In re Doran, 12 ROP 95 (2005)
In the Matter of
MARK DORAN,
Respondent.

Disciplinary Proceeding No. 04-002

Supreme Court, Disciplinary Tribunal
Republic of Palau

Heard: March 3, 2005
Decided: March 14, 2005

Disciplinary Counsel: Frederick W. Reynolds

Counsel for Respondent: Pro Se

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, ⊥96 Associate Justice.

PER CURIAM:

Disciplinary Counsel ("Counsel") filed a two-count complaint against attorney Mark Doran, alleging that he violated the Disciplinary Rules and Procedures for Attorneys and Trial Counselors Practicing in the Courts of the Republic of Palau (cited as Disc. R.) by communicating with a represented person and by failing to keep current his business license and Republic of Palau taxes. Doran admitted most of the allegations in the complaint, but denied that he should be professionally disciplined. The Tribunal held a hearing, at which both Counsel and Doran presented evidence and argument supporting their respective positions. For the reasons set forth below, we publicly censure Doran but decline to impose additional disciplinary sanctions at this time.

BACKGROUND

The relevant facts are largely undisputed and primarily involve a 2003 civil action Pacific Savings Bank (PSB) filed against Doran to recover an unpaid money judgment for approximately $16,000. On May 27, 2004, the day before a scheduled hearing in the PSB case, Doran contacted John Devivo, PSB's Vice-President and Chief Operating Officer, and attempted to negotiate a settlement. Doran knew that David Shadel represented PSB in the civil action, and he hoped to avoid possible attorney's fees for Shadel's time by resolving the dispute directly with Devivo.

The next day, with a settlement not reached, the trial court held a hearing at which Doran discussed his meeting with Devivo the day prior. Doran also testified, in answering questions about his financial records, that he had not filed his ROP tax returns or obtained his ROP

business licenses for at least the past two years. Doran stated, however, that he had "an agreement" with Ken Barden, the former Assistant Attorney General assigned to Revenue and Taxation, concerning those matters, though Barden later executed an affidavit denying that he had agreed Doran could operate without filing his tax returns or obtaining a business license.

Devivo also testified at the hearing, confirming that Doran had come to see him and asserting that no final agreement had been reached. At the conclusion of the hearing, Shadel requested that Doran have no further contact with PSB or its officers, although the parties dispute the intensity and tenor of that request.

Despite Shadel's admonishment not to speak with his client, Doran again approached Devivo on June 2, asking to make a new agreement with PSB. Two days later, Shadel e-mailed Doran a proposed stipulation to consider and repeated the request that Doran "not have any further communications with John Devivo or any other person at the Bank regarding its lawsuit against you." Doran, however, again sought out Devivo, arguing about the terms of the proposed stipulation. At this time, Devivo himself told Doran that any further communication should be through Shadel.

Disregarding Shadel's instructions and the request from Devivo to communicate only with Shadel, Doran continued to contact Devivo both via e-mail and in person. Counsel identified three additional occasions on which Doran contacted Devivo, once about an extension of time and twice about Shadel's continued collection efforts.

Upon the filing of a disciplinary ⊥97 complaint, the matter was referred to Associate Justice Michelson pursuant to Rule 4(c), who recommended that the complaint be processed. The Chief Justice then appointed Frederick W. Reynolds as Disciplinary Counsel,[1] and he filed a two-count complaint against Doran, recommending discipline for communicating with a represented party and for failing to file his taxes and obtain a business license.

ANALYSIS

I. Communicating with a Represented Person

Disciplinary Rule 2(h) provides that an attorney may be disciplined for acts or omissions that violate the American Bar Association Model Rules of Professional Conduct. Disc. R. 2(h). The Model Rules provide that

> [i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

[1]Reynolds was actually the third attorney appointed to be Disciplinary Counsel; the first two recused themselves due to conflicts of interest. The Court appreciates the time and effort Reynolds expended in order to present this case in such a professional manner.

Model Rules of Prof'l Conduct R. 4.2. Doran does not deny that he knew Shadel represented PSB, and he does not dispute that Devivo, as an officer of PSB, was a represented person under the rule. He argues, however, that he was not "representing a client" because he was proceeding pro se, and thus that the rule did not apply to him in the circumstances presented.

We have not yet had occasion to determine whether this rule restricts the conduct of attorneys who are acting pro se, and jurisdictions in the United States that have adopted this or a similarly-worded rule are split on the issue. The majority opinion holds that pro se attorneys are "representing a client"—namely, themselves—and so they too are prohibited from contacting a represented party. *Runsvold v. Idaho State Bar*, 925 P.2d 1118, 1120 (Idaho 1996); *In re Segall*, 509 N.E.2d 988, 990 (Ill. 1987); *In re Schaefer*, 25 P.3d 191, 199-200 (Nev. 2001); *Sandstrom v. Sandstrom*, 880 P.2d 103, 108-09 (Wyo. 1994). At least two states, however, allow pro se attorneys to contact represented persons about the underlying litigation. *See, e.g.*, *Pinsky v. Statewide Grievance Comm.*, 578 A.2d 1075, 1079 (Conn. 1990) (holding that the language of the rule governs only those situations where an attorney is "representing a client," and concluding that "plaintiff's letter was a communication between litigants and . . . the plaintiff had a right to make such a communication because he was not representing a client"); Cal. Rules of Prof'l Conduct 2-100, Discussion ¶ 2 ("[T]he rule does not prohibit [an attorney] who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such [attorney] has independent rights as a party which should not be abrogated because of his or her professional status.").

According to the ABA,

> [t]he purpose of the restriction ⊥98 on communications with parties represented by counsel is to preserve the integrity of the lawyer-client relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer. . . . [T]he rule is meant to prevent situations in which a represented party may be taken advantage of by adverse counsel.

ABA/BNA Lawyers' Manual on Prof'l Conduct 71:302 (1988) (internal quotations and citations omitted). We believe the majority opinion represents the more prudent view and the interpretation that best supports the purposes of the rule to honor the protection a represented person achieves by obtaining counsel. *Runsvold*, 925 P.2d at 1120. We recognize that a lawyer has an advantage over the average layperson in navigating legal proceedings. Our rules must ensure that lawyers do not misuse that advantage by interfering with the attorney-client relationship. *Segall*, 509 N.E.2d at 990. Accordingly, we hold that Rule 4.2 applies to lawyers appearing pro se.

To Doran's credit, this is a case of first impression in Palau. And he previously practiced in a jurisdiction that adopted the minority viewpoint, allowing pro se lawyers to communicate directly to represented persons. We note with some consternation, however, that Shadel asked Doran several times to direct all communications to him as PSB's lawyer, and yet Doran continued to contact Devivo. Doran explained that he believed it was his right as a party to speak with Devivo, regardless of Shadel's preference. However, Devivo himself told Doran not

to contact the bank and referred him instead to Shadel's law firm. But Doran ignored even this request and continued to contact Devivo, and that is entirely unacceptable under either formulation of Rule 4.2.

II. ROP Tax Returns and Business Licenses

It is undisputed that Doran has not maintained a business license for at least the past two years and has not filed tax returns or paid taxes in the Republic since 2001. Doran explained that, as a result of a decline in business in 2000, he was unable to pay his tax liability. He attempted -- in early 2001 and every quarter thereafter -- to file his taxes without paying the amount due and with the understanding that he would incur a penalty until the full amount of tax was paid. According to him, however, the Division of Revenue and Taxation had no procedures in place for allowing someone to file taxes but not to pay the tax liability at that time, and so the Division would not allow him to file his taxes. When Doran went to obtain his business license for that year, he was unable to do so because the license application requires certification that all tax returns are current.

The question we face, then, is whether this failure to pay taxes and properly obtain a business license is conduct deserving of professional sanction. Counsel suggests that some punishment from the Court is appropriate, particularly given a statement Doran made that the Director of the Division never told him he had to comply with the tax laws. Doran explained that comment to mean that no official demand, pursuant to the statutory provisions governing collection actions, *see* 40 PNC § 1602, had been made of him. Instead, Doran characterizes the affair as a "domino effect" where his initial inability to ⊥99 pay his taxes, despite his willingness to file and be assessed a late-payment penalty, touched off a chain reaction, resulting in several years of operating without a business license and without filing current tax returns.

Rule 2(a) provides that an attorney may be disciplined for acts "involving moral turpitude, dishonesty, or corruption." Disc. R. 2(a). Model Rule 8.4, applicable here via Rule 2(h), defines the following acts as professional misconduct: violating the Rules of Professional Conduct; committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaging in conduct prejudicial to the administration of justice. Model Rules of Prof'l Conduct (hereinafter, "Model R.") 8.4(a)-(d). A majority of U.S. jurisdictions have found that convictions for violating the income tax laws warrant attorney discipline either because they involve moral turpitude, *see* Annotation, *Federal Income Tax Conviction as Involving Moral Turpitude Warranting Disciplinary Action Against Attorney*, 63 A.L.R.3d 476 (1975), or because they constitute attorney misconduct, *see* Annotation, *Federal Income Tax Conviction as Constituting Nonprofessional Misconduct Warranting Disciplinary Action Against Attorney*, 63 A.L.R.2d 512 (1975). Indeed the comments to the Model Rules themselves note that "the offense of willful failure to file an income tax return" is an example of illegal conduct that reflects adversely on an attorney's fitness to practice law. Model R. 8.4 cmt. ¶ 2.

Here, however, Doran has not been convicted of any income tax violation. But both Palau's Disciplinary Rules and the Model Rules recommend discipline for conduct involving

"moral turpitude, dishonesty, or corruption," Disc. R. 2(a), or "dishonesty, fraud, deceit or misrepresentation," Model R. 8.4(c), regardless of whether an attorney has been convicted for said behavior. Given Doran's uncontradicted assertions that he has attempted each quarter to file his tax returns but that the Division of Revenue and Taxation could not accommodate him because of his inability to pay the outstanding liability, we cannot find that Doran acted fraudulently or with any intention of deceiving the Republic or the Court.

We are, however, somewhat concerned that Doran continued to operate his business without ensuring that he had the proper license to do so. Doran explained at the hearing that he could not obtain a business license without first resolving the tax return situation, which has taken years, and so he opted to continue his business so he could support himself and his son, despite not having the proper paperwork.

To the extent that the wheels of government are sometimes slow-moving, we are sympathetic to Doran's plight in regards to the business license situation. We firmly believe, however, that if an attorney finds himself on the wrong side of the law, for whatever reason, it is incumbent upon him to diligently pursue the matter until he is in full compliance with all legal requirements and to take no comfort in bureaucratic inaction. We are not entirely convinced that Doran did so, which leads to the inevitable conclusion that he was, at the very least, indifferent to his legal obligation.

III. Appropriate Sanction

Both issues in this matter present questions of first impression for this Court to consider, and so Doran's actions, while ⊥100 improper, do not warrant the full spectrum of disciplinary sanctions. Additionally, the split of authorities regarding the communication issue and Doran's continued attempts to resolve his tax situation factor into our decision. We therefore issue this opinion as a public censure of Doran's actions. Additionally, Doran represented to this Tribunal that he was communicating with the Division of Revenue and Taxation about rectifying his income tax deficiencies. We trust that these efforts will come to fruition, and we order Doran to file a status report three months from the date of this order and continuing every three months thereafter until the situation is resolved. We reserve the right to impose additional sanctions as needed.

CONCLUSION

In issuing this opinion, we set forth our interpretation of Model Rule 4.2 that prohibits communication by attorneys, even attorneys who are also acting as pro se litigants, with people represented by counsel. We reaffirm our belief that the attorney-client relationship is to remain sacrosanct for the benefit of both the legal profession and the public it serves. We also reiterate that attorneys must be ever-vigilant in conforming their actions to the laws of the Republic.