledge, he could have previously raised the argument regarding the lack of evidence of value. Maquera's failure to do so was at his peril.

[21] The lower court also denied Maquera's Rule 60(b) motion, finding that although the original panel did not delve into the manner in which the Ethics Committee derived its valuation of the property, the panel nonetheless considered both Maquera's and the Ethics Committee's opinions as to value. After weighing the two, the panel adopted the Ethics Committee's valuation. Thus, the new panel found that the original panel properly arrived at a value and declined to reconsider the finding. This ruling was not an abuse of discretion.

[22] The fair market value of property at a given time is a question of fact, *see Salt Lake City Southern R.R. Co. v. Utah State Tax Comm'n*, 987 P.2d 594, 598 (Utah 1999), and this court reviews factual findings for clear error. *See Yang*, 1998 Guam 9 at ¶ 4.

[23] A review of the record reveals that both parties argued their opinions as to valuation. Maquera argued that the property was worth $25,000.00, while the Ethics Committee asserted that the property was worth $248,220.00. The court accepted the Ethics Committee's valuation. The court further found that Maquera did not provide sufficient evidence to support his valuation. When faced with two competing opinions regarding the value of the property, the court was required to make a determination. It could either choose between the two, or arrive at its own finding. The lower court did not commit clear error by adopting the figure put forth by the Ethics Committee.

Cf. Navarro v. Navarro, 2000 Guam 31, ¶ 10 (holding that where a party has the burden to prove the value of community property and fails to provide or contest valuation, the court has the discretion to accept the value proposed by the other party). Moreover, the later sale price of the property for $320,000.00 is evidence that the Ethics Committee's valuation was the more reasonable and probable of the two. Thus, we hold that the record supports the finding that the property was worth $248,220.00 at the time of the transfer. The original panel did not commit clear error in arriving at its value; therefore, the new panel did not abuse its discretion in denying Maquera's motion for reconsideration under GRCP 60(b).

C. The lower court's order of restitution.

[24] The lower court ordered Maquera to pay $273,975.00 in restitution to Castro. Maquera argues that this order was improper. Rule 12 of the Superior Court of Guam Rules for the Discipline of Attorneys governs the types of sanctions and orders the court may impose for violating the disciplinary rules. Rule 12(c) provides: "An attorney who has been disciplined under this rule may be ordered to make restitution. Any order of restitution does not preclude damages being awarded by a court of competent jurisdiction." RULES FOR DISCIPLINE OF ATTORNEYS, Rule 12(c) (1992). Thus, it is clear the court may order restitution. The relevant issue is what constitutes restitution.

[25] The common law definition of a restitution interest is "an interest 'in having restored to [one party] any benefit that [he or she] has conferred on [another] party.'" *In re Robertson*, 612 A.2d 1236, 1240 (D.C. 1992) (internal brackets in original) (citing RESTATEMENT (SECOND) OF

CONTRACTS § 370 (1981)) (adopting the common law definition in disciplinary proceedings); *see also Nelson v. O.E. Serwold*, 687 F.2d 278, 281 (9th Cir. 1982). Thus, unlike a claim of damages, where the goal is to compensate the injured party, the primary purpose of restitution is to prevent unjust enrichment, and a party unjustly enriched is required to disgorge himself of the benefit of which it would be unjust for him to keep by returning it in kind or paying money. *See Robertson,* 612 A.2d at 1241; *see also Booher* v. *Frue*, 358 S.E.2d 127, 129 (N.C. Ct. App. 1987).

[26] In attorney disciplinary cases restitution refers to: "(a) a monetary payment by the respondent lawyer to the former client for the money, interest or thing of value that has been paid or entrusted to the lawyer by a client (or third party) in the course of the representation, (b) *a refund of unearned fees*, or (c) a compensatory payment for the harm respondent has caused." *State of Oklahoma v. Leigh*, 914 P.2d 661, 668 (Okla. 1996) (emphasis added) (internal footnotes omitted). When an attorney violates the rules of professional conduct, it is entirely appropriate to order the attorney to make restitution in the amount of the fee charged. *See e.g. In re Anschell*, 9 P.3d 193, 205-06 (Wash. 2000). In cases where the attorney charges an excessive fee, a court may properly order restitution of the excessive portion. *See e.g. In re Levingston*, 755 So.2d 874, 876 (La. 2000); *cf. In re Heard*, 963 P.2d 818, 824, 829 (Wash. 1998) (en banc).

[27] The instant case is not one where the client paid the unearned fee with money. *Cf. e.g. In re Levingston*, 755 So.2d 874, 876 (La. 2000). Rather, in the instant case the payment was made in property. If the property is valued in excess of the value of legal services rendered, then we hold,

in line with the cases where the attorney was paid in money, that the attorney can be required to return an amount which equals the value of the property in excess of the value of legal services rendered. Therefore, the lower court properly ordered Maquera to make restitution in the amount of the difference between the value of the property at the time of the transfer ($248,220.00) and the value of legal services ($45,000.00). This is a restitutionary remedy because it seeks to disgorge Maquera of the benefit he received at the expense of Castro. *See Robertson*, 612 A.2d at 1241. As stated earlier, the rules for attorney discipline allow a court to order an attorney to make restitution.

[28] The fact that Maquera no longer has possession of the property is irrelevant. Because restitution seeks to prevent unjust enrichment, "[a] party who has received a benefit at the expense of [another] . . . is required to account for it, *either by returning it in kind or by paying a sum of money*." *Robertson*, 612 A.2d at 1241 (citation omitted). "A person obtains restitution either by the return of something which he formerly had *or by the receipt of its equivalent in money*." RESTATEMENT (FIRST) OF RESTITUTION, § 1 cmt. a (1936). Thus, it is clear that an order to pay the monetary equivalent of the value of unearned legal services is an order of restitution and is a proper remedy in attorney disciplinary cases.

[29] The next issue is whether the court properly ordered Maquera to pay the difference between the amount of money Maquera received for the sale of the property to the Changs ($320,000.00) and the value of legal services rendered ($45,000.00). Specifically, as set forth above, while the lower court properly ordered Maquera to pay the difference between the value of the land *at the time of*

the transfer and the value of legal services, the issue is whether the court properly ordered Maquera to pay, in addition, the *profit* obtained from the sale of the property to a third party. We hold that the order was proper.

[30] In cases where an attorney breaches his fiduciary duty to a client, and profits therefrom, it is proper to require the attorney to surrender the profit under a constructive trust theory. *See Booher*, 358 S.E.2d at 129. "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises." RESTATEMENT (FIRST) OF RESTITUTION § 160 (1936). The constructive trust remedy is meant to prevent the trustee from being *unjustly enriched* by retaining the profit made from a violation of the trust. *See id* cmt. d. Furthermore, "if the defendant has made a profit through the violation of a duty to the plaintiff to whom he is in a fiduciary relation, he can be compelled to surrender the profit to the plaintiff, although the profit was not made at the expense of the plaintiff," or in other words, where the plaintiff has not suffered as great a loss as the benefit received by the defendant. *See id*.

[31] A constructive trust is often imposed, for example, in cases of fraud, duress, undue influence or mistake, the wrongful disposition of another's property, or where there is a breach of a fiduciary duty. *See Scollard v. Scollard*, 947 S.W.2d 345, 348 (Ark. 1977). While a disciplinary proceeding does not involve a common law breach of fiduciary duty claim, we hold that the policy underlying the constructive trust remedy supports its application in disciplinary proceedings to prevent an

attorney from unjustly profiting as a result of violating a rule of professional conduct. Our holding clearly effectuates the purposes of disciplinary sanctions to deter unprofessional conduct and maintain the integrity of the local bar. *See Attorney Grievance Commission of Maryland v. Oswinkle*, 2001 WL 503399, *4 (Md. 2001) ("[T]he purposes of sanctions are to protect the public, to deter violations of the Rules of Professional Conduct, and to maintain the integrity of the legal profession, not to punish the errant attorney.")

[32] In violating the rules of professional conduct, Maquera accepted property at Castro's expense and profited by selling it to a third party. Maquera was unjustly enriched, not only to the extent of the value of excessive portion of his fee, but also to the extent of the profit obtained as a direct result of violating the rules. Therefore, Maquera should be held to hold the profit in constructive trust for the benefit of Castro.

[33] A constructive trust is a form of restitution. *See Pottinger v. Pottinger*, 605 N.E.2d 1130, 1136-37 (Ill. App. Ct. 1992) (recognizing that a constructive trust is a restitutionary remedy); *Scollard*, 947 S.W.2d at 348. Because the Superior Court may order restitution for a violation of a disciplinary rule, the lower court properly ordered Maquera to pay to Castro as restitution the entire difference between the amount Maquera sold the property to the Changs for ($320,000.00) and the value of legal services rendered ($45,000.00).

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[34] Maquera argues, however, that in ordering restitution, the lower court failed to take into account a prior civil judgment entered in *Estate of Benavente v. Maquera*, 2000 Guam 9. In *Estate of Benavente*, Castro obtained a *civil* judgment in the amount of $274,500.00 for the same land transaction at issue under a breach of fiduciary duty claim. *See id.* Maquera argues that the judgment in the civil action bars the entry of a judgment ordering restitution in the instant disciplinary proceeding. Maquera cites no authority for the proposition that the existence of a prior civil judgment bars the issuance of a judgment in the instant case.[8] It is entirely proper for a disciplinary court to address and remedy an attorney's wrongdoing even if the same wrongdoing was addressed in a prior civil suit. *See e.g. In re Kinast*, 357 N.W.2d 282 (Wis. 1984). Because the proceedings at issue were distinct, *to wit*, one pursuant to a common law cause of action and the other seeking discipline for the violation of the Guam Rules of Professional Conduct, the Superior Court had the authority to entertain both proceedings and enter judgments in accordance therewith. *See In re LaQua*, 548 N.W.2d 372, 377 (N.D. 1996) ("That an injured party may recover from a lawyer in a malpractice action is not in itself sufficient to show that a client suffered no injury or that disciplinary proceedings are no longer necessary.") However, because both the civil judgment and the disciplinary order remedy Maquera's wrongful gain from the same land transaction with Castro, *see Estate of Benavente*, 2000 Guam 9 at ¶ 25 (entering judgment for Castro in the amount of

[8] The rules governing disciplinary proceedings contemplate recovery pursuant to a civil judgment notwithstanding an order of restitution in a disciplinary proceeding. *See* RULES FOR DISCIPLINE OF ATTORNEYS, Rule 12(c), Title 7, GCA, Appendix (1992) ("Any order of restitution does not preclude damages being awarded by a court of competent jurisdiction.")

$274,500.00, "representing what the Appellee wrongfully gained from the sale"), we hold that the order of restitution in the present disciplinary proceeding ($273,975.00) should be reduced by the amount Maquera was previously ordered to pay as restitution in the prior civil case ($274,500.00). *See In Re Kinast*, 357 N.W.2d at 286; *Florida Bar v. Schultz,* 712 So.2d 386, 389 (Fla. 1998). The net effect is that the order of restitution in the instant proceeding is reduced to zero.[9]

D. Whether the judgment was fraudulently procured

[35] Maquera argued in the lower court that the judgment should be set aside on the ground that the judgment was fraudulently procured. A court may grant a Rule 60(b) motion to set aside a judgment if there is "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." Guam R. Civ. P. 60(b)(3). To have a judgment set aside under Rule 60(b)(3), the "movant must (1) prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct, [and] (2) establish that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense." *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878-79 (9th Cir. 1990). A common example of this is where one party failed to disclose required discovery. *See Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978); *Jones*, 921 F.2d at 879. It has also been intimated that to prevail in setting aside the judgment, the misconduct complained of must have had

[9] We emphasize that our holding that the order of restitution be reduced does not in any way affect the lower court's finding that Maquera has violated the rules of professional conduct, has benefitted by a certain amount of money as a result of the violation, and should be held to make restitution.

bearing on the merits of the case, *see McCall v. Coats*, 777 P.2d 655, 658 (Alaska 1989), or have prevented a party from *otherwise discovering* an important aspect of the case that would affect the relief requested. *See e.g. In re M/V Peacock*, 809 F.2d 1403, 1405 (9th Cir. 1987). "The rule is aimed at judgments which are unfairly obtained, not at those which are factually incorrect." *Id*. at 1405.

[36] Further, a judgment can be vacated under Rule 60(b)(3) due to a "fraud upon the court." *See Broyhill Furniture Industries, Inc. v. Craftmaster Furniture Corp.*, 12 F.3d 1080, 1085 (Fed. Cir. 1993). "Fraud upon the court embraces only that species of fraud which subverts or attempts to subvert the integrity of the court itself, or fraud perpetrated by officers of the court so that the judicial machinery cannot perform in an impartial manner." *See Trans Pacific Export Co. v. Oka Towers Corp.*, 2000 Guam 3, ¶ 33 (citation omitted).

[37] In the instant case, Maquera argues that he and counsel for the Ethics Committee agreed to the form of original judgment. Maquera alleges that the Ethics Committee committed a fraud by submitting a judgment form that differed from the form accepted by Maquera. We find that Maquera's allegations do not support a finding of fraud cognizable under Rule 60(b)(3). A lower court is not bound to accept a party's judgment form and may adopt a judgment form notwithstanding that one party may disagree as to its contents. Because there was no fraud, the lower court clearly did not abuse its discretion in denying Maquera's Rule 60(b) Motion to Set Aside the judgment.

E. The trial court's grant of the Committee's Rule 59(e) Motion to Amend the judgment.

[38] Maquera argues that the court erred in granting the Ethics Committee's Rule 59(e) Motion to Amend because "the motion did not comply with Rule 5A(2) of the Superior Court Rules, thus not even entitled to a hearing." Respondent-Appellant's Opening Brief, p. 16. Rule 5A provides: "(1) A motion shall be served not later than twenty-one (21) days before the time set for a hearing. (2) The motion shall be heard if it is supported by a memorandum containing citations, analysis and explanation." Guam Ct. R. 5A (1993).

[39] We decline to review the issue Maquera raises. At the hearing on the Ethics Committee's Motion to Alter or Amend, Maquera did not raise the issue of the Ethic's Committee's alleged non-compliance with Rule 5A(2). *See* Transcript, vol. - - (Hearing, Aug. 20, 1999). Furthermore, a review of the record does not indicate whether Maquera raised the issue at any other time in the lower court.[10] With limited exceptions, this court has consistently declined to address issues raised for the first time on appeal. *See Dumaliang v. Silan*, 2000 Guam 24, ¶ 12. We find no reason to depart from the general rule in the instant case.

[10] An appellant has the responsibility to form the record for his appeal and ensure that the lower court's record is transmitted to this court. *See* Guam R. App. P. Rule 7 (k), (m). Maquera designated as part of his record "all those papers enumerated in GRAP 7(a)." *See* Record on Appeal, p. 87 (Designation of the Record on Appeal, May 2, 2000). This designation of record was insufficient to create the requisite record for this court to conduct a meaningful review. *See* Rule 13 (requiring that the Appellant *specify* the documents he wishes to include in the record, and requiring that the Appellant include in the designation of record the "motion and response upon which the court rendered judgment"). A party's failure to provide a sufficient record may preclude review of the issue. *See In re Hunt*, 238 F.3d 1098, 1105 (9th Cir. 2001) (declining to review an issue raised by the appellant because the record was insufficient to make the relevant determination).

IV.

[40] The lower court did not err in denying Maquera's post-judgment motions. The lower court's findings of the existence of an attorney-client relationship as well as the value of the property was supported by the evidence. We also find Maquera's allegation that the Ethics Committee fraudulently procured the judgment completely lacking in merit. Further, because the record on appeal is insufficient, we decline to address Maquera's contention that the lower court erred in granting the Ethic's Committee's Motion to Amend. Finally, because Maquera charged an excessive fee and thereby profited from a violation of the rules of professional conduct, the lower court properly found that Maquera must pay restitution to Castro in the amount of the excessive portion of the fee as well as the profit obtained. However, because restitution was ordered under a prior civil judgment, the lower court erred in calculating the amount of restitution in the instant case. Accordingly, we modify the order of restitution and reduce the restitution amount to zero, and, as modified, we **AFFIRM**.

JOHN A. MANGLONA
Designated Justice

RICHARD H. BENSON
Justice *Pro Tempore*

F. PHILIP CARBULLIDO
Chief Justice, Acting