

In re Schluckebier, 13 ROP 35 (2006)
**In the Matter of
DAVID P. SCHLUCKEBIER,
Respondent.**

Disciplinary Proceeding No. 05-002

Supreme Court, Disciplinary Tribunal
Republic of Palau

Heard: December 19, 2005

Decided: January 9, 2006

Disciplinary Counsel: Christina M. Ragle

BEFORE: LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice;
LOURDES F. MATERNE, Associate Justice.

PER CURIAM:

This is a disciplinary proceeding in which David P. Schluckebier, an attorney licensed to practice law in the Republic of Palau, is charged with violations of this Court's Disciplinary Rules and Procedures and the American Bar Association Model Rules of Professional Conduct¹ (hereinafter referred to as the "Disciplinary Rules" and "Model Rules" respectively). The complaint charges Schluckebier with violating Disciplinary Rule 2 and Model Rules 3.3 and 8.4 by (1) falsely testifying under oath, **136** (2) knowingly receiving proceeds of his wife's illegal business, and (3) attempting to conceal or disguise the illegal nature of the source of the money from his wife's illegal business.²

BACKGROUND

Both Schluckebier and Xue Hong Kun lived in Palau for several years prior to their marriage in August 2002. In 1997, Xue entered a joint business agreement with Palauan citizen Obodei S. Iyar.³ As a result of this agreement, Xue opened and operated the O.S.I. Meyuns Restaurant. In addition to being a food service establishment, the Meyuns Restaurant doubled as a massage parlor. In August 1998, Schluckebier began working in the Senate Legal Counsel Office.

¹ The Model Rules have been incorporated into the ROP Disciplinary Rules and Procedures by Disciplinary Rule 2(h).

² These are Counts I, III, and IV, respectively. Count II charged Schluckebier with regularly being at his wife's restaurant and knowing a prostitution business was being conducted at that location. Disciplinary Counsel, however, withdrew Count II at the hearing because after further research, she did not believe that mere knowledge is sufficient to trigger a violation of the rules.

³ Although the trial court's decision in *ROP v. Hong Kun Xue*, Crim. Case Nos. 04-244 and 04-310, indicates that Xue started managing the restaurant in April 2002, Schluckebier's letter to President Remengesau in support of the clemency petition for his wife states that she opened the restaurant in 1997.

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While investigating whether the Meyuns Restaurant also served as a house of prostitution, the police attempted at least two stings on the business. Schluckebier was present during the first sting attempt. In fact, Schluckebier testified that he ate lunch at the restaurant five times a week and occasionally on weekends. Officer Norman Bintorio testified that Schluckebier and his sister-in-law conferred after plain-clothed officers entered the restaurant and sat at a booth. Shortly after the discreet conference, Schluckebier's sister-in-law approached the officers and said that only massage services were available. Schluckebier was not present for the second sting, during which two confidential informants entered the restaurant and requested sex. After each paid \$120 and were escorted to two back rooms, one of the confidential informants called the investigating officers, who were waiting outside the restaurant. The officers entered the restaurant, and an altercation between the officers and restaurant employees ensued. Apparently, Xue hit the officer with a metal chair.

As a result of this altercation, Xue was charged with assault and battery with a dangerous weapon, obstruction of justice, and assault and battery. Shortly thereafter, she was also charged in a separate case with two counts of foreign investment law violations and three counts of money laundering. The two cases were consolidated for trial.

Significant time during trial was spent on the couple's finances and checking accounts. In November 2002, the couple opened a joint checking account with the Palau Construction Bank ("PCB"). Schluckebier testified that they opened an account with PCB, which is not federally insured, because PCB offered a higher interest rate than Bank of Hawaii ("BOH"), the bank where they each had individual accounts. The PCB account shows an initial deposit of \$5500. Prior to the closing of the account eighteen months later, the couple made twenty five deposits ranging from \$1000 to \$2500. Each of the deposit slips from these deposits are stamped "CASH RECEIVED." When the L37 account was closed in April 2004, it had a balance of \$40,000.

At trial, Schluckebier testified that the initial \$5500 was from wedding gifts the couple received. He stated that approximately \$1500 or \$2000 of that money were from checks, while the remainder was in cash. When confronted with the deposit slip that was stamped "CASH RECEIVED," Schluckebier could not explain why it did not indicate that some of the deposit was from checks. In fact, he even admitted that his testimony was inconsistent with the stamp on the deposit slip.

Regarding the source of the funds deposited in the PCB account, Schluckebier testified that it was common for him to deposit his government paycheck at the BOH and withhold \$1100 or \$1200 in order to give his wife \$1000 to deposit into their PCB account. The remainder of the cash was used for everyday expenses. Apparently, Schluckebier gave the cash to Xue to deposit because she was always "happy to see \$1,000.00 cash."

On direct examination, Schluckebier gave an example of this type of scenario. He testified "with almost 100% certainty" that he received \$1100 cash from BOH check number 803 on December 26, 2002. From this money, he gave \$1000 to Xue to deposit into their PCB account. The PCB deposit slips indicate that there was a deposit of \$1000 on December 27, 2002, but it has Schluckebier's signature, as opposed to that of his wife.

Schluckebier's and Xue's individual accounts at the Bank of Hawaii are also important in regards to the money laundering charges. Between March 25, 2002, and April 15, 2004, Schluckebier deposited \$103,576.36 into his BOH account. This figure roughly corresponds with his salary ranging from \$42,500 to \$45,000 per year plus \$1000 per month housing allowance.⁴ Between January 2002 and June 2004, Xue deposited \$66,961.56 into her BOH account. This exceeds her gross salary of \$6000 during that time period and the reported \$30,000 gross revenue for the Meyuns Restaurant by roughly \$30,000.⁵

Based on several contradictions in his testimony, the trial court gave no credit to Schluckebier's testimony. Subsequently, a disciplinary complaint was filed on April 11, 2005, by Eugene J. Murret against David P. Schluckebier. Because Chief Justice Ngiraklsong sat as the trial judge in Xue's criminal case, he designated Associate Justice Miller to act upon the complaint pursuant to Disciplinary Rule 4(a). On April 28, 2005, Justice Miller concluded that further investigation was appropriate, and he appointed Christina Ragle as the Disciplinary Counsel.

Disciplinary Counsel filed an initial Findings and Recommendations on July 26, 2005. She recommended, *inter alia*, that Schluckebier be given extra opportunity to respond to the allegations that he was aware of his wife's prostitution business. The Disciplinary Tribunal accepted this proposal, **138** but neither Schluckebier nor his attorney Mark Doran responded. Disciplinary Counsel filed Supplemental Findings and Recommendations on September 15, 2005, and the Tribunal found the allegations in the findings had merit. Pursuant to the Tribunal's order, Disciplinary Counsel filed a formal complaint on October 6, 2005.

Schluckebier has not responded to the complaint, and neither he nor his attorney appeared for the disciplinary hearing held on December 19, 2005. Schluckebier did, however, send two letters to the Disciplinary Counsel dated May 11 and July 5, 2005, which address some of the issues before this Tribunal. In addition, Schluckebier sent an e-mail to the Disciplinary Counsel on July 17, 2005, in which he stated that he was in China, that he had no definite plans to return to Palau, and that "Mark Doran is authorized to receive notices and communications directed to me, except of course for anything that can be sent via e-mail to this address." The Disciplinary Counsel offered these letters and e-mail as exhibits to her initial Findings and Recommendations.

ANALYSIS

It is significant to note that Schluckebier has not responded to the formal complaint, and he did not appear at the disciplinary hearing. This is particularly troubling to the Tribunal in light of one of the main purposes of disciplinary proceedings, which is to reassure the public of

⁴ Using those figures, Schluckebier would have grossed approximately \$118,000 in salary and housing allowance. After deducting taxes and social security payments, Schluckebier's net salary would be approximately \$107,000.

⁵ Because Xue's BOH account records or tax statements were not submitted as exhibits for this hearing and because Schluckebier did not offer any contrary evidence, we adopt the account figures and salary stated in the Findings of Fact in Xue's criminal case.

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the reliability and integrity of attorneys. *See Lawyer Disciplinary Bd. v. Wade*, 614 S.E.2d 705, 712 (W. Va. 2005). Failing to respond to a disciplinary complaint not only reflects poorly on the individual, but also on others within the legal profession. Because Schluckebier did not respond, all matters in the complaint are deemed admitted pursuant to Disciplinary Rule 5(c).

The Tribunal also notes concern with the actions of Schluckebier's attorney, Mark Doran. Doran represented Xue in her criminal case, and he was authorized by Schluckebier to receive notices in this disciplinary proceeding. Doran, however, never filed any information in response to the complaint, and he failed to appear for the disciplinary hearing. This type of inaction also reflects poorly on the profession and cannot be condoned. Doran should have either served the interests of his client in this matter, or if he did not believe he was retained in this case, Doran should have notified the Tribunal after receiving several documents related to the matter. Based on representations of the Disciplinary Counsel, however, it appears that Doran knew that he was representing Schluckebier.

In fact, the Disciplinary Counsel stated at the hearing and in her Supplemental Findings and Recommendations that she spoke with Doran on September 13, 2005, and Doran indicated that "his client was invoking his 'Fifth Amendment rights' not to incriminate himself." The Tribunal presumes that this refers to a right protected by Article IV, Section 7 of the Constitution of Palau.⁶ We question whether and to what extent this right, which by its terms applies to a "person charged with a criminal offense," can be invoked by an attorney in a disciplinary hearing, which is civil in nature. Nevertheless, we need not reach that decision because we agree with American case law that holds that an attorney must appear before the Tribunal prior to asserting the privilege. *See* Andrea G. Nadel, Annotation, *Extent and Determination of Attorney's Right or Privilege Against Self-Incrimination in Disbarment or Other Disciplinary Proceedings—Post-Spevack Cases*, 30 A.L.R.4th 243, 248-50 (1984 & Supp. 1996). Because Schluckebier has not responded to the formal complaint and did not appear at the hearing, he cannot now assert this privilege. 139

Although the assertions in the complaint are deemed admitted, the Tribunal must still find that Schluckebier was involved in misconduct by clear and convincing standard of proof, Disciplinary Rule 5(e), and this standard is met.

Disciplinary Rule 2 dictates that an attorney may be subject to disciplinary action for "[t]he commission of any act involving moral turpitude, dishonesty, or corruption;" for the "[v]iolation of his oath or duties as an attorney;" or for "[a]ny act or omission which violates the American Bar Association Model Rules of Professional Conduct and the amendments thereto." Model Rule 8.4 states that it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" and to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Conviction of a crime is not necessary in order to violate the rule. *See* Disciplinary Rule 2(a);

⁶ The Fifth Amendment of the American Constitution has been interpreted by American courts to protect an individual from self-incrimination. It states that "No person . . . shall be compelled in any criminal case to be a witness against himself." Palau's Constitutional Article IV, Section 7 states, "[A person accused of a criminal offense] shall not be compelled to testify against himself."

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see also People v. Odom, 941 P.2d 919 (Colo. 1997)(disciplining an attorney for committing a felony even though he was never charged); *In re Hassenstab*, 934 P.2d 1110 (Or. 1997) (disciplining an attorney when criminal proceedings only resulted in a plea of no contest to one count of prostitution). Moreover, Model Rule 3.3 forbids an attorney from making “a false statement of fact or law to a tribunal” or offering “evidence that the lawyer knows to be false.” An attorney can violate this rule even though he is not acting in the capacity of an attorney. *See, e.g., People v. Kolbjornsen*, 917 P.2d 277 (Colo. 1996)(“Testifying falsely under oath to a tribunal is an extremely serious ethical violation and raises serious questions about a lawyer’s fitness to continue to practice law.”)

The same contradictory statements that led the trial court to give no credit to Schluckebier’s testimony also supports the complaint that he falsely testified under oath. First, Schluckebier testified that the couple opened an account with PCB because that bank offered a higher interest rate than the bank at which both he and his wife had individual accounts. In reviewing the PCB account statement, however, the account was never credited with any interest. At the bottom of the statement, boilerplate language states that any interest that accrues would be paid on the 20th of March, June, September, and December. It notifies the account owner that he or she has 15 days to notify the bank of any errors in interest. If their account was interest bearing, Schluckebier’s testimony indicates that he would have notified the bank. It is highly unlikely that someone would go to the trouble of researching interest rates for bank accounts and not confirm that the bank was actually paying that interest after thousands of dollars were deposited. Second, even though he testified that their initial deposit at PCB included checks and cash, the deposit slip indicates that only cash was received. Third, Schluckebier testified on direct examination “with almost 100% certainty” that he gave his wife \$1000 to deposit on December 27, 2002, but the deposit 140 slip from that date indicates that he made the deposit, instead of his wife.

This evidence is sufficient to find that Schluckebier testified falsely under oath. This conduct violates Disciplinary Rule 2(a) for committing an act involving moral turpitude, dishonesty, or corruption. It also violates Model Rule 3.3(a)(1) for making a false statement of fact or law to a tribunal and Model Rule 8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

With respect to the charge that Schluckebier knowingly received proceeds of his wife’s illegal business, there is evidence to support his knowledge of the prostitution going on at his wife’s restaurant. He testified that he ate lunch there every weekday and sometimes on weekends. Moreover, a police officer testified that Schluckebier was at the restaurant during a sting attempt, and it was Schluckebier who informed one of the employees that two customers were undercover officers.

In addition, there is sufficient evidence to support that he received proceeds from this prostitution business. Over a two year period from April 2002 to April 2004, Schluckebier would have netted approximately \$107,000 with his housing allowance, and Xue reported approximately \$6000 of income. The restaurant also reported approximately \$30,000 revenue during this time. Nevertheless, Schluckebier deposited over \$100,000 in his BOH account, Xue

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deposited approximately \$60,000 in her BOH account, and they deposited \$40,000 in their PCB account. These numbers do not add up.

The deposits overshadow the couple's income by roughly \$60,000. The Tribunal recognizes that some of these deposits could overlap. For example, Schluckebier could have deposited his salary check into his BOH account, and then withdrawn money from that account to deposit into the PCB account. This would result in double deposit of the same income. But Schluckebier's testimony indicates that it was his normal practice when depositing money in the PCB account was to withhold \$1000 or more cash from his salary check at BOH. Thus, that money would never appear as a deposit at BOH. Therefore, some of the deposits in Schluckebier's BOH account or the couple's PCB account had to come from outside their reported income. In light of Xue's conviction for prostitution, the Tribunal finds clear and convincing evidence that Schluckebier received the proceeds of his wife's illegal business. This violates RPPL 6-4, Section 3(a)(3), which prohibits the "acquisition, possession, or control of property by any person who knows that the property constitutes the proceeds of crime."

Similarly, there is clear and convincing evidence that Schluckebier attempted to conceal or disguise the illegal nature of the source of the money from his wife's illegal business. Schluckebier attempted to make it appear as though the deposits at PCB were from his salary. As shown above, however, the figures cannot support that the deposited money only came from legitimate, reported salaries. This violates RPPL 6-4, Section 3(a)(2), which prohibits "the concealment or disguise of the illegal nature, source, location, disposition, movement, or ownership of property." Thus, Schluckebier has committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects in violation of Model Rule 8.4(b).

141 APPROPRIATE SANCTION

Disciplinary Rule 3 lists the various forms of discipline which may be imposed on lawyers found to be in violation of the Rules. These include disbarment, suspension for not more than five years, public censure, private censure, a fine, or community service. In determining appropriate sanctions, Tribunals in previous disciplinary proceedings in Palau have referred to the list of aggravating and mitigating circumstances set forth in the ABA Standards for Imposing Lawyer Discipline (1986). *See In re Tarkong*, 4 ROP Intrm. 121, 131 (1994). The aggravating factors listed by the ABA Standards are as follows:

- (a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of victim; (i) substantial experience in the practice of law; (j) indifference to making restitution.

The mitigating factors are the following:

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(a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical or mental disability or impairment; (i) delay in disciplinary proceedings; (j) interim rehabilitation; (k) imposition of other penalties or sanctions; (l) remorse; (m) remoteness of prior offenses.

Id. (citing ABA Standards for Imposing Lawyer Discipline (1986)). The ultimate prerogative and responsibility to select the appropriate discipline in light of all of the circumstances of this case, however, is our own. *Id.* (citing *Gary v. State Bar of California*, 749 P.2d 1336, 1340-41 (Cal. 1988)).

An attorney who testifies falsely before the very Court in which he practices corrodes not only the attorney's integrity, but also the foundation of our legal system. The public would justifiably distrust the Court system if it were to permit professionals who have been given the privilege to practice law in this Republic to lie on the witness stand. The same skepticism should result after an attorney is found to have committed criminal acts. Clear and convincing evidence supports that Schluckebier has done both. Moreover, he was aware of the disciplinary proceedings against him and intentionally failed to respond to this Tribunal. Therefore, it is ORDERED that Schluckebier is DISBARRED and his name is stricken from the roll of attorneys licensed to practice in the Republic of Palau. **¶42** It is further ORDERED that Schluckebier comply with the provisions of Disciplinary Rule 12, which include notifying all clients of his disbarment, withdrawing from any pending matters before the Court, and notifying all other jurisdictions to which he is admitted to practice of the disciplinary action as may be required by the rules of such jurisdictions.