In re David F. Shadel

Disciplinary Proceeding No. 14-002

Disciplinary Tribunal
Republic of Palau

Decided: March 25, 2015

Disciplinary Counsel..... James E. Hollman
Counsel for Respondent..... F. Randall Cunliffe

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
C. QUAY POLLOI, Associate Justice Pro Tem
KATHERINE A. MARAMAN, Part-Time Associate Justice

[1] **Professional Responsibility**: Burden of Proof

Allegations of ethical violations must be proven by clear and convincing evidence. Clear and convincing evidence requires the Tribunal be convinced that the allegations are highly probable or reasonably certain, but falls short of proof beyond a reasonable doubt.

[2] **Professional Responsibility**: Unrepresented Parties

While it is certainly good practice to advise all adverse parties of their right to counsel both orally and in writing, the ethical rules require the unrepresented person to be so advised "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter."

[3] **Professional Responsibility**: Burden of Proof

It is exceedingly rare for a swearing contest to rise to the standard of clear and convincing evidence.

[4] **Professional Responsibility**: Nondelegable Duties

A lawyer cannot pass his ethical obligations on to his partner or his staff and then feign ignorance if he fails to monitor his firm.

Decision

Per Curiam:

On August 7, 2014, Attorney Vameline Singeo, on behalf of her client, Jose Ise, filed a Disciplinary Complaint against Respondent David F. Shadel alleging violations of ABA Model Rules of Professional Responsibility 1.5(b) and 4.3. After a review and determination that the complaint was not plainly without merit, the Chief Justice

appointed Disciplinary Counsel James E. Hollman to investigate and report back to the Disciplinary Tribunal. Hollman filed his report on December 9, 2014, and, after review of this report the Tribunal directed him to file a formal complaint. An adjudicative hearing on the complaint was held on March 5, 2015. The following constitutes the findings and decision of the Tribunal.

BACKGROUND

In his Report and Recommendation, Disciplinary Counsel concluded that sufficient evidence existed to support a complaint against Respondent for violations of Model Rules 3.3 (Candor to the Tribunal), 4.3 (Dealing with Unrepresented Persons), 4.4 (Respect for Rights of Third Persons), and 8.4 (Misconduct). A ten count Complaint was filed, and, while the factual allegations largely overlap multiple rules, they stem from several independent areas of ethical concern which we address in turn.

The primary thrust of the Complaint involves the undisputed nature of Respondent's debt collection business. Respondent, dating back to at least 1992, has acted as a collections attorney representing creditors who have extended personal and commercial loans in Palau. His practice in this capacity regularly includes meeting with debtors in arrears, who are often unrepresented, to attempt to negotiate terms of repayment for submission to the Court. A complaint for money owed is filed against the debtor and Respondent files a stipulated judgment and order (memorializing this agreement) for the approval of the Court. A number of these judgments were submitted by the parties, and the Tribunal takes judicial notice of their contents as requested by the parties without objection of the opposing party.

The specific acts underlying this disciplinary complaint conformed to this practice and involved Respondent's collection actions dealing with Jose Ise. Respondent sued Ise to collect a debt incurred when he made significant purchases on credit from Koror Wholesalers. It is undisputed that, after being served with the suit in June of 2007, Ise met with Respondent at his law office, at which time Respondent drafted a Stipulation for Judgment and Order (the Stipulation) which Respondent and Ise both signed. Pl.'s Ex. 1. This Stipulation was submitted to the Court for approval and ostensibly outlines the terms of a payment plan intended to resolve Ise's outstanding debt.[1] It is

[1] We use the word "ostensibly" because of Respondent's own admission that this stipulated order failed to incorporate a significant term that Ise had insisted on and Respondent agreed to: that his payments would be applied to the principal of his loan prior to his accrued interest. The stipulation itself states that "[p]ayments shall be applied first to the judgment, then to interest on the judgment, and then to postjudgment attorney fees and costs," without distinguishing between the principal of the loan and the remaining amount of the judgment despite the split-interest rate applied. Respondent admits that Ise's payments were not applied to the principal of the loan and that this caused Ise to be overcharged by at least $4,000.00. We note,

undisputed that Ise was not represented by counsel when the Stipulation was negotiated and signed, and that, while the parties dispute whether Respondent informed Ise of his right to seek counsel, the Stipulation makes no mention of this right.

The Stipulation states that Ise's outstanding debt includes $6,484.83 of principal, $10,208.13 of prejudgment interest, $247.50 of attorney's fees, and $50.00 of court costs, and asks for further reasonable attorney's fees at $137.50 per hour. It further states that the unpaid principal "shall continue to earn 18% annual interest, and the rest shall earn annual interest at the maximum rate allowed by law (currently 9%)." *Id.* It is undisputed that Respondent's accounting of Ise's debt has been accruing interest in this split fashion as has been Respondent's practice in numerous other collection cases. This accounting is largely itemized in a ledger provided to Ise by Respondent's law office, which contains a record of Ise's interest accrued, payments, fees, and running balances. Pl's. Ex. 3 (the statement or ledger). It is undisputed the Respondent keeps these accounting ledgers in the regular course of his debt collection business.

Around July of 2011, Ise stopped making payments on this debt. As such, Respondent sought a contempt order to enforce the existing stipulation before eventually meeting with Ise again to sign a new stipulation. The 2012 Stipulation For Further Order agreed to automatic payroll deductions of $380.00 per paycheck to resume payment of the debt. Ise signed the 2012 Stipulation for Further Order, which, in contrast to the original Stipulation, asserts that he had been informed of his right to seek legal counsel. Pl's Ex 4. The Court accepted and issued the requested Further Order. Pl's Ex 5.

Some time in 2014, Ise eventually retained the services of counsel, Ms. Vameline Singeo. Attorney Singeo reviewed Ise's Statement and inquired with Respondent about the "All Fees" column, which contains several charges that she believed to be attorney's fees. Respondent concedes that the column memorializes his hourly billing of attorney's fees, but asserts that these fees are recorded only for purposes of billing his client and are not charged to the debtor. However, in response to Attorney Singeo's inquiry, Respondent provided a version of this document that does not include these fees and in which the "Total Balance" is reduced accordingly. Pl's Ex 7. Attorney Singeo filed the instant complaint with the Supreme Court following receipt of Respondent's letter.

APPLICABLE STANDARDS

[1] "An attorney may be subject to disciplinary action as provided by these rules for . . . [a]ny act or omission which violates the American Bar Association Model Rules of

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however, that Respondent's own accounting statements suggest that *neither* the agreed upon order of application nor the written stipulation were being followed. *See infra* Part III.

Professional Conduct and the amendments thereto." ROP Disc. R. 2(h). Allegations of violations must be proven by clear and convincing evidence. ROP Disc. R. 5(e); *In re Shadel*, 16 ROP 244, 249 (Disc. Pro. 2009). Clear and convincing evidence requires the Tribunal be convinced that the allegations are highly probable or reasonably certain, but falls short of proof beyond a reasonable doubt. *In re Shadel*, 16 ROP at 249.

DISCUSSION

The Complaint in this matter alleges ten counts, but the counts effectively fall into three categorical allegations: (1) that Respondent knowingly submitted to the Court stipulations charging post-judgment interest in excess of the amount permitted by law; (2) that Respondent failed to advise Ise of his right to seek the advice of counsel; and (3) that Respondent inappropriately charged Ise for attorney's fees without legal authority to do so and without disclosing such to Ise or the Court. We address each in turn.

I. Charging Post-Judgment Interest Exceeding Nine Percent

Disciplinary Counsel alleges that Respondent knowingly, and knowing that it was contrary to law, charged Ise eighteen percent interest on the principle of his loan subsequent to the judgment. Contained within this allegation are three key questions: (1) whether the law allows for parties to stipulate or contract to eighteen percent post-judgment interest; (2) whether such a stipulation survives the merger of the contract into a judgment; and (3) whether Respondent, knowing either (1) or (2) to be contrary to law, affirmatively misled Mr. Ise and/or the Court.

A. Whether the parties may legally stipulate to post-judgment interest in excess of nine percent

Disciplinary Counsel relies primarily on 14 PNC § 2001, which states that: "Every judgment for the payment of money shall bear interest at the rate of nine percent a year from the date it is entered." Such simple language was repeated by the Appellate Division when it stated, if in dicta, that "[t]he legislature has established 9% per year as the ceiling for post-judgment interest." *A.J.J. Enterprices v. Renguul*, 3 ROP Intrm. 29, 31 (1991). Respondent argues that an exception exists, and must exist, where post-judgment interest in excess of nine percent is a contractual term of a loan or a stipulation of judgment. Without such an exception a debtor could contract for a loan at a legal rate of interest greater than nine percent, immediately default *intentionally*, and then be subject to only nine percent interest, unjustly depriving the creditor of his rights under the contract.

Section 2001, however, does not stand alone; like all other statutes, it stands as interpreted by the courts. It is indisputable that the Supreme Court has repeatedly, and seemingly consistently, allowed for and enforced such post-judgment interest in excess of the statutory cap, which leads to the conclusion that the legal issue of whether

section 2001 applies always or an exception exists is, at the very least, unsettled. As such, the state of the law on this issue is unclear and we cannot conclude that Respondent's actions were knowingly contrary to this law.

B. Whether the parties' stipulation survives the merger with the judgment

Disciplinary Counsel, however, argues that even if the parties stipulated to a higher rate of post-judgment interest, any agreed upon interest rate cannot have survived the entry of judgment. He asserts that because of the merger rule, which Palau adopts through the Restatement (Second) of Judgments § 18 and 1 PNC § 303, an entry of judgment extinguishes a creditor's rights under an existing contract or debt in lieu of the rights embodied in the judgment itself. Any contractual right being extinguished, the remaining money judgment is bound by 14 PNC § 2001 and as such cannot possibly allow for eighteen percent interest on any portion therein. Respondent contends that an exception to the merger rule exists in the common law where the parties have contracted or stipulated to a post-judgment rate of interest greater than the statutory 9% rate.

Disciplinary Counsel is correct that the merger rule applies, and that the judgment, having been entered, extinguished any rights Respondent's client may have had under the pre-existing agreement(s). But the merger rule is a general one, primarily embodying the principle of res judicata, which exists to preclude re-litigation of a claim or further application of a contract subsequent to the entry of a judgment. It does not limit the scope of the judgment itself, and the judgment that extinguishes a contract may itself preserve and provide the previously-contractual rights of a plaintiff. *See Rdialul v. Kirk & Shadel*, 12 ROP 89, 93–94 (2005). Such survival of rights is highlighted in the commentary to the Restatement, which specifically notes that "when by reason of the plaintiff's obtaining judgment upon a claim the original claim is extinguished and rights arise upon the judgment, *advantages to which the plaintiff was entitled with respect to the original claim may still be preserved despite the judgment*." Restatement (Second) of Judgments § 18 cmt. g (emphasis added). As an example, the Restatement explains that a creditor who holds a lien against a debtor's property but obtains a judgment against the debtor does *not* lose the benefit of the lien. *Id*.

It is undisputed that the eighteen percent interest rate in question was stipulated to prior to the entry of the judgment and *was* embodied in the subsequent judgment. Respondent's client, a creditor, did not have a lien on Ise's property; the client instead had a contractual right to eighteen percent interest on the principal of the loan, which falls within the statutory maximum permitted by the usury laws. *See* 11 PNC § 305(b) ("The maximum annual percentage rate of finance charged, taken, received or reserved on an extension of consumer credit shall be no greater than 18 percent per annum."). The Restatement offers no further clarification as to whether a post-judgment interest right is somehow inferior to a lien with regards to preservation, and

we are not convinced that, under the Restatement itself, the merger of the contract into a judgment would extinguish, and not enshrine, a formerly contractual right.

But the Restatement is not the end of our consideration of the common law. 1 PNC § 303 imposes the Restatements as the rules of decision to the extent that they express the common law, but states that the rules, "to the extent not so expressed, [shall be applied] as generally understood and applied in the United States." As to whether a contractual post-judgment interest rate merges into and is overridden by a statutory post-judgment interest rate, the Restatement is silent. United States common law is not, and it guides our application of the statute. The right of parties to contract to a higher rate of post-judgment interest is accepted in numerous United States jurisdictions so long as that intent is sufficiently clear in the contract. *See Kanawha-Gauley Coal & Coke Co. v. Pittston Minerals Grp., Inc.*, 501 Fed. App'x 247, 254 (4th Cir. 2012) (per curiam) (recognizing that, despite the post-judgment interest rate provided by statute,[2] "parties may stipulate a different rate consistent with state usury and other applicable law") (quotation omitted); *Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982, 1004 (10th Cir. 2005) (quoting *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 101 (2d Cir. 2004)) ("We agree that parties may by contract set a post-judgment rate at which interest shall be payable.") (further quoting *Yergensen v. Ford*, 402 P.2d 696, 697 (Utah 1965)) ("If parties want to override the general rule of merger and specify a post-judgment interest rate, they must express such intent through clear, unambiguous, and unequivocal language."); *Cent. States, Se. & Sw. Pension Fund v. Bomar Nat'l, Inc.*, 253 F.3d 1011, 1020 (7th Cir. 2001) ("It is well established that parties can agree to an interest rate other than the standard one contained in [United States statute]."); *Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097, 1108 (9th Cir. 1998) ("Here, the parties specifically agreed that the contract rate of interest would be applied even after judgment was entered."); *ITT Diversified Credit Corp. v. Lift & Equip. Serv., Inc.,* 816 F.2d 1013, 1018 (5th Cir. 1986) ("While [United States law] provides a standard rate of post-judgment interest, the parties are free to stipulate a different rate, consistent with state usury and other applicable laws.").

The merger rule exception Respondent claims has been adopted by a number of jurisdictions, and may even be implied by the Restatement itself. Given the lack of certainty in the Restatement and the breadth of this exception across United States common law, the existence of this is an unsettled question in Palauan law. As such, we cannot find that the merger rule conclusively extinguished Respondent's client's right to collect eighteen percent interest on the principal of the debt.

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[2] The United States post-judgment interest statute, 28 U.S.C. § 1961, varies significantly from 14 PNC § 2001 and as such is not quoted here. We note, however, that the Appellate Division has looked to case law applying § 1961 when considering how Palau's post-judgment interest statute applies. *See Becheserrak v. ROP*, 8 ROP Intrm. 147, 148–150 (2000).

C. Whether Respondent affirmatively misled either Ise or the Court with regards to (1) the cap on post-judgment interest or (2) the merger rule

Having found that Disciplinary Counsel has failed to prove that either (1) parties may not legally stipulate to post-judgment interest in excess of that provided by statute, or (2) such stipulations do not survive the merger rule, the issue of Respondent's knowledge on this point is moot. We address it only to restate and apply the standard of proof applicable in a disciplinary case: that the violations must be demonstrated by clear and convincing evidence. It is beyond the jurisdiction of this Tribunal to decide the correct interpretation of the merger rule and the statute imposing post-judgment interest.[3] But given the lack of clarity in this area of Palauan jurisprudence, with regard to the charges involving charging eighteen percent post judgment interest we find that Disciplinary Counsel's burden of proof has not been, and likely could not be, met.

II. Duty to Unrepresented Persons

[2] The complaint further charges Respondent with both failure to inform Ise of his right to retain counsel and affirmatively misleading the Court by filing documents asserting that Ise had been so informed. While it is certainly good practice to advise all adverse parties of their right to counsel both orally and in writing,[4] the ethical rules require the unrepresented person to be so advised "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter." ABA Model R. of Prof. Conduct 4.3. However, whether or not Respondent was required to advise Ise to seek assistance of counsel, it would be misconduct for Respondent to inform the Court that Mr. Ise was so advised if in fact this did not happen.

As such, these charges boil down to a simple question of fact: whether Respondent informed Ise of his right to seek independent counsel.[5] The evidence on this point is

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[3] This Tribunal, despite consisting of a panel of three Justices, is not a court in which Palauan common law is developed, because a disciplinary tribunal holds a trial on the merits of a complaint and the Tribunal's decision is not subject to appeal. *See In re Perrin*, 10 ROP 132, 133 (2003). Common law precedent is developed through litigation in the Trial Division and review by the Appellate Division, and any judicial announcement conclusively interpreting section 2001 or the merger rule must come from those courts.

[4] Indeed, Respondent has previously been informed by the Disciplinary Tribunal that "includ[ing] waivers of substantive [] rights in a stipulation with an unrepresented party" is not good practice. *In re Shadel*, 16 ROP at 251.

[5] Significant testimony, including Ise's, detailed his interactions with lawyers in his previous professional experiences and suggested that he had an understanding of the nature of the adversarial system and did not mistakenly believe that Respondent was

limited and simple because of the undisputed fact that only Ise and Respondent were present for their relevant conversations. Ise testified that Respondent did not inform him of his right to seek counsel; Respondent testified that he did. The 2007 Stipulation does not include a statement referencing Ise's right to counsel and Respondent's alleged advisement; the 2012 Stipulation for Further Order does. Ise's failure to retain counsel until 2014 suggests that he may not have understood his right to counsel or the advantages counsel could have offered. However, his experiences working for Continental Airlines and his professional involvement with lawyers suggest that he understood a lawyer's relationship to her client.

[3] While it is unclear why the Stipulation for Further Order contains a line memorializing Ise's right to counsel and the Stipulation from five years earlier does not, Respondent was under no affirmative duty to put such a line in the Stipulation and the burden of proof is squarely on Disciplinary Counsel. This question effectively comes down to a swearing contest with roughly equal evidence existing on both sides. Were disciplinary violations proven by the preponderance of the evidence, this Tribunal would make credibility determinations and a finding on this point. But they are not, and it is exceedingly rare for a swearing contest to rise to the standard of clear and convincing evidence. *See Rechirikl v. Descendants of Telbadel*, 13 ROP 167, 169 (2006). As such, we cannot find that Respondent did not inform Ise of his right to counsel or, accordingly, that he mislead the Court as to whether or not he so informed Ise.

III. Improper Charging of Attorney's Fees

The final set of charges in the Complaint alleges that Respondent charged Ise random attorney's fees throughout the collection process without his knowledge and without prior court approval. Attorney's fees and billing practices are a strictly regulated ethical area. *See, e.g.*, ABA Model R. Prof. Conduct 1.5.

Attorney's fees are a particularly serious issue when charged to an opposing party. Generally, "[a]bsent a statute or contract to the contrary, each party is responsible for his own attorney fees." *W. Caroline Trading Co. v. Kloulechad*, 15 ROP 127, 128–29 (2008); *see also Rdialul*, 12 ROP at 94. Even where the parties stipulate to an award of attorney's fees, a court is not necessarily bound by that stipulation; the Appellate Division has repeatedly, particularly at the insistence of Respondent, addressed the issue of discretionary awards of attorney's fees, going so far as to specifically rebuke the Respondent. *See Whipps v. Nabeyama*, 17 ROP 9, 12 (2009) ("As we noted before, this is not the first time this issue has been presented by [Mr. Shadel]. Thus, we reemphasize here that, in the exercise of its discretion, the Trial Division—not the attorney—gets to make the reasonableness determination about whether and to what extent to award attorney fees."); *see also W. Caroline Trading Co. v. Kinney*, 18 ROP 70,

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on his side. This question need not be resolved because this ruling turns on whether Respondent advised Ise of his right to counsel.

72 (2011) (no abuse of discretion where Trial Division denied Respondent attorney's fees); *Kloulechad*, 15 ROP at 129 (same); *W. Caroline Trading Co. v. Kinney*, 13 ROP 28, 30 (2005) (same).

The evidence before the Tribunal is deeply troubling, particularly given Respondent's history of admonishment and instruction regarding attorney's fees. It is undisputed that the original Stipulation called for Ise to pay "plaintiff's further reasonable attorneys fees," but the Court, exercising its discretion when entering judgment, explicitly struck out and excluded the attorney's fees provision. Pl.'s Exs. 1, 2. That stipulation, consequently, was without legal force once rejected by the Court, and Respondent's accounting ledger for Ise's account suggests that, from June of 2007 to February of 2012, Respondent complied with the Court's order and did not bill his fees to Ise. *See* Pl.'s Ex. 3 (Account statement, "All Fees" column empty during this time period).

Without authorization of the Court, that changed in February of 2012. As previously discussed, Ise's account was past due—payments had stopped in June of 2011, so Respondent sought a contempt order. At this time, fees start to appear in Ise's account statement: $60.00 on February 26, 2012; $0.50 on June 6, 2012; $75.00 on June 29, 2012, and an additional $60.00 fee on what appears to be June 30, 2012.[6] This adds up to $195.00 in hourly attorney billing and $0.50 for some unknown cost. One hundred thirty five dollars of this, likely the paired $75.00 and $60.00 fees, is reflected in the July 2012 Stipulation for Further Order, Pl.'s Ex. 4, and the Court's subsequent order, Pl.'s Ex. 5, which directs Ise to pay $135.00 of attorney's fees and allows for "possible reasonable attorney fees" beyond that amount, *id.* No evidence presented shows, or even suggests, that Respondent disclosed to the Court the February 26, 2012 fee or the fees charged thereafter, nor does any evidence suggest that the Court approved any further fees.

Nonetheless, the billing statement includes seven additional fees, between February of 2013 and June of 2014, totaling $530.00. Pl.'s Ex. 3. Respondent testified that these fees are simply recorded for the purpose of billing Respondent's clients, and are not assessed to the debtor. Test. of Respondent David Shadel, March 5, 2015 at 1:32–34 p.m; *see id.* at 1:52 p.m. ("It does not say fees are being assessed. It simply has a column for attorney's fees, but they're not being assessed against [Ise]."). He further testified that the $260.00 fee was, and must have been, entered in error, because it was not a

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[6] This line is cut off on Plaintiff's photocopied exhibit but the Tribunal infers from what appears to be the number 1 in the "days from last payment" column that the date in question is June 30. *See* Pl.'s Ex. 3. While the $60.00 fee and the $135.00 "All Fees Unpaid" listing are partially cut off, it is clear that the original contains this figure because without it the next visible line, July 11, would include a $380.00 payment but account for only $320.00 of it.

multiple of any hourly billing rate his firm uses.[7] He testified that this fee was removed and corrected. *Id.* at 1:53 p.m.

Respondent admitted to more than just this one accounting error. He testified that he and Ise had agreed, at the meeting when the 2007 Stipulation was negotiated and signed, that Ise's payments would be applied in an unusual fashion: Ise insisted that his payments be applied to the principal of his loans *before* interest and fees, a payment structure that benefitted him because the principal was accruing interest at a higher rate than the rest of the judgment. Respondent agreed, but concedes that he later discovered that the accounting software was not applying these payments as agreed.[8] As a consequence, Respondent admits that Ise was overcharged and overpaid by more than $4,000.00 because of Respondent's accounting error. Respondent testified that his client offered to return this amount but the offer was rejected.

Respondent's credibility, however, was sorely undercut by an enormous admission: that he has no idea how the accounting for his account ledgers works. When asked what kind of software he uses, flatly responded "I don't know . . . I'm sort of a dummy when it comes to computers. My partner created the app—I don't know what to even call it—the application, the system by which we generate those forms. So, I don't know what it's called, I'm, I don't know how to answer any more. But I don't know what kind of a program we have. I mean, we have Windows, if that helps, but I'm not sure what—I'm a real dummy on computers." Test. of Respondent David Shadel at 1:46–47 p.m. In the context of this admission, this Tribunal struggles to understand how Respondent could have agreed to a specific payment structure (principal prior to interest) when he had, and still has, no knowledge of how this would—or could—be calculated using his office's accounting practices and software. In fact, Respondent admits he later learned that his firm's software, which he testified was built by his law partner, Kevin Kirk, was not even *capable* of implementing the payment plan to which Respondent and Ise agreed, and that the system was in fact set up to subtract from interest and fees prior to the principal. *Id.* at 1:49 p.m.

Despite Respondent's self-admitted total ignorance of how his accounting system's software works, Respondent apparently felt that he could commit to a debtor and the debtor's attorney how payments would be applied. Such self-admitted ignorance with regard to the collection of monies from unrepresented debtors constitutes, at the very least, *gross* negligence if not intentional misconduct, and frankly raises serious doubts

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[7] The documents before the Tribunal and Respondent's testimony demonstrate that Respondent has billed at the hourly rates of $137.50 and $150.00. As such, all fees should be in some multiple of one tenth of these rates, because attorney's fees are billed by the tenth of the hour.

[8] Respondent further failed to memorialize this agreement in the Stipulation submitted to the Court. *See supra* note 1.

as to the veracity of other statements Respondent has made to this Tribunal and to other parties and courts throughout the course of his practice. These doubts bring us to Respondent's testimony regarding the listed fees and his assertion that they are not charged to debtors.

Even without looking at Respondent's software or billing statements, we are at a loss to understand how Respondent could be both (a) totally ignorant as to how his firm's accounting is handled and the mechanics of the accounting software, yet (b) competent to testify, under oath, to what the meaning and effect of a fee listed in that software is. The two statements are fundamentally incompatible, and yet he testified under oath about both his ignorance of the accounting software and his certainty that these fees were not being assessed to Ise.

The accounting statement itself demonstrates that he erred in his testimony when he stated attorney's fees recorded in the accounts were not charged to Ise. It is clear that the fees were deducted from Ise's payments prior to his payments being applied to his debt. Each line of the ledger contains a snapshot of the state of a debtor's account on a given date and the changes relative to the previous line in the accounting statement. While the specific methods of calculating these figures were not disclosed to this Tribunal, the numbers conclusively demonstrate that the fees column is being added into the debtor's total balanced owed and that the "All Fees Unpaid" figures, when they are reduced to a lower or zero balance in a subsequent line, are deducted from the debtor's payments.[9] This is explicitly contrary to Respondent's testimony. Whether by gross negligence or intentional misconduct, Respondent charged attorneys fees to

[9] The columns in these ledgers fall into two categories: discrete, individual entries (such as the date, payments made, interest accrued since the previous payment, and application of individual fees) and running totals (the balances of the principal and the judgment, the unpaid interest, the "all fees unpaid" column, and the total balance due). Entries in the individual columns are added or subtracted from the running totals, so, for example, where no fees are currently unpaid and a new fee is applied, the "All Fees" and "All Fees Unpaid" columns are the same. *See, e.g.*, Pl.'s Ex. 3 at Feb. 18, 2013. However, where no payments have been made since the application of those fees, the "All Fees Unpaid" column carries over and keeps a running total of the outstanding fees and any new fees applied. *See id.* at Feb. 22–March 5, 2013 (adding four separate fees to the previous total, for a total of $180.00 unpaid fees). Once a payment comes in, those fees are collected from that payment (prior to the payment being applied to the debt) and the "All Fees Unpaid" is reduced to zero because payment has been collected. *See id.* at March 7, 2013 ($180.00 "all fees unpaid" reduced to zero in the subsequent entry, and only $200.00 of debtor's $380.00 payment applied to his debt itself).

debtors in violation of both his ethical duties and the law.[10] A few examples from Plaintiff's Exhibit 3, the statement of Ise's account, follow.

Ise's total balance on June 21, 2011, is listed as $16,601.48. The next entry, on February 26, 2012, lists no payments being made and a new balance of $18,075.30, a difference of $1,473.82. Because no payments were included, this difference should be entirely reflected in the charges listed on the February 26 line, and it indeed is. This line lists 250 days of interest accrued: $799.50 accrued on the principal and $614.31 accrued on the remainder of the judgment. The sum of these accruals is $1,413.81, which should be the difference in the two balances *if* Respondent is correct and fees are not being charged to the debtor. The line, however, includes $60.00 of fees, and the difference in balance between the two listings is $60.01 higher than it would be if it reflected the accrual of interest only and did not charge these fees to the debtor.[11]

The same can be seen more easily on the second line labeled June 6, 2012. Interest has already been accrued and calculated on the previous line; no payments, interest, or other adjustments are listed beyond a $0.50 fee. The balance on the first June 6 line is $17,666.48; the balance on the second is $0.50 higher, $17,666.98. In direct conflict with Respondent's testimony, the statement shows the fees are incorporated into the "Total Balance Due," and that balance is what Respondent has told both the debtor and the Court is owed. *Compare* Pl.'s Ex. 3 (the Statement) *with* Pl.'s Ex. 4 (the Stipulation for Further Order): Respondent's filing asserts that the judgment balance owed is $17,674.67, a "Total Balance Due" figure from the bottom of the page that is higher than it should be because Respondent had already charged the unapproved February 26 fee. This discrepancy was further concealed from the Court because the Stipulation for Further Order lists and seeks an order approving "attorney fees of $135.00"—the "All Fees Unpaid" balance at the time of that stipulation—but fails to disclose that Respondent had charged Mr. Ise $195.50 in fees by that date (but had already deducted $60.50 from Mr. Ise's payments, leaving only the $135.00 balance that Respondent sought the Court's approval to collect). *See* Pl.'s Ex. 3 (sum of "All Fees" from February 26, 2012 through June 29, 2012). Respondent's stipulation does not list the total fees charged; it lists only the remaining fees unpaid, an unconscionable affirmative misrepresentation to the Court that impeded the Court's ability to review

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[10] Respondent's practice with Ise is corroborated further by Plaintiff's Exhibit MLSC 2, provided by Micronesian Legal Services attorney Ronald Ledgerwood. *See infra*.

[11] Respondent's software apparently does not round intermediate numbers to the nearest penny, but carries fractional pennies forward invisibly until the final total is rounded up to the nearest cent. As such, an additional penny of interest accrued is shown in the balance but not shown in the intermediate calculations. This clearly does not constitute an ethical issue, but is included herein because it explains the extra one cent difference.

these fees for reasonableness as is the Court's obligation and right. *See Whipps*, 17 ROP at 12.

The billing practices revealed by the accounting ledger unquestionably show that Respondent's testimony regarding the calculation and charging of fees was false—Respondent's software *does* apply a debtor's payments to attorney's fees, and it does so prior to applying them to the actual debt in question.[12] Respondent unequivocally testified that it is not the custom or practice of his office to assess fees in advance of a stipulation or court order allowing for such, testimony that was clearly incorrect. *See* Test. of Respondent David Shadel at 1:51 p.m. Of further concern to the Tribunal, given Respondent's testimony that this was inadvertent, a software error, or somehow unknown to him, is the apparent ubiquity of this billing of undisclosed fees in his collection practice. This ubiquity is shown in the other evidence before the Tribunal: ledgers provided by Respondent to Micronesian Legal Services clients. *See* Pl.'s Ex. MLSC 2.

To better understand one of these ledgers, the Tribunal takes judicial notice of the public case file in *Western Caroline Trading Co. v. Olkeriil*, *et al.*, C/A No. 12-046, Respondent's collection case regarding one of the accounts in Plaintiff's Exhibit MLSC 2 (the account of Rosemary Terry).[13] The ledger from that case, Pl.'s Ex. MLSC 2 pgs. 3–4, shows numerous fees incurred under the "All Fees" column, and clearly shows, as is the case with Ise's ledger, that payments are applied to the fees prior to any interest or principal. *See, e.g., id.* at Jan 2, 2013 ($25.00 payment deducted exclusively from $190.00 in "All Fees Unpaid"); *id.* at July 26, 2013 ($100.00 payment deducted exclusively from $155.00 in "All Fees Unpaid"). Respondent's stipulations filed with the Court in Terry's case consistently exhibit the same practice found in Ise's case: **Respondent only reports to the Court the fees that he has not yet collected and fails to disclose the fees he charges and deducts from debtors' payments without the approval of the Court**. We list the following details that corroborate Disciplinary Counsel's claim of the consistent, systemic, and apparently universal nature of this practice, contrary to Respondent's testimony wherein he

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[12] We express no opinion, because it is not necessary, on whether Respondent's testimony was perjurious or merely woefully misinformed. Given his admission that he has no actual knowledge about how the accounting software works, it is more likely that he simply testified about the inclusion of fees based on hearsay, speculation, or some other understanding that does not give him a legitimate basis for knowledge to answer. *See* ROP R. Evid. 602. Such testimony is, without question, testimony a lawyer should know he is not competent to give, but incompetence does not necessarily rise to the level of perjury.

[13] Terry's case, Civil Action No. 12-046, involved multiple debtors jointly and severally liable on the same line of credit, several of whom entered a stipulation for judgment with Respondent.

claimed that at least one fee in Ise's case was simply "entered in error" and corrected when it was found.

In Terry's case, C/A 12-046, according to Respondent's *own* ledgers and court filings, the following occurred:

1. On April 6, 2012, judgment was entered for Respondent's client, including $180.00 of attorney's fees and allowing for "possible reasonable attorney fees thereafter." *Olkeriil*, C/A No. 12-046, Apr. 6, 2012 Default Judgment as to Ganny U. Madrach-Eluib and Rosemary Terry.

2. The debtors paid $350.00 to Respondent over the course of 2012. Respondent, however, billed $540.00 of fees to the debtors during that time. Neither of these things was ever reported to the Court, and the result is that the debtor's "Total Balance Due" increased significantly more than the interest accrued. "All Fees Unpaid" was reduced to $190.00. *See* Pl.'s Ex. MLSC 2 at 4.

3. On or about January 28, 2013, Respondent entered stipulations with two of the defendants which were submitted to the Court for approval. Those stipulations listed $330.00 and $435.00 in fees requested, amounts that do not represent the total fees Respondent charged the debtors but instead represent only the "All Fees *Unpaid*" balances from the ledger on January 24 and 25, 2013. Respondent failed to inform the Court that he had already collected $350 that he applied towards his fees. *Olkeriil*, C/A No. 12-046, Jan. 28, 2013 Stipulations for Orders as to Ganny U. Madracheluib [sic] and Rosemary Terry; *see* Pl.'s Ex. MLSC 2 at 4.

4. The exact same cycle repeated on or about July 15, 2013, when Respondent submitted another stipulation requesting $70.00 of attorney's fees and failed to disclose that, between January 29 and July 15, 2013, he had charged $150.00 of attorney's fees which he had already taken out of the debtors' payments. *Olkeriil*, C/A No. 12-046, July 15, 2013 Stipulation for Order as to Jeremy N. Olkeriil; *see* Pl.'s Ex. MLSC 2 at 4.

5. This repeated again with a stipulation on January 10, 2014, which failed to disclose that Respondent had charged (and collected from debtors' payments) fees totaling $585.00 between July 16, 2013 and January 10, 2014. The January 10 stipulation requests only $90 of attorney's fees, again the "All Fees Unpaid" balance—not the total fees charged. *Olkeriil*, C/A No. 12-046, Jan. 10, 2014 Further Stipulation for Order as to Jeremy N. Olkeriil; *see* Pl.'s Ex. MLSC 2 at 3–4.

6. Respondent continued to charge fees without Court approval throughout the rest of this case, continued to deduct those fees from the debtors' payments, and continued to file stipulations that failed to disclose this practice (and

affirmatively misrepresented the fees being charged) with the Court on March 28, 2014 and November 14, 2014. *See Okleriil*, C/A No. 12-046; Pl.'s Ex. MLSC 2 at 3.

Respondent's collection efforts with Lischelle Alambra show the same behavior. *See* Pl.'s Ex. MLSC 2 at 5–6. Again, taking judicial notice of her case file, C/A No. 13-135, we note Respondent's May 15, 2014 stipulation. This stipulation informs the Court that the judgment balance outstanding is $75,663.22, of which only $958.50 consists of attorney's fees, and claims that this balance reflects $800.00 of payments made by the defendant. *Alambra*, C/A No. 13-135, May 15, 2014 Stipulation for Judgment and Order. What this stipulation fails to mention is that, again, *according to Respondent's own ledgers*, the debtor's $800.00 worth of payments were applied directly to Respondent's unauthorized attorney's fees, not the outstanding debt, and that the actual fees charged by Respondent were $800.00 higher than reported to the Court. *See id.*; *see*, *e.g.*, Pl.'s Ex. MLSC 2 at 5, Jan 10, 2014 ($200.00 payment reducing "All Fees Unpaid" from $408.50 to $208.50).[14]

Returning to the instant case, the record is entirely devoid of any evidence that Respondent submitted the attorney's fees he billed to Ise to the Court for review, and contains conclusive evidence showing that those fees were deducted from Ise's payments contrary to Respondent's testimony (in what apparently is Respondent's usual practice). Respondent nonetheless testified that it is not his custom or practice to assess fees in advance of a court order or stipulation. His ledgers show that this testimony was false.

[4] Respondent's claims of negligence—that his law partner created the accounting system, and that he himself is "sort of a dummy when it comes to computers"—are both hard to believe and legally irrelevant. *See* Test. of Respondent David Shadel at 1:47 p.m. Even were his ignorance of his accounting practices true,[15] a lawyer cannot

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[14] In a stunningly brazen act, Respondent actually filed a Motion for Relief from judgment in Civil Action 13-135, claiming that he had mistakenly under-requested attorney's fees and itemizing $1,455.00 in billing that he claimed should be *added* to the judgment. Respondent filed a copy of his ledger, similar to the one in Plaintiff's Exhibit MLSC 2, where he has added this $1,455.00 in additional fees. Respondent nonetheless, again, failed to disclose that the $800.00 paid by Alambra already had been applied to his fees and failed to list or disclose the fees from May 1, 2012 through May 16, 2012, which were also deducted from Alambra's payments without leave of (or even knowledge of) the Court.

[15] The unreported fees appear to constitute, on average, significantly more than half of the billing in the collections cases analyzed for this decision, meaning that Respondent's income on these cases is more than twice what he reports to the Court. Given that Respondent testified that debt collection is much of his practice, we struggle to believe that he failed to notice how much extra money his law firm was

pass his ethical obligations on to his partner or his staff and then feign ignorance if he fails to monitor his firm. A lawyer who has been *explicitly admonished* by the Appellate Division for his failure to understand that the Court, not the lawyer, determines the reasonableness of attorney's fees has lost any benefit of the doubt in this area. *See Whipps v. Nabeyama*, 17 ROP 9, 12 (2009) ("As we noted before, this is not the first time this issue has been presented by [Mr. Shadel]. Thus, we reemphasize here that, in the exercise of its discretion, the Trial Division—not the attorney—[makes] the reasonableness determination about whether and to what extent to award attorney fees.").

FINDINGS AND DECISION

We find, by clear and convincing evidence, that Respondent David F. Shadel charged the listed attorney's fees and assessed them to Ise contrary to Respondent's testimony. We further find that these fees were not disclosed to, and were in fact affirmatively obscured from, Ise and the Court, because the figure included in the 2012 Stipulation, for which Respondent sought the debtor's consent and the Court's approval, represents only the "All Fees Unpaid" balance from the ledger—not the total accrued and assessed fees. This finding is corroborated by the aforementioned ledgers submitted to the Tribunal on behalf of Respondent's other collection defendants, where an identical pattern of affirmative misrepresentation to the Court can be seen by comparing the ledgers to the stipulations submitted in these cases.

As charged in Counts Six and Seven of the Complaint we find that this conduct, in which Respondent charged seemingly random attorney's fees to Ise without Ise's knowledge and without legal authorization to do so, violates ABA Model Rules of Professional Conduct 4.4 (Respect for Rights of Third Parties) and 8.4 (Misconduct). Respondent had no legal authority to assess these fees to Ise, and by deducting attorney's fees from Ise's payments without legal authority or judicial oversight, Respondent engaged in prohibited conduct that serves no purpose other than to burden Ise for Respondent's financial benefit.

As charged in Count Seven, we further find that these actions constituted engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, a violation of ABA Model Rule 8.4 (Misconduct). Because the stipulations submitted to the debtor and the Court do not accurately reflect the accrual and billing of Respondent's fees, these fees were concealed from both the debtor, who has a right to understand what he is being asked to pay, and the Court, which is required to evaluate and approve of attorney's fees *prior* to Respondent charging them. Respondent has been admonished

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making. Further, Respondent testified that he charges these fees directly to his client, not the debtor. Test. of Respondent David Shadel, March 5, 2015 at 1:32–34 p.m. If he is truly charging his client as well, it appears he is double billing for this work, making it even harder to believe that he would not have noticed this extra income.

by a previous Disciplinary Tribunal that misconduct involving the collection of attorney's fees inherently involves a dishonest or selfish motive. *See In re Shadel*, 16 ROP 262, 266 (Disc. Proc. 2009).

We find that Counts One through Five and Counts Eight through Ten have not been proven by clear and convincing evidence. We note, however, that Counts One and Two, which charge Respondent with failing to correct the total amount owed submitted to the Court in the 2007 Stipulation and the 2012 Stipulation for Further Order, appear to contemplate that this figure is incorrect in part because the listed fees do not account for the fees previously deducted from Ise's payments. As discussed above, we have found that the amount due listed in the 2012 Stipulation for Further Order *was* incorrect, as it incorporated charges for fees that Respondent had no authority to bill to Mr. Ise and consequently undervalued the payments Mr. Ise had made. The Complaint, however, only speaks to the total amount owed being inaccurately calculated—not the fees being improperly assessed and underreported—and fails to distinguish the fee error from the allegations that the total amount is incorrect because Respondent allegedly charged an excessive interest rate (allegations that have not been proven by clear and convincing evidence). We are convinced the Respondent has, at the very least, been grossly negligent if not outright dishonest in how he charges and accounts for his fees—and, as such the fees listed in the 2012 Stipulation absolutely *do* violate a lawyers duty of candor to the Court—but no Count in the Complaint alleges that Respondent's failure to report the fees constitutes a breach of candor to the Court. While it is absolutely clear that Respondent charged, and failed to report, these fees, it is less clear that he understood how this affected the total value of the judgment listed given his professed ignorance of his firm's accounting methodology.

If Respondent truly is ignorant as to these charges and the operation of his accounting software, he lacked the personal knowledge required to testify to the facts and practices he asserted to this Tribunal. His testimony explicitly disavowed the alleged practices, but his own ledgers show that he accrued and assessed these fees without Court authorization by deducting them directly from the money paid through Ise's payroll deduction. Nothing in the law authorized him to do so, as the Supreme Court has repeatedly told him. *See id.*

CONCLUSION

We find that the violations listed in Counts Six and Seven have been proven by clear and convincing evidence in violation of ABA Model Rules of Professional Conduct 4.4 and 8.4 and that disciplinary action is warranted. However, Counts One through Five and Eight through Ten have not been so proven. Because of Respondent's disciplinary history, suspension, at a mimumum, is required by ROP Disc. R. 14. However, "[t]he parties are directed to the case *In re Tarkong*, 4 ROP Intrm. 121, 131–32 (Disc. Pro. 1994), for a list of aggravating and mitigating factors this jurisdiction weighs in deciding

on a sanction." *In re Shadel*, 16 ROP at 254; *see also In re Shadel,* 16 ROP 262 (sanctions issued in Respondent's previous disciplinary case). The parties shall submit briefing on appropriate sanctions on or before April 3, 2015.

POLLOI, Associate Justice Pro Tem, concurring:

I join the decision of the Disciplinary Tribunal in its entirety. I write separately, however, to express my view of the statutes at issue. 1 PNC § 303 says that, when there is no applicable written Palauan law, the rules of the common law, as expressed in the Restatements of the Law or as generally understood and applied in the United States, shall be the rules of decision. But here, on the issue of post-judgment interest, there *is* an applicable written Palauan law, so there is no need to venture abroad to find other law to replace what we already have. Our own applicable law, 14 PNC § 2001, states that "[e]very judgment for the payment of money shall bear interest at the rate of nine percent a year from the date it is entered." This language plainly says what it says and admits no other reasonable interpretation.

Asking a court to carve out an exception in the face of such clear statutory language borders on asking the Judiciary to legislate from the bench. However, despite my view that the statute is clear, the Tribunal is correct that the legality of a split-interest rate judgment (that accrues interest in excess of nine percent) is a matter for courts of law to decide. The legality of this practice is not before this Tribunal, was not fully briefed or explored, and was not subjected to a full adversarial adjudication as it might be in a civil or criminal case before the Supreme Court. A Disciplinary Tribunal only is tasked with addressing alleged ethical violations on a compressed timetable, not deciding pure questions of law in the first instance. Accordingly, I concur.