In re Brungard, 15 ROP 144 (2008)
In the Matter of
RICHARD BRUNGARD,
Respondent.

DISCIPLINARY PROCEEDING
NO. 08-001

Supreme Court, Disciplinary Tribunal
Republic of Palau

Heard: September 11, 2008
Decided: September 25, 2008
⊥145
Disciplinary Counsel: Rachel Dimitruk

Counsel for Respondent: *Pro Se*

Before: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; C. QUAY POLLOI, Associate Justice Pro Tem.

PER CURIAM:

This is a disciplinary proceeding in which Respondent Richard Brungard, 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 Conduct.[1] Specifically, Respondent is charged with violating Palau Disciplinary Rule 2(b) and ABA Model Rule 1.8(a).

BACKGROUND

The disciplinary complaint arises out of Respondent's representation of Tai Chin Long in Long's action against Palau Marine Industries Corporation (PMIC) to collect on a series of promissory notes issued by Long to PMIC. Respondent filed suit against PMIC on behalf of Long, and, based on an agreement reached between the two parties, the trial court issued a judgment for Long against PMIC in the amount of $605,280.35. *See Long v. PMIC*, Civil Action No. 04-182. Respondent asserts that the lawsuit was amicable, in no small part because Long is the father of the president and sole shareholder of PMIC, Tai Jung Fei.

Another, less friendly creditor ofPMIC, Pacific Call Investments, (PCI) challenged Long's judgment and sought priority over Long for debts PMIC owed to PCI. The trial court issued an Order on April 26, 2002, freezing PMIC's assets during the priority dispute, stating that PMIC,

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

> its agents, employees, and officials . . . and all persons working at their direction or with them . . . shall not sell, assign, transfer, alienate, encumber, waste or otherwise dispose of in any manner any of [PMIC's] interests or claims to or in any property, income, or assets or negotiate or attempt to do so without court order, except that they may pay [PMIC's] ongoing operating expenses.

⊥146

Despite the order freezing PMIC's assets, and despite the fact that Respondent represented Long, Respondent accepted from PMIC two checks totaling $3,000 for legal services Respondent provided to Long. It is this conduct which the Complainant in this proceeding alleged violates ROP DR 2(b) and ABA Model Rule 1.8(a).

DISCUSSION

A. Model Rule 1.8(a)

ABA Model Rule 1.8(a) provides:

> (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 in a manner that can be reasonably understood by the client;
> >
> > (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
> >
> > (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

In a vigorous and long-winded defense, Respondent asserted at the hearing that this rule is meant to apply only to business transactions between lawyers and clients, and not to the situation here, where a third party, (PMIC) so closely related to the client (Long) pays for the lawyer's services. Indeed, the main thrust of the rule does appear to govern business transactions between lawyers and clients, as illustrated in comments 1 through 4 of Rule 1.8. But comments 11 and 12 of Rule 1.8 specifically discuss "Person[s] Paying for a Lawyer's Services" and provide as follows:

> [11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in

> part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or ⊥147 continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. (Citation omitted).
>
> [12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7.

The conflict of interest in this case arose when Respondent, who was actively seeking to obtain PMIC funds for his client Long, accepted payment directly from PMIC, thereby depleting the very pool of assets he was attempting to win for his client. It is true that Respondent eventually won priority for his client over PMIC's assets, and that PMIC and Long were eventually aligned in defending against PCI's attack on PMIC's assets. But even if we were satisfied that there was no interference with Respondent's independent professional judgment, the rule also requires the informed, written consent of the client, which was not obtained here. Disciplinary Counsel cited other instances where Respondent procured a release from his client Long regarding dealings between Respondent and PMIC, and Respondent should have done so before accepting payment from PMIC.

Respondent insists that ours is a wooden interpretation of the rule, and that because his client is satisfied with Respondent's work and ratified PMIC's payment of Respondent from its coffers, the rule should not apply retroactively in this case. But there is no injury requirement under Rule 1.8(a), and were we to judge every attorney discipline case with the benefit of hindsight, the model rules would lose persuasive force among members of the bar. One can easily imagine another case in which a cozy relationship between creditor and corporation sours, leaving an attorney who had accepted payment from a corporation with adverse interests from his client in the awkward position of holding money from a pool of assets that he is supposed to be securing for his client. Simply because this is not that case does not erase the violation of Rule 1.8(a) requiring an attorney to get written, informed consent from the client and to encourage the client to seek independent legal advice before accepting payment from a third party. This Panel finds clear and convincing evidence that Respondent violated Rule 1.8(a).

B. Disciplinary Rule 2(b)

ROP Disciplinary Rule 2(b) provides as follows:

> An attorney may be subj ect to disciplinary action as provided by these rules for any ofthe following causes occurring within or outside the Republic of Palau. . . . (b) Wilful disobedience or violation of a court order directing him to do

or cease doing an act which he ought in good faith to do or forebear.

The Complaint alleges Respondent violated this rule when he accepted two checks from PMIC totaling $3,000 despite knowing of ⊥148 the April 2002 Order freezing all of PMIC's assets. Respondent argues that the order did not apply to him, because he is not named in the order and it was never served upon him. But the order applies to "all persons working at [PMIC's] direction or with them" and Respondent admitted at the hearing that he was working with PMIC during his representation of Long. Respondent also argues that Rule 2(b) does not apply to his conduct, because even if the order applies to him, by passively accepting checks from PMIC he did not "do or cease doing an act" that the Order prohibited him from doing. We again disagree. The Order prohibited Respondent from "otherwise dispos[ing] of in any manner any of [PMIC's] interests or claims to or in any property, income, or assets." Accepting payment from PMIC is disposing of PMIC assets and therefore is "doing an act" within the meaning of Rule 2(b).[2] This, in turn, was a "violation of a court order" (the April 2002 Order) as prohibited by Rule 2(b). Therefore, the Panel finds by clear and convincing evidence that Respondent violated Disciplinary Rule 2(b).

APPROPRIATE SANCTION

In making a determination of the appropriate sanctions, the Disciplinary Tribunal looks to the ABA Standards for Imposing Lawyer Sanctions for guidance. *See In Re Kalscheur,* 12 ROP 164, 167 (2005). The Tribunal considers the duty breached, the attorney's mental state, the extent of the actual or potential injury, and other aggravating or mitigating circumstances. ABA Standards § 3.0.

Although the duties breached, both to his client and to the court, are important, the other factors taken into account all favor Respondent. He was not acting out of malice or a desire to swindle either his client or the court. This incident appears to be an oversight on his part; Respondent simply did not believe the freeze order applied to him and did not think about the potential conflict of interest to his client in accepting funds from PMIC due to the close relationship between his client and PMIC. There was no injury to either PMIC, PCI, or Long. Respondent has a long history of ethical law practice and is clearly very concerned about his reputation as a "straight shooter." He has never faced disciplinary proceedings before. This Panel finds that the only appropriate sanction is for Respondent to pay the attorney fees of Disciplinary Counsel. Therefore, pursuant to Disciplinary Rule 3, Respondent is ordered to pay the legal fees and costs of investigating and prosecuting this action. Disciplinary Counsel shall submit an accounting of her fees and costs to this Tribunal within thirty days of this decision and

[2] The dissent does not believe that Respondent "disposed of' PMIC assets by passively receiving money. Even if this were the proper interpretation of "dispose of," Respondent at a minimum aided and abetted the disposal of PMIC assets by accepting payment, which falls under the "dispose of *in any manner*" language contained in the order. (emphasis added). Furthermore, Rule 2(b) provides that an attorney must not do an act which he "ought, *in good faith,* to . . . forebear." (emphasis added). Respondent knew of the order freezing PMIC's assets and he could not have accepted PMIC assets in good faith. Respondent cannot feign ignorance of the order or of PMIC's financial troubles, and we must therefore find a violation of Rule 2(b).

shall serve the same on Respondent. Respondent shall have ten days to file a written objection to Disciplinary Counsel's accounting. Absent an objection, Respondent is directed to pay such fees and costs no later than thirty days ⊥149 after service upon him of Disciplinary Counsel's submission. If an objection is filed, a single member of this panel shall resolve the fee dispute upon further proceedings. *See In re Perrin,* 10 ROP 111, 115 (2003); *In re Rechucher,* 7 ROP Intrm. 28, 32 (1998); *In re Webster,* 3 ROP Intrm. 229, 237 (1992).

Disciplinary Counsel is thanked for her commendable efforts.

C. QUAY POLLOI, Justice, concurring in part and dissenting in part:

I write separately because although I concur[3] with the finding that the Respondent violated ABA Model Rule 1.8(a), albeit a violation that Disciplinary Counsel even conceded at the hearing as "technical," I cannot readily find, by clear and convincing evidence, that ROP Disciplinary Rule 2(b) has been violated.

ROP Disciplinary Rule 2(b) provides that:

> An attorney may be subject to disciplinary action as provided by these rules for any of the following causes occurring within or outside the Republic of Palau. . . . (b) Wilful disobedience or violation of a court order *directing him* to do or cease doing an act which he ought in good faith to do or forebear. (emphasis added).

The first question, therefore, is whether, as to Respondent, any of the freeze orders were "directing him" to do or cease doing an act. The language of the Court order, particularly the April 22, 2002 order, states that:

> defendants, its agents, employees, and officials . . . and all persons working at their direction or *with them* (1) shall not sell, assign, transfer, alienate, encumber, waste or otherwise dispose of in any manner any of defendant's interests or claims to or in any property, income, or assets or negotiate or attempt to do so without court order, except that they may pay defendant's ongoing operating expenses. (emphasis added).

Respondent conceded at the hearing that he did meet and work with defendant's agents, employees, and officials and even drafted pleadings for defendant's counsel. Thus, the order applied to Respondent after all.

Since the freeze orders did apply to Respondent, the next question is whether Respondent violated the terms of said orders because he did "sell, assign, transfer, alienate, encumber, waste, or otherwise dispose of in any manner any of defendant's interests or claims to or in any property, income, or assets." *Id*. The majority has concluded that by "receiving" the checks, Respondent violated the freeze order. It may seem technical but in my mind the words ⊥150

[3] I also concur with the sanction ultimately imposed as it is the lowest possible one for the one "technical" violation that I could find.

used by the order have meanings and connotations different from the word "receiving". Only the distributer, the *disposer* of assets, can dispose of them, including directing who receives assets. Respondent did not distribute or dispose of any assets in any manner, he merely received them. Thus, taking the transaction involving Respondent at face value (i.e., he received two checks) and applying the ordinary meaning of the words used in the court order, (i.e., sell, assign, transfer, alienate, encumber, waste, or otherwise dispose of) and absent clear and convincing evidence to prove otherwise, I cannot find that "receiving" is synonymous with "disposing," that taking is the same as giving.

Indeed, Respondent cashed the checks and later tried to return the amount to defendant, and although this does not necessarily erase a violation if there was one and may amount to aiding and abetting the disposal of assets in violation of the court order, the point is that, to me, the Disciplinary Counsel did not show by clear and convincing evidence that by receiving and cashing the checks, Respondent at least aided and abetted or did in fact "sell, assign, transfer, alienate, encumber, waste, or otherwise dispose of in any manner any of defendant's interests or claims to or in any property, income, or assets." *Id*.

I therefore concur in finding a violation of ABA Model Rule 1.8(a), and I respectfully dissent with the majority's finding of a violation of Disciplinary Rule 2(b).