In re Shadel, 16 ROP 269 (2009)
In the Matter of DAVID SHADEL,
Respondent

Disciplinary Proceeding No. 08-009

Supreme Court, Disciplinary Tribunal
Republic of Palau

Argued: September 2 - 3, 2009
Decided: September 21, 2009

Disciplinary Counsel: Rachel A. Dimitruk

Counsel for Respondent: Richard L. Johnson

Before: ARTHUR NGIRAKLSONG, Chief p.270 Justice; KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice.

PER CURIAM:

In this disciplinary proceeding, Respondent David Shadel, an attorney licensed to practice law in the Republic of Palau, is charged with violating the ROP Disciplinary Rules and Procedures and the American Bar Association Model Rules of Professional Conduct.[1] Specifically, Respondent is charged with violating Model Rule 1.5(a). For reasons set forth below, we find that Disciplinary Counsel has not established by clear and convincing evidence that Respondent violated Model Rule 1.5(a) as alleged in the complaint.

BACKGROUND

This disciplinary proceeding arises from Respondent's billing practices in two sets of cases: four cases in 2005 and four in 2008.

A. 2005 Cases

In 2005, Respondent filed the following bad-check cases on behalf of his client, Western Caroline Trading Co. ("WCTC"): *WCTC v. Madraisau*, Civil Action No. 05-230, *WCTC v. Adelbai*, Civil Action No. 05-232, *WCTC v. Osiik*, Civil Action No. 05-233, and *WCTC v. Eberdong and Dolmers,* Civil Action No. 05-234 ("2005 Cases"). In each case, Respondent moved for default judgment. On January 11, 2006, the trial court, Justice Miller presiding, granted default judgment in WCTC's favor. The trial court declined, however, to grant WCTC the punitive damages/attorney's fees that Respondent had requested. In identical orders entered in each of the 2005 Cases, the trial court explained that although it had granted similar requests for attorney's fees as punitive damages in bad check cases in the past, it now believed it

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

appropriate to require plaintiffs to prove their entitlement to punitive damages. *See, e.g.*, Ord. at 2-3, *WCTC v. Eberdong and Dolmers*, Civil Action No. 05-234 (Jan. 11, 2006). In striking the requested attorney's fees, the trial court specifically provided that "[s]uch striking is without prejudice in each case to plaintiff's making a further motion for a hearing, on notice, to demonstrate the propriety of an award of punitive damages against any defendant or defendants." *Id.* at 4.

On January 23, 2006, Respondent filed in each of the 2005 Cases a Motion to Amend and Alter Judgment. Respondent moved that the trial court reverse course and award the attorney's fees as punitive damages without a hearing. On the same day, Respondent filed a fourteen-page memorandum in support of his motion ("January 2006 Memo"). In the January 2006 Memo, Respondent argued that the complaint, motion for default, and attached affidavits sufficiently established WCTC's entitlement to attorney's fees and that no "prove up" hearing was necessary. Respondent asserted that punitive damages were justified because the defendants' conduct was vexatious and constituted fraud. He then argued that because the defendants failed to respond to the complaints, they admitted the allegations that they acted fraudulently and in bad faith. Consequently, p.271 Respondent contended, the trial court was required to accept the allegations. Finally, Respondent argued that the amount of attorney's fees he requested was reasonable.

Along with the January 2006 Memo, Respondent submitted (1) an affidavit of WCTC's collections manager regarding his attempts to collect from the defendants in the 2005 Cases; (2) affidavits from three local attorneys stating that $150 per hour is a reasonable rate for an experienced attorney in Palau; and (3) demand letters Respondent sent to the defendants. Respondent billed WCTC 20.8 hours for the January 2006 Memo, which he divided equally among the 2005 Cases.

On April 11, 2006, the trial court amended the judgments in the 2005 Cases to include attorney's fees equaling "twenty-five percent of the amount of the outstanding balance of the debt at the time the lawsuit was filed." *E.g.*, Amend. J., *WCTC v. Eberdong and Dolmers*, Civil Action No. 05-234 (April 11, 2006). In a separate order, the trial court explained that he limited the amount of attorney's fees in accordance with RPPL 7-11. *E.g.*, Ord. at 2 n.1, *WCTC v. Eberdong and Dolmers*, Civil Action No. 05-234 (April 11, 2006). The trial court reasoned that "since there were no pre-existing contracts between the parties as to the payment of fees, and since all of these cases were filed after the passage of the new law, the Court sees no retroactivity problem in applying the statute to them." *Id.*

Respondent disagreed with the trial court's application of RPPL 7-11 and filed a motion to amend and alter and a memorandum in support of his motion on April 21, 2006 ("April 2006 Memo"). Respondent argued that Article IV, Section 6 of the Constitution prohibited applying RPPL 7-11 to the 2005 Cases. Respondent also cited the "rule against retroactive application." *Id.* at 6.

On April 25, 2006, four days after Respondent filed the April 2006 Memo, he filed an affidavit from Peter Tsao, the general manager of WCTC, and attached WCTC's corporate charter. On May 22, 2006, Respondent filed a one-paragraph document titled Additional

Authorities Supporting Judgment Including Fees and Costs. In this document, Respondent listed five cases to "further show that it is general rule as applied by courts in the United States that even remedial legislation (e.g., consumer protection laws, damages, etc.) are not applied retroactively even to aid a consumer." Add. Auth., Disc. Counsel's Ex. 17. On July 13, 2006, Respondent filed the affidavit of Benita Sibetang, who averred that, in each of the 2005 Cases, the defendant or defendants were citizens of Palau. These documents – the charter, additional authorities, and citizenship affidavit – were filed in each of the 2005 Cases.

On October 16, 2006, Respondent filed a seven-page Further Memorandum in support of his April motion to amend. Respondent pointed out "that the court need only interpret the statute properly and that it need not , indeed, should not reach the constitutional issue." Pl.'s Further Mem. 1, Disc. Counsel's Ex. 20. Rather, Respondent argued, RPPL 7-11 should be interpreted so that it does not apply to prior existing debts.
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The trial court ruled on the April motion to amend on November 27, 2006. Although the trial court rejected Respondent's constitutional argument, it ultimately found that RPPL 7-11 did not apply to the 2005 Cases because the defendants' fraudulent conduct occurred prior to the effective date of RPPL 7-11. Consequently, the trial court awarded WCTC the attorney's fees that Respondent requested in its January 2006 motion for default judgment. The trial court did not award, nor did Respondent apparently seek to collect from the defendants, the fees Respondent incurred from April 2006 through October 2006.

B. 2008 Cases

In 2008, Respondent represented two clients in four debt-collection cases ("2008 Cases"). Respondent brought three cases on behalf of Isla Financial Services ("Isla"): *Isla Financial Services v. Oiph*, Civil Action No. 08-239, *Isla Financial Services v. Recheungel*, Civil Action No. 08-240, and *Isla Financial Services v. Boisek*, Civil Action No. 08-241. Respondent also filed a case on behalf of WCTC, *WCTC v. Arurang*, Civil Action No. 08-244.

In August 2008, Respondent filed complaints in the 2008 Cases. Each complaint was one page in length. Attached to the complaints were the loan agreements or promissory notes upon which the complaints were based. Respondent billed 0.5 hours for preparing the complaint and summons for each of the 2008 Cases.

On October 2, 2008, Respondent moved for default judgment against the defendants. In the motions, Respondent pointed out that the relevant contract provided that the defendant pay attorney's fees or some portion of attorney's fees. In *Arurang* and *Boisek*, Respondent requested post-judgment attorney's fees in his motion for default judgment. Also in *Arurang* and *Boisek*, Respondent filed a seven-page Memorandum Supporting Provision for Postjudgment Attorney Fees ("2008 Memo"). Respondent billed WCTC and Isla 2.8 hours to "[p]repare default papers; legal research; draft memo" in *Arurang* and *Boisek*. Later, he billed WCTC and Isla 0.9 hours to "[e]dit & finalize default papers." As for *Oiph* and *Recheungel*, Respondent billed Isla 1.4 hours and 1.2 hours, respectively, to [p]repare default papers; legal research; draft memo" in those cases. Respondent also billed 0.6 hours in those cases to "[e]dit & finalize default papers."

The trial court, Justice Foster presiding, granted default judgments in the 2008 Cases. In each case she awarded WCTC and Isla attorney's fees, but she awarded an amount less than that requested by Respondent. In *Arurang* and *Boisek*, the trial court struck the amount of time Respondent spent to prepare the default papers and the 2008 Memo because "[a]lthough Defendants agreed to cover attorney's fees when they signed the promissory notes, it should not randomly fall to Justino Boisek and Maureen Arurang to pay for this memorandum." Mem. of Oct. 28, 2008 at 2, Disc. Counsel's Ex. 27. Likewise, the trial court struck the default judgment and memo fees in *Oiph* and *Recheungel* because the 2008 Memo was not filed in these cases and, even if it had been filed, "this cost should not fall to these Defendants, either." *Id.* The trial court did, however, award p.273 Isla and WCTC the attorney's fees Respondent incurred drafting the complaints in the 2008 Cases.

C. Procedural History

On November 12, 2008, this Tribunal directed the Disciplinary Counsel to investigate possible disciplinary violations committed by Respondent in the 2005 and 2008 Cases. Based upon the Disciplinary Counsel's recommendation, the Tribunal ordered her to file a formal complaint. A hearing in this matter was held on September 2 and 3, 2009. Disciplinary Counsel and Respondent filed their written closing arguments on September 9, 2009.

DISCUSSION

A. Burden and Degree of Proof

Disciplinary Counsel bears the burden of proving by clear and convincing evidence that Respondent violated the ROP Disciplinary Rules. ROP Disp. R. 5(e); *In re Perrin*, 8 ROP Intrm. 165, 167 (2000). Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." Black's Law Dictionary 596 (8th ed. 2004); *see also McCormick on Evidence* § 340 (Edward W. Cleary ed., 1984) (encouraging use of "highly probable" formulation); 29 Am. Jur. 2d *Evidence* § 173 (2008). Put differently, clear and convincing evidence "is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established, and requires the existence of a fact to be highly probable." *Masaki v. Gen. Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989); *Sophanthavong v. Palmateer*, 378 F.3d 859, 866 (9th Cir. 2004) ("To meet this higher standard, a party must present sufficient evidence to produce 'in the ultimate factfinder an abiding conviction that the truth of its factual contentions are highly probable.'"). Whatever the language used, this standard is "an intermediate standard of proof greater than a preponderance of the evidence, but less than proof beyond a reasonable doubt required in criminal cases." *Masaki*, 780 P.2d at 575; *see also United States v. Green*, 62 M.J. 501, 503 (A.F. Ct. Crim. App. 2005).

B. Applicable Rule

Respondent is charged with violating ABA Model Rule 1.5(a). Model Rule 1.5(a) provides that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee

or an unreasonable amount for expenses." Model Rules of Prof'l Conduct R. 1.5(a). The conduct prohibited by Model Rule 1.5(a) includes bill-padding, seeking fees for doing nothing, and excessive lawyering. Ctr. for Prof'l Responsibility, Am. Bar Ass'n, *Annotated Model Rules of Professional Conduct* 70-72 (6th ed. 2007).

C. Analysis

1. Allegation One: Billing in Oiph and Recheungel for a Memo Not Filed

In Allegation One, Disciplinary Counsel alleges that Respondent violated Model Rule 1.5(a) by billing Isla in *Oiph* and *Recheungel* for a memo that was not filed in those cases. It is undisputed that Respondent billed Isla 1.6 hours in *Oiph* and 1.2 hours in *Recheungel* to "[p]repare default papers; legal research; draft memo." It is also undisputed that Respondent did not file the 2008 Memo in those cases, though he did file it in *Boisek*, another case where Isla was p.274 the client.

Uduch Senior, Disciplinary Counsel's expert witness, testified that she would not bill the client if faced with the same situation. She stated that she would either file the memorandum in all four cases and bill in all four cases or only bill in those cases where the memorandum was filed. Mark Beggs, Respondent's expert witness, stated that in his opinion, it *was* reasonable to allocate the time spent researching the 2008 Memo across the three Isla cases because the research was useful in all three cases. According to Mr. Beggs, the test for whether something should be billed to a client is not whether something is filed, but whether the research performed was of benefit to the client in a particular case.

Respondent testified that he performed research for all of the 2008 Cases and that he allocated his research time as fairly as possibly between his clients, Isla and WCTC. He stated that rather than file the 2008 Memo in each Isla case, he filed one memorandum in one Isla case to save costs. Moreover, Justice Miller had previously encouraged Respondent to file one memoranda when addressing similar issues in related cases. *See* Resp.'s Trial Mem. 11 n.10 (quoting one of Justice Miller's orders).

Because Respondent's research for the 2008 Memo related to all three of the Isla cases, we do not find that there is *clear and convincing evidence* that Respondent charged an unreasonable fee when he allocated his research costs across the three Isla cases and the one WCTC case. The focus of Rule 1.5(a) should, in most instances, be on the client. Model Rule 1.5(a) falls under the heading "Client-Lawyer Relationship" in the ABA Model Rules of Professional Conduct. As Mr. Beggs pointed out, attorneys routinely charge their clients for research that is performed, even when it does not give rise to a court filing. Moreover, there is no indication that Respondent did not perform the work he billed for.

Although the high standard of proof in disciplinary actions prevents the Tribunal from finding a violation, we are nonetheless troubled by the potential unfairness that could result from seemingly arbitrary fee spreading. Even though three of the 2008 Cases had the same plaintiff, Isla, each case had different defendants and different facts. Had Respondent persuaded the trial court to award all the fees requested, Oiph and Recheungel may have had to pay for a memo that,

while benefiting Isla, was not actually filed in their cases. Only the vigilance of the trial court prevented this result.

Respondent's answer to our concern is that

> the issue as to whether it is reasonable to assess a fee against a defendant in a civil case pursuant to a fee shifting provision such as punitive damages in the amount of attorney's fees or a contractual provision for the award of attorney's fees as damages is completely different than whether those fees are to be deemed reasonable between the lawyer and his client.

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Resp.'s Trial Mem. 3. Respondent concedes that the trial court has a "role in determining how much of those expenses to assess against the individual defendants in each of the WCTC cases." But, to paraphrase Respondent's counsel during the hearing "there is no harm in asking" a court to award attorney's fees, as the trial court judge is the gatekeeper. The solution to the potential unfairness is for the trial court to strike fees it does not deem reasonable, not institute disciplinary proceedings.

We agree with Respondent, but only up to a point. It is true that the propriety of fee shifting between plaintiff and defendant is different from whether an attorney has charged his client an unreasonable fee. We agree that trial court judges are gatekeepers and should only award a plaintiff reasonable attorney's fees. But we decline to adopt Respondent's view that there "is no harm in asking." First, Model Rule 1.5(a) does not actually use the term "client." It simply says that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Model Rules of Prof'l Conduct R. 1.5(a). Moreover, attorneys have a duty of candor toward the tribunal. There may be no harm in asking for reasonable attorney's fees when they are justified by a contract or as punitive damages, but it is a problem if an attorney knowingly seeks to have a trial court judge award attorney's fees that the attorney knows the defendant should not have to pay. Here, there is no indication that Respondent sought to mislead anyone in requesting the attorney's fees in the 2005 or 2008 Cases. Respondent is on notice, however, that trial courts in Palau will continue to scrutinize requests of attorney's fees for reasonableness.

2. Allegation Two: Padding Bills for the Complaints in the 2008 Cases

In Allegation Two, Disciplinary Counsel alleges that Respondent charged an unreasonable fee by billing 0.5 hours in each of the 2008 Cases to "[p]repare complaint & summons." According to Disciplinary Counsel, it was unreasonable for Respondent to try to collect a half hour of fees "to complete a single page form complaint." Compl. ¶ 37. At the hearing, Respondent stated that the 2008 complaints were form complaints saved on the computer. Respondent also testified that the numbers used in the complaints were calculated by a spreadsheet-like computer program and that in many instances, his secretary fills out the complaint and summons, and he reviews them. Ms. Senior, testified that it would take her between 0.2 to 0.3 hours to prepare the first in a serious of debt collection complaints, and it would take her less time to prepare the related complaints thereafter.

Were this the only evidence adduced at the hearing, the Tribunal might be concerned that Respondent charged too much. But Respondent provided facts justifying his fees. Three of the complaints were filed on behalf of Isla, a new, off-island client. Respondent testified that because he was not familiar with Isla's loan agreements, he had to research whether Palau or CNMI law applied and whether the interest rates in the Isla loan agreements were legal in Palau. Respondent also stated that *Arurang* was not a "typical" WCTC collection case. Rather, the promissory note in that case arose from an auto accident where a renter allowed a minor to use a rental car. Respondent testified that he had to do more work than usual to determine the amount WCTC should seek in damages.

Moreover, on cross examination, Ms. Senior conceded that her prior testimony was based on the assumption that a loan was involved, not an auto accident involving a rental car. When presented with a hypothetical question about an off-island client and a two page loan agreement containing a high interest rate and no choice of law provision, Ms. Senior testified that it would take longer than 0.2 to 0.3 hours to draft a complaint, as some research might be required. Likewise, Mr. Beggs testified that in his opinion, it was not unreasonable to charge 0.5 hours to draft the complaints for Isla. Finally, Justice Foster implicitly found that charging 0.5 hours for the 2008 complaint was reasonable; she awarded Respondent's clients attorney's fees for this work.

In her written closing, Disciplinary Counsel argues that Respondent's testimony about the Isla research lacks credibility. She also notes that he did not mention "research" on his time sheets, the implication being that he did not actually perform the research. According to Disciplinary Counsel, "Respondent's attempt to provide competent evidence to demonstrate the value of his services has failed." Disc. Counsel's Trial Mem. 21.

We disagree and find that Disciplinary Counsel has not shown by clear and convincing evidence that Respondent charged an unreasonable fee by charging 0.5 hours for the complaints in the 2008 Cases. Disciplinary Counsel provided little evidence that 30 minutes was unreasonable given that the Isla cases involved unfamiliar loan documents and the *Arurang* case involved more than a simple loan agreement. In addition, the testimony of both experts supported Respondent's justification for the fees.

3. Allegation Three: Padding Bills in Oiph and Recheungel

Disciplinary Counsel alleges that it was unreasonable for Respondent to charge Isla 2 hours in *Oiph* and 1.8 hours in *Recheungel* for filing (1) a single page motion for default and entry of default, (2) two single page draft orders, (3) a copy of computer generated time sheets, and (4) an affidavit from Respondent. Disciplinary Counsel alleges that the amounts charged were excessive for simple form pleadings.

It is undisputed that in *Oiph*, Respondent charged 1.4 hours to "[p]repare default papers; legal research; draft memo" and 0.6 hours to "[e]dit and finalize default papers." *Oiph* Timesheet, Disc. Counsel's Ex. 30. Respondent charged 1.2 hours and 0.6 hours for the same work in *Recheungel*. *Recheungel* Timesheet, Disc. Counsel's Ex. 38. Disciplinary Counsel argues that because "[n]o memorandum was filed in either *Oiph* or *Recheungel* thus, in those

cases, the Respondent billed 2 hours in *Oiph* and 1.8 in *Recheungel* for work which result[ed] only in the preparation of default papers." Disc. Counsel's Trial Mem. 21.

Disciplinary Counsel's argument is based on an incorrect factual premise, and thus we find no clear and convincing evidence that Respondent violated Model Rule 1.5(a) as alleged in Allegation Three. Respondent admitted that he split the time he spent researching the 2008 Memo between the four 2008 Cases. This means that the amounts billed in *Oiph* and p.277 *Recheungel* include time he spent on the 2008 Memo. Thus, as a factual matter, the Tribunal has no basis for finding that the 2 and 1.8 hours billed in *Oiph* and *Recheungel* were excessive for simple form pleadings; the time billed represents time spent on the simple form pleadings *and* the 2008 Memo. There has been no showing that these amounts are excessive.

4. Allegation Four: Excessive Lawyering by Filing the 2008 Memo

In Allegation Four, Disciplinary Counsel alleges that filing the 2008 Memo in *Arurang* and *Boisek* constituted excessive lawyering, and, that by billing his client for the 2008 Memo, Respondent violated Model Rule 1.5(a). Disciplinary Counsel argues that the 2008 Memo, which supported Respondent's request for post-judgment attorney's fees, was premature because no judgment had been entered and because Justice Foster had given Respondent no indication that she was prepared to deny him the requested relief. Ms. Senior testified that in her opinion, it was unreasonable to file the 2008 Memo because the relief requested had not yet been denied. On direct examination by Disciplinary Counsel, Justice Foster stated that the 2008 Memo was premature.

Respondent testified that he felt it was in his clients' best interests to file the 2008 Memo and make sure that the default judgments would include a provision for post-judgment attorney's fees. He stated that he was concerned because Justice Foster had denied such fees in the past and because Justice Materne had recently been striking post-judgment attorney's fees language from judgments. Mr. Beggs testified that it was reasonable to file the 2008 Memo because Respondent had a reasonable belief that the relief he requested might not be granted.

We cannot find that there is clear and convincing evidence that the 2008 Memo is excessive lawyering. The 2008 Memo complied with the ROP Rules of Civil Procedure, which allow a movant to accompany a motion with a brief, or in this case, a memorandum. *See* ROP R. Civ. P. 7(b)(1). It is true that "[b]riefs are not required when the motion raises no substantial issue of law and relief is within the court's discretion. Examples include . . . motions for default judgment." ROP R. Civ. P. 7(b)(1). Here, Respondent felt that his clients' entitlement to post-judgment attorney's fees was a substantial issue that required briefing, despite attorney's fees being mentioned in the debt instruments. In light of past practice by trial courts in Palau, we cannot find that Respondent's belief, or filing the 2008 Memo, was unreasonable. And unreasonableness, not necessity, is the standard under Model Rule 1.5(a).

5. Allegation Five: Excessive Lawyering in the January 2006 Memo

In this Allegation, Disciplinary Counsel alleges that the January 2006 Memo was an example of excessive lawyering, and, Respondent charged an unreasonable fee when he charged WCTC for the memo in the 2005 Cases. Specifically, Disciplinary Counsel alleges that the

January 2006 Memo contains superfluous arguments, citations to cases that are not on point, string citations for simple points of law, and unnecessary affidavits stating that $150 per hour is a reasonable rate when Respondent only charged $137.50 per hour. Disciplinary Counsel argues that when the January 2006 Memo is p.278 reviewed for relevancy, cogency, and necessity, it is apparent that the fees Respondent charged for the January 2006 Memo are unreasonable.

Having reviewed the January 2006 Memo, we cannot find clear and convincing evidence that it is an example of excessive lawyering in violation of Model Rule 1.5(a). Disciplinary Counsel alleges that it was unnecessary for Respondent to discuss a plaintiff's entitlement to default judgment without a hearing because default judgment had already been granted in the 2005 Cases. Respondent's point, however, was that default judgment may be granted without a hearing. This is part of the major premise of Respondent's argument that a hearing is not necessary on punitive damages in a default judgment case. Likewise, it was not unreasonable for Respondent to cite cases about the necessity of a hearing on damages, even though the cases might not deal specifically with attorney's fees in default judgment cases. Again, the cases were used to support the major premise of Respondent's syllogism. Nor can the Tribunal find it unreasonable for Respondent to have attached affidavits regarding a reasonable rate. Respondent's goal was to convince the trial court that no hearing on damages was necessary. The affidavits were used to demonstrate that there was no need for a hearing on the reasonableness of Respondent's fees.

The remaining "problems" with the January 2006 Memo involve writing style, not ethical violations. **[1]** The Tribunal is not convinced that the use of string citations violates Model Rule 1.5(a), at least not on the facts of this case. We also note that the January 2006 Memo was effective. The trial court agreed with Respondent's arguments and awarded the requested attorney's fees as punitive damages without a hearing. Given the success of Respondent's motion, it is difficult for the Tribunal to conclude that the arguments in the January 2006 Memo were superfluous, irrelevant or unnecessary.

6. Allegation Six: Excessive Lawyering by Filing Documents in 2005 Cases

In Allegation Six, Respondent is charged with excessive lawyering by filing in each of the 2005 Cases, (1) a copy of WCTC's charter; (2) a paragraph of four additional authorities; and (3) an affidavit from Benita Sibitang regarding the Palauan citizenship of the defendants. These documents were filed after, and in support of, the April 2006 Memo concerning RPPL 7-11. Disciplinary Counsel describes these documents as unnecessary filings. Ms. Senior testified that she could find no justification for filing the WCTC charter and citizenship affidavits. Nor did Justice Foster find them necessary. Ms. Senior also testified that she would not file additional authorities with the court unless they were new cases that were decided after the initial memo had been filed.

Respondent testified that he filed the WCTC charter and citizenship affidavits because the "contracts clause" in Article IV, Section 6, of the Constitution applies only to citizens, and he wanted to provide factual support for his argument that applying RPPL 7-11 to the 2005 Cases was unconstitutional. He also testified that he filed the one-paragraph list of additional authorities to bolster the argument that remedial legislation should not be applied retroactively.

In p.279 her closing, Disciplinary Counsel argues that Respondent could not have believed that these documents were essential and necessary because he did not file them with the April 2006 Memo, and, under Rule 7(e) of the ROP Rules of Civil Procedure, briefs and evidence filed not in conformity with Rule 7 may be disregarded by the presiding judge.

For two reasons, we find that there is not clear and convincing evidence that filing the additional documents violates Model Rule 1.5(a). First, Disciplinary Counsel did not introduce any evidence regarding how much Respondent charged his clients for filing these additional documents. The complaint states that "[o]n information and belief, Shadel billed his client for the time spent on these filings." Compl. ¶ 64. Respondent denied this allegation on the ground that he was without sufficient information to respond. Ans. ¶ 3. No further proof regarding this allegation was adduced at the hearing. Because there is no proof as to how much Respondent charged, the Tribunal cannot find that the amount charged is unreasonable. Disciplinary Counsel argues that she does need to establish what a reasonable fee would be when the allegation is that the work performed was unnecessary. Disc. Counsel's Trial Mem. 10. "The finding that the work was unnecessary is sufficient to find that billing for that work was unreasonable." *Id.* With respect to the additional documents, however, there is no proof that Respondent billed for this work, let alone proof that the amount charged was unreasonable.

Second, the Tribunal cannot find by clear and convincing evidence that it was unreasonable for Respondent to file the additional materials. Respondent made an argument based on Article IV, Section 6, of the Constitution. This section provides that "[c]ontracts to which a citizen is a party shall not be impaired by legislation." Const. art. IV, § 6. Thus, it was not unreasonable for Respondent to file WCTC's corporate charter and the citizenship affidavits in order to establish that the plaintiff and defendants in the 2005 Cases were Palauan citizens.

Nor was it *unreasonable* to provide the trial court with additional authority. There is a distinction between what is unreasonable and what is necessary. Model Rule 1.5(a) prohibits charging unreasonable fees; it says nothing about unnecessary filings. As Respondent's counsel points out, many of the filings in litigation are not strictly necessary. While it is not necessary to file a motion to strike, for example, it may be a good idea depending on the circumstances. That the motion may not be necessary does not, however, mean that the attorney who filed it charges an unreasonable fee when he bills his client for the motion. Here, the additional documents may or may not have been necessary. Disciplinary Counsel has not , however, demonstrated by clear and convincing evidence that it was unreasonable for Respondent to file them.

7. Allegation Seven: Excessive Lawyering by Filing October 2006 Memo

In the final allegation of the complaint, Disciplinary Counsel alleges that by filing the October 2006 Memo in the 2005 Cases, Respondent engaged in excessive lawyering in violation of Model Rule 1.5(a). Disciplinary counsel argues that the October 2006 Memo contains redundant arguments against retroactivity of RPPL 7-11 that were already p.280 briefed in the April 2006 Memo and superfluous articles on Palau's standing in the international business community. Disciplinary Counsel also argues that "a simple motion requesting a decision based on the April 2006 Memo would have been sufficient." Compl. ¶ 70.

At the hearing, Justice Foster testified that she did not consider the October 2006 Memo necessary. Ms. Senior agreed. Respondent, on the other hand, stated that he filed the October 2006 Memo because he found an alternative argument the trial court could use and thus avoid the constitutional issue. Likewise, Mr. Beggs testified that the October 2006 Memo was reasonable under the circumstances. He stated that it would have been better if this argument was raised in the initial April 2006 Memo, but an attorney owes a duty to his client and the court to bring new authority to the court's attention.

We have reviewed the October 2006 Memo and cannot find that by billing his clients for this memorandum, Respondent charged an unreasonable fee. The bulk of the memorandum deals with Respondent's statutory construction argument. Essentially, he asserts that RPPL 7-11 should be interpreted so as to not violate the Constitution. This argument was not raised in the April 2006 Memo. Although the October 2006 Memo might not have been necessary, again, necessity is not the standard. It is true, of course, that by filing the October 2006 Memo several months after the motion to alter or amend Respondent violated the ROP Rules of Civil Procedure. *See* ROP R. Civ. P. 7(b)(1) ("Every motion raising a substantial issue of law shall be supported by a brief *which shall be filed simultaneously with the motion*.") (emphasis added). As a consequence, the trial court could have disregarded the October 2006 Memo. ROP R. Civ. P. 7(e). If the trial court thought the October 2006 Memo was filed for an improper purpose, such as to increase the costs of litigation, the trial court could have sanctioned Respondent under Rule 11. *See* ROP R. Civ. P. 11(b) (attorney signature certifies that "the document is not being presented for any improper purpose, such as . . . needless increase to the cost of the litigation"); ROP R. Civ. P. 11(c) (allowing sanctions). And in the future, Respondent would be advised to seek leave of the court before filing untimely motions or memoranda. If Respondent fails to comply with the Rules of Civil Procedure, trial courts can, and should, disregard the documents filed. But an attorney does not necessarily violate the Model Rules when he violates the Rules of Civil Procedure. The October 2006 Memo, though untimely and arguably of little use, was not an unreasonable filing for the purposes of Model Rule 1.5(a).

CONCLUSION

The Tribunal finds that none of the disciplinary violations alleged in the complaint were proved by clear and convincing evidence. The Disciplinary Counsel shall file her attorney's fees and costs with the Tribunal. After the Tribunal's review and certification, the billings shall be submitted to the treasurer of the Palau Bar Association for payment pursuant to Rule 9(c) of the Rules of Admission for Attorneys and Trial Counselors, as amended.

The Tribunal appreciates Ms. Dimitruk's p.281 willingness to serve as Disciplinary Counsel in this case. In a small bar, no lawyer wants to prosecute a fellow attorney that she knows well. This is also a fact-intensive case that presents challenges in proving the elements of the charges by clear and convincing evidence. We also commend Mr. Johnson for his vigorous defense of the Respondent. The high quality of his work was of great benefit to the Tribunal.