

In the Matter of Clara KALSCHEUR,

CLARA KALSCHEUR

Respondent.

Disciplinary Proceeding No. 12-003

Supreme Court, Trial Division
Republic of Palau

Decided: July 23, 2012

[1] Professional Responsibility:
Applicable Rules

Disciplinary Rule 3 lists the various forms of discipline that may be imposed on lawyers found to be in violation of the Rules. These include disbarment, suspension, censure, a fine, or community service. The Disciplinary Tribunal may also assess the costs of investigating and prosecuting the action.

[2] Professional Responsibility:
Applicable Rules

The Disciplinary Rules are designed to protect the public. The Rules provide safeguards for those who pay for, but do not receive, competent, diligent, expeditious, and fair legal services from their attorneys.

[3] Professional Responsibility: Practice
of Law

Attorneys licensed to practice in Palau, as with attorneys in most other jurisdictions, swear an oath and are the designated gatekeepers to the justice system.

[4] Professional Responsibility: Practice
of Law

It is the responsibility of the Disciplinary Tribunal, as the supervisors of the Palau Bar, to ensure that its members remain competent to practice law before the courts.

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice, KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

PER CURIAM:

In the formal complaint filed June 21, 2012, Disciplinary Counsel charges Respondent with violating Palau’s disciplinary rules for attorneys during the course of representation in three particular cases. Because she did not file a response,¹ Respondent admits that the complaint is true. Disciplinary Rule 5(c). Respondent appeared for her formal hearing on July 20, 2012. After the formal hearing, Kalscheur filed with the Clerk of Courts her “Statement of Respondent,” which she had prepared but was unable to file until the hearing. The Statement explains that she does not contest the Disciplinary Proceeding and she agrees that she should no longer practice law, but she wishes to delay the onset of her disbarment so that she may finish between five and ten cases that she estimates will go to trial in the coming months.

¹ According to the formal complaint, Respondent indicated to Disciplinary Counsel that she did not intend to contest the proceedings, but she has filed no formal answer or other response with the Court stating this position.

The only matter to decide is the appropriate sanctions. After considering the gravity of the transgressions and her past suspension from law practice in Palau, we find that Respondent shall (1) be required to pay restitution to two clients; (2) be disbarred from the practice of law in Palau; and (3) pay the fees and costs incurred by Disciplinary Counsel during this proceeding. She shall also bear the costs associated with disbarment, including notice of disbarment published in the newspaper pursuant to the Disciplinary Rules. Respondent's disbarment will be effective thirty days after entry of this order, pursuant to Disciplinary rule 5(c).

VIOLATIONS OF DISCIPLINARY RULES

The formal complaint filed on June 21, 2012, charges that Respondent violated the Republic of Palau's Disciplinary Rules and the American Bar Association Model Rules of Professional Conduct ("ABA Model Rules"). The Disciplinary Rules state that one ground for attorney discipline in Palau is violation of the ABA Model Rules. Disciplinary Rule 2(h), while another ground for discipline is violation of Disciplinary Rule 2 (c): "[a]n attorney may be subject to disciplinary action as provided by these rules for . . . violation of his oath or duties as an attorney."

The complaint charges that Respondent has violated ABA Model Rules 1.1 (competence); 1.3 (diligence); 3.2 (expediting litigation); 3.4 (fairness to opposing party and counsel); and 8.4 (misconduct).²

² The text of the ABA Model Rules is available at [http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html)

The violations, which we accept are true, may be summarized as follows:

1. In the case of *Airai State Gov't v. Kuniyoshi Fishing Co.*, Civ. Action No. 11-086, Respondent represents Plaintiff Airai State Government. The parties agreed to a status conference on September 13, 2011, but Respondent failed to appear. A pre-trial order issued that day was placed in Respondent's box; the order set deadlines for completion of discovery; pre-trial motions; pre-trial statements; and pre-trial conferences. Trial was set for January 30, 2012. Respondent filed nothing on behalf of her client. She arrived late to a pre-trial conference scheduled for January 23, 2012 and said she was on her way to the hospital because she did not feel well. The trial judge issued an order stating that Respondent's actions did a disservice to the court and to opposing counsel. On January 24, 2012, Respondent filed a motion to continue the trial due to health problems; the motion was granted and a status conference was set for February 21, 2012. The defendant in the case filed a motion to dismiss on March 12, 2012, "based mainly on Plaintiff's concessions." Respondent failed to respond, and the motion was granted.

2. In the case *Sato v. Sato*, Civ. Action No. 09-283, Respondent represents Defendant Sato. The trial

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date was set for September 7, 2011. During status conferences held on September 6, 2011, September 14, 2011, and in November of 2011, Respondent sought to continue the trial dates for medical reasons. Her requests were granted. Respondent also represented to the court on two different occasions that she could handle the case.³ Trial is currently set for August 22 to 24, 2012.

3. In the case *Airai State Gov't v. Masters*, Civ. Action No. 11-115, Respondent represents Plaintiff. At a status conference on September 14, 2011, the parties agreed to deadlines for completion of discovery; pre-trial motions; pre-trial statements; and pre-trial conferences. Trial was set for December 19, 2011. On November 29, 2011, Respondent moved to continue the trial date due her health and the power outages affecting Palau at the time. At a status conference on December 5, 2011, the parties appeared before the court and set new filing deadlines as well as a new trial date. On February 1, 2012, the defendant filed a motion for default judgment because Respondent had failed to answer defendants' counterclaim. Respondent failed to oppose that motion. Respondent failed to respond on behalf of her client to

discovery requests, forcing defendants to file a Civ. Proc. Rule 37(b) motion. Respondent promised and then failed to file pre-trial statements, and she filed a motion to continue trial.

The formal complaint alleges, and we accept as true, that Respondent has exhibited a pattern of behavior that involves failing to file required documents, failing to appear in court on behalf of her clients, and a lack of readiness to meet agreed-upon trial dates and deadlines. With this backdrop, we turn to the issue of sanctions.

DISCUSSION

[1] Disciplinary Rule 3 lists the various forms of discipline that may be imposed on lawyers found to be in violation of the Rules. These include disbarment, suspension, censure, a fine, or community service. The Disciplinary Tribunal may also assess the costs of investigating and prosecuting the action. What is more, Rule 5(g) provides that “[i]f the Tribunal finds that the allegations of misconduct are true, it shall impose an appropriate sanction or combination of sanctions pursuant to Rule 3 hereof. In considering what would be an appropriate disposition of the case, the Tribunal may take into account any prior disciplinary actions involving the respondent attorney.” Sanctions are determined by reference to the ABA Standards for Imposing Lawyer Discipline.⁴ In re *Smith*, 11 ROP 36, 38 (2003). See also In re *Shadel*, 6 ROP Intrm. 252, 257 (1997)

³ In her Statement of Respondent filed July 20, 2012, Respondent claims that she spent considerable time on the case, but ultimately “does not object to returning the fee so that Mr. Sato can use the money to pay other counsel to finish the case.”

⁴ The text of this document is available at http://www.americanbar.org/content/dam/aba/migrated/cpr/regulation/standards_sanctions.authcheckdam.pdf.

(“In determining an appropriate sanction, we refer to factors considered as either aggravating or mitigating circumstances”)

We note that in 2005, Respondent was suspended for six months for a similar lack of diligent and competent representation. *In re Kalscheur*, 12 ROP 164 (2005). While the earlier proceeding is an aggravating factor, we are especially concerned by the similar nature of the behaviors that have been the subject of the 2005 and 2012 disciplinary proceedings. Respondent’s medical issues, which the Disciplinary Tribunal acknowledged in 2005 “played a significant role in her derelictions,” *id.* at 167, do not appear to have subsided.

Respondent has admitted to “suffering from mental health setbacks beginning in August 2011.” However, Respondent did not inform her clients that she was unable to protect their interests; she did not inform her clients about the status of their cases; and she failed to advise her clients to seek help from other attorneys.

During the formal hearing, Respondent reiterated these facts and admitted that she did not do enough to represent her clients. The complaint alleges that Respondent continued to receive legal fees from clients Sato and Airai State Government despite engaging in misconduct in violation of the ABA Model Rules. These are all aggravating factors we consider in assessing sanctions. She did not raise mitigating factors that should ease the sanctions. While we are sensitive to the medical issues that have been plaguing Respondent for some time, we do not believe, as the Disciplinary Tribunal stated in the earlier disciplinary proceeding, that these issues excuse her behavior.

The Disciplinary Rules are designed to protect the public. The Rules provide safeguards for those who pay for, but do not receive, competent, diligent, expeditious, and fair legal services from their attorneys. While disbarment might appear to be a harsh form of sanctions, we take into account that Respondent was suspended for identical conduct in the past. We have considered the alternatives, and we are left with little choice but to disbar Respondent for the ultimate protection of the public.

DISCIPLINE

[3, 4] As the Disciplinary Tribunal wrote in 2005, “[t]he public is entitled to a reasonable guarantee that an attorney remains competent to represent clients.” *In re Kalscheur*, 12 ROP at 168. “Attorneys licensed to practice in Palau, as with attorneys in most other jurisdictions, swear an oath and are the designated gatekeepers to the justice system. As such, it is the responsibility of the Disciplinary Tribunal, as the supervisors of the Palau Bar, to ensure that its members remain competent to practice law before the courts.” *Id.* Considering Respondent’s minimal level of representation on behalf of some paying clients; the aggravating factors discussed above; and the lack of mitigating factors present here, we therefore issue the following sanctions:

1. Return of the legal fee of \$1,000.00 that Respondent received from Sato. Respondent shall notify Disciplinary Counsel and the Court through an affidavit when she has completed this restitution. The fee shall be due within thirty days of the issuance of this order.

2. Return of the portion of the monthly retainer of \$750.00 that Respondent received from Airai State Government for work related to in-court practice and appearances for a period of ten months. Respondent is to submit to Disciplinary Counsel, within thirty days of the issuance of this order, an accounting of the hours she spent to prepare for and attend hearings and other court-related practice on behalf of Airai State Government. Should she fail to do this, she shall return the full amount of \$6,750.00 that Airai State Government paid for her representation. She shall notify Disciplinary Counsel and the Court through an affidavit when she has completed this restitution. The fee shall be due within thirty days of the issuance of this order.

3. Disbarment pursuant to Disciplinary Rules 12 and 13. The effective date of disbarment is thirty days from the entry of this order. Respondent shall follow the procedures in Rule 12 for notification of clients being represented in permanent matters and the desirability of prompt substitution of another attorney. She shall file an affidavit pursuant to Rule 12(d) showing compliance and proper notification. Reinstatement is possible after two years, subject to all of the requirements provided in Rule 13.

4. Payment of Disciplinary Counsel's costs of investigating and

prosecuting this action. Counsel shall submit to Respondent an itemized list detailing his fees and costs within seven days of the issuance of this order. Kalscheur will then have seven days to object to the amount requested. In the absence of any objection, she shall pay the amount to Disciplinary Counsel within thirty days. If an objection is filed or if Respondent fails to pay the fees, Disciplinary Counsel shall notify the Tribunal by filing a motion for attorneys' fees. We will then set a date for hearing further proceedings.

5. Costs associated with publishing the notice of disbarment. The Clerk of Courts will pay the cost of publication of the notice of disbarment pursuant to Disciplinary Rule 12 (e). The Clerk of Courts will then seek remuneration from Respondent.