

In re Shadel, 16 ROP 262 (2009)
In the Matter of DAVID SHADEL,
Respondent

Disciplinary Proceeding No. 08-008

Supreme Court, Disciplinary Tribunal
Republic of Palau

Order on Sanctions

Decided: December 21, 2009

Disciplinary Counsel: William L. Ridpath

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; KATHRINE M. MARAMAN, Associate Justice

PER CURIAM:

On April 17, 2009, this Tribunal found clear and convincing evidence that David F. Shadel violated Rule 4.4 of the ABA Model Rules of Professional Conduct and Rule 2(h) of Palau's Disciplinary Rules and Procedures.¹ Specifically, it found that Shadel made threatening statements to an opposing party with no substantial purpose other than to harass and burden her. The Tribunal ordered the parties to submit briefs on the appropriate sanctions and directed them to the aggravating and mitigating factors discussed in *In re Tarkong*, 4 ROP Intrm. 121, 131-32 (Disc. Pro. 1994). The appropriate discipline for Shadel is now before the Tribunal.

BACKGROUND

The allegations against Shadel arose from a complaint filed by Imelda Robles, a defendant in a collection matter in which Shadel acted as counsel for the plaintiff. Robles contended that Shadel made misrepresentations to the court and to her and threatened her while collecting a judgment debt she owed to Shadel's client, WCTC.

In 2007, WCTC filed a complaint against Robles for passing bad checks. Shadel entered into a stipulation with Robles for the repayment of the debt, the terms of which required Robles to pay the principal, pre-judgment interest, court costs, returned check fees, punitive damages, post-judgment interest, and present and future attorney fees. The stipulation also waived certain protective provisions of RPPL 7-11, required p.263 Ms. Robles to pay \$137.50 an hour in attorney fees, and stated that forty percent of her future gross income would be used to satisfy her debt. In November of 2007, the trial court entered judgment against Robles and an Order in Aid of Judgment adopting the stipulation.

¹Palau Disciplinary Rule 2(h) states that an attorney may be subject to disciplinary action for “[a]ny act or omission which violates the American Bar Association Model Rules of Professional Conduct and the amendments thereto.”

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Ms. Robles is a single mother of two and was unemployed when the first Order in Aid of Judgment was executed. She had other significant financial obligations and was having trouble providing for her essential needs, something that she told Shadel on multiple occasions. Not surprisingly, she failed to pay her \$1,082 debt. On February 4, 2008, Shadel met with Robles alone in the chambers of the trial court before the court entered a second Order in Aid of Judgment. The circumstances surrounding this meeting were the focus of the hearing in this matter on April 6, 2009.

After the hearing, this Tribunal found that Shadel threatened and harassed Robles by making two separate statements that Robles may go to jail if she did not pay her debt. Shadel first threatened Robles before she agreed to the second stipulation for the repayment of her debt, purportedly causing Robles to inform the judge that the parties had reached agreeable terms. These terms included permitting Shadel to deduct \$200 per month – approximately forty percent of her income – directly from Robles’s paycheck.² Shadel made his second threat on the stairwell outside the trial judge’s chambers. At the hearing, Shadel denied making these statements and argued in the alternative that they were not improper even if he had made them.

This Tribunal held that Shadel’s statements served no substantial purpose but to harass and burden Robles. The “negotiations,” if they can be labeled as such, had concluded at the time Shadel made his second statement. But even had the negotiations been ongoing, the Tribunal determined that, given the circumstances, the threats were “unnecessarily burdensome negotiation tactics.” *In re Shadel*, Disc. Pro. No. 08-008, at 16 (Disc. Pro. April 17, 2009). The Tribunal found that Shadel violated ABA Model Rule 4.4(a), and, consequently, Palau Disciplinary Rule 2(h).

In addition to violating Model Rule 4.4(a), Disciplinary Counsel in this matter charged Shadel with violating Model Rule 4.1(a) (making a knowingly false statement of material fact or law to a third person), Rule 4.3 (improper legal advice to an unrepresented person), and Rule 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The Tribunal determined that these charges were not supported by clear and convincing evidence and therefore dismissed them.

DISCUSSION

This matter is now before the Tribunal to determine the appropriate discipline for Shadel’s violation of Model Rule 4.4(a). Rule 3 of the Palau Disciplinary Rules provides six forms of discipline for an attorney who violates a Rule: (1) disbarment, (2) suspension for not more than five p.264 years, (3) public censure, (4) private censure, (5) a fine, or (6) community service. The Tribunal may also require the respondent to pay the cost of investigating and prosecuting the disciplinary proceeding. *Id.* In addition to the discipline provided by Rule 3, Rule 14 of the Disciplinary Rules states that an attorney who has a record of three or more

²For a more detailed description of the underlying facts in this case, including the events following Shadel’s statements, see this Tribunal’s opinion, Disc. Pro. Opinion, No. 08-008, at 2-8 (Disc. Pro. April 17, 2009).

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censures shall be subject to suspension from the practice of law. *Id.* R. 14.

An appropriate sanction should “impose the discipline necessary to protect the public, the legal profession, and the courts.” *In re Kalscheur*, 12 ROP 164, 167 (2005) (quoting *Tarkong*, 4 ROP Intrm. at 132). To reach such a sanction, we refer to the ABA Standards for Imposing Lawyer Discipline, which require weighing the duty involved, the attorney’s mental state, the actual or potential injury caused by the misconduct, and aggravating or mitigating factors. *Id.* Although we refer to the ABA Standards, the ultimate responsibility to select an appropriate discipline rests solely with the Tribunal. *In re Schluckebier*, 13 ROP 35, 41 (Disc. Pro. 2006).

The duty implicated by this proceeding is important – to treat the rights of third persons with respect. Disciplinary Counsel notes that a violation of this duty “ranks fairly low on the scale of seriousness of the possible violations.” This is arguable, but the legal system undoubtedly relies on licensed attorneys conducting themselves appropriately in dealing with third parties. As an officer of the court, an attorney carries an air of authority and presumed legal knowledge. See Restatement (Third) of the Law Governing Lawyers § 103 (2000) (“[B]y education, training, and practice, lawyers generally possess knowledge and skills not possessed by nonlawyers. Consequently, a lawyer may be in a superior negotiating position when dealing with an unrepresented nonclient, who therefore should be given legal protection against overreaching by a lawyer.”).

Regarding the actual and potential injury to Robles, both Shadel and the Disciplinary Counsel indicate that it was negligible.³ The Tribunal disagrees. Shadel, fully aware that Robles was on financially shaky ground, persuaded her to consent to a one-sided stipulation governing the terms of her repayment, caused her to waive important legal rights, and threatened her with jail time if she failed to adhere to these terms. One need not have been a sage to predict that Robles would fall behind on her obligations and incur additional expenses due to late payment. Though the financial harm to Robles was not objectively extraordinary (although it is a lot of money to her), the actual and potential psychological stress accompanying the threat of a trip to prison could have been substantial.

We next consider the aggravating and mitigating factors approved by the ABA and articulated in *Tarkong*, 4 ROP at 131-32. The aggravating factors are as follows:

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- (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

³Disciplinary Counsel noted that Shadel’s improper comments “caused no apparent injury or potential injury beyond Ms. Robles being scared, and no interference or potential interference with the outcome of the legal proceeding.”

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- 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.

Conversely, the following are appropriate mitigating factors:

- (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.

Application of these factors to the circumstances of this case indicates that a somewhat elevated sanction is appropriate.

First and arguably most important in this case, Shadel has a prior record of disciplinary proceedings, although he notes that they occurred several years ago. In 1992, a Tribunal found that Shadel's law firm violated the Model Rules regarding conflicts of interest and communications with a represented party. *In re Law Office of Kirk and Shadel*, 3 ROP Intrm. 285, 301-02 (Disc. Pro. 1993). The tribunal publicly censured the firm and imposed costs.

In 1996, Shadel was found in violation of Model Rule 8.4(c) (conduct involving dishonesty) and Rule 8.4(d) (conduct prejudicial to the administration of justice). *In re Shadel*, 5 ROP Intrm. 265 (Disc. Pro. 1996). The Tribunal determined that Shadel moved evidence at the p.266 scene of an accident and made false statements to the investigating officers. *Id.* at 268-69. The tribunal ordered Shadel to perform 100 hours of free legal service, complete an approved ethics course, and pay the costs of the disciplinary proceeding. *Id.* at 270.

Finally, in 1997, a Tribunal found that Shadel violated Model Rule 3.3(a) by making a false statement to the court regarding his representation of a client. *In re Shadel*, 6 ROP Intrm. 252, 256 (Disc. Pro. 1997). The Tribunal considered the factors in *Tarkong* – emphasizing Shadel's prior disciplinary violations – and publicly censured him, ordered twenty-five hours of free legal services, imposed the costs of the proceeding, and required him to retake and pass the

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next multi-state bar ethics examination (MPRE). *Id.* at 257. One justice dissented, believing the sanctions to be overly lenient, and suggested suspension because the prior sanctions had not been effective. *Id.* at 258-59.

Regarding the second *Tarkong* factor, both Shadel and Disciplinary Counsel suggest that there was no dishonest or selfish motive in his threats against Ms. Robles, reasoning that they were merely empty or harassing. But when viewed in light of all of the surrounding circumstances, including that a large – and continually growing – portion of Ms. Robles’s debt was Shadel’s attorneys’ fees, we find at least some selfish or dishonest motive to his threat.

The next applicable factor is Shadel’s refusal to acknowledge the wrongful nature of his conduct. We must take care not to aggravate an attorney’s discipline merely because he denies the alleged misconduct and the Tribunal eventually rejects his version of the facts. In this case, however, we find that Shadel not only disavowed the statements, but he argued that they were appropriate even if he made them. Furthermore, in an affidavit attached to his brief regarding sanctions, Shadel expressed some regret at this incident and detailed the harm that he has personally undergone, but notably absent from the statement was any concern for or apology to Ms. Robles. This demonstrates a lack of remorse and a refusal to acknowledge that his comments were wrong.

Finally, Shadel’s discipline may be aggravated based on the vulnerability of the victim and his substantial experience as an attorney. Although Shadel produced evidence that Robles was college-educated, she was unrepresented when meeting with Shadel, and she was unaware of her right to withhold enough income to provide for her basic human needs.⁴ Most significantly, Shadel knew that Robles was a single mother in dire financial straits and that she had only recently obtained employment when he threatened her. This certainly did not absolve Robles of her debt to WCTC, but, armed with this knowledge, Shadel played on her fear to persuade her to pay more than she could afford – including hefty attorneys’ fees. As for Shadel’s experience, he has been a practicing attorney in Palau for many years.

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Shadel asserted several mitigating factors, two of which we find applicable. First, Shadel appears to have fully cooperated with the Tribunal and Disciplinary Counsel. Second, the remoteness of Shadel’s prior discipline offenses mitigates his discipline to some extent.

Shadel argues that he has a good reputation and character (*Tarkong* factor (g)), and he has included letters from various individuals attesting to this fact. We acknowledge these letters, but find that, in light of his prior disciplinary record, this is neither a mitigating nor aggravating factor. Shadel also argues that he has already suffered other penalties or sanctions, which should reduce any sanction this Tribunal might impose (*Tarkong* factor (k)). Specifically, he has had to incur expenses to defend himself against the charges. But defense costs are not “other penalties or sanctions,” and we do not find them to be an appropriate mitigating factor.

⁴Ignorance of the law is no excuse for violating it, of course, but she has not been charged with violating it. Her awareness of the law is relevant to her ability to negotiate, and, derivatively, her vulnerability to someone as knowledgeable and experienced as Shadel.

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SANCTION

Having addressed the above considerations, in light of Shadel's misconduct, we turn now to the appropriate sanction. Shadel's conduct, although not the worst this Tribunal has seen, was serious, and we must impose a penalty that protects the public, the legal profession, and the courts from similar future conduct. Shadel threatened Robles not for a legitimate purpose but merely to harass and frighten her. Worse, his tactic was part of a broader effort to corner her into paying under a settlement agreement that was one-sided and disadvantageous. An important additional factor is Shadel's record of prior disciplinary violations, even though they occurred many years ago.

According to Rule 14 of the Palau Disciplinary Rules, if a lawyer has a record of three or more censures, he shall be subject to the suspension from the practice of law. Shadel meets Rule 14's prerequisite. After reviewing the file, Shadel's conduct, and the aggravating and mitigating factors, we find that a suspension from the practice of law is warranted.

We therefore **ORDER** that David F. Shadel be **SUSPENDED** from the practice of law for four (4) months. We also **ORDER** Shadel to pay the costs of investigating and prosecuting this action, as permitted by Rule 3 of the Disciplinary Rules.

According to Disciplinary Rule 12, this Order imposing suspension will be effective thirty (30) days after it is entered, and Shadel shall not accept any new retainers or engage as an attorney in any new cases during that period. We remind Shadel of his duties upon suspension under Disciplinary Rule 12, including to promptly notify all clients in pending matters of his suspension and advise them to seek legal assistance elsewhere, and to file an affidavit of compliance with the court within ten days after the effective date of his suspension. Shadel may apply for reinstatement after showing proof of payment of costs. Upon such proof and obtaining an order from a Disciplinary Tribunal, he may resume the practice of law four months after the effective date of his suspension. ROP Disc. R. 13.