In re David F. Shadel

Disciplinary Proceeding No. 14-002

Disciplinary Tribunal
Republic of Palau

Decided: May 28, 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**: Sanctions

The ultimate responsibility of a Disciplinary Tribunal is to select the appropriate discipline in light of all the circumstances of the particular case.

Decision and Order

Per Curiam:

This Tribunal has authority to preside over attorney disciplinary actions and pursuant to the Palau Constitution, Article X section 14, and the Rules for the Discipline of Attorneys enacted subject to that constitutional authority.

Based on the findings set forth in the March 25, 2015 Decision, incorporated by reference, in which this Tribunal found Respondent David Shadel in violation of multiple ABA Model Rules of Professional Conduct and further found that, because of his disciplinary history, suspension, at a minimum, was required by ROP Disciplinary Rule 14. Briefs were submitted by the parties on sanctions under the factors outlined in *In re Tarkong*, 4 ROP Intrm. 121, 132–32 (Disc. Pro. 1994). The decision of this Tribunal is hereby entered for the reasons stated below.

APPLICABLE STANDARD

[1] The ultimate responsibility of a Disciplinary Tribunal is "to select the appropriate discipline in light of all the circumstances of [the particular] case." *Tarkong*, 4 ROP Intrm. at 131 (citing *Gary v. State Bar of California*, 749 P.2d 1336, 1340–41 (Cal. 1988). However, for purposes of determining what discipline is appropriate, this Court's

Disciplinary Tribunal has adopted and applied the following aggravating and mitigating factors from the ABA Standards for Imposing Lawyer Discipline.[1]

Aggravating Factors: (a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of victim; (i) substantial experience in the practice of law; (j) indifference to making restitution.

Mitigating factors: (1) absence of prior disciplinary record; (2) absence of dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to the disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; (13) remoteness of prior offenses.

DISCUSSION

We begin by reiterating that, by rule, Respondent's sanction must, at a minimum, include a suspension from the practice of law. ROP Disciplinary Rule 14 states that "[a]n attorney disciplined after the effective date of these rules who has a record of: (a) three or more censures and/or reprimands; or (b) any combination of a suspension or disbarment, plus one or more censures or reprimands *shall* be subject to suspension from the practice of law." *Id.* (emphasis added). Respondent's record includes three censures or reprimands and a suspension, so this rule is applicable under part (a) and part (b), as should be clear from his previous suspension under this rule in *In re Shadel*, 16 ROP 262, 267 (2009). We made this clear in our previous order, so it defies all belief that Respondent's briefing includes the statement "[w]e start with the proposition that, barring other factors, a private reprimand is appropriate for a violation." We do

[1] The ABA Standards have been superseded by the ABA Model Rules for Lawyer Disciplinary Enforcement. However, the new Model Rules include only the following four holistic factors to be considered: "(1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors." We consider the *Tarkong* factors significantly more useful due to their specificity, and instructed the parties to brief them.

not bar other factors, and, despite Respondent's apparent willingness to do so, will not disregard the Rules promulgated by the Palau Supreme Court.

Respondent attempts to argue that a previous Tribunal held, *sub silentio*, that "shall be subject to suspension" does not require suspension, over the dissent of the Chief Justice. *See generally In re Shadel*, 6 ROP Intrm. 252. This argument is fundamentally flawed, primarily because it entirely misreads the Chief Justice's concurring and dissenting opinion, which makes no mention of Rule 14 and merely expresses his view, as a member of that Tribunal, that Respondent's "third time violation requires suspension from the practice of law." *See id.* at 258 (Ngiraklsong, C.J., concurring in part and dissenting in part). Further, Respondent's proposed interpretation, that the word "subject" controls and is therefore discretionary, and that the word "shall" is apparently irrelevant, would render the entire rule a nullity: suspension and disbarment are already available as potential sanctions for *first* time offenses if, in the discretion of the Tribunal, the offenses are egregious enough to warrant such action. *See* ROP Disc. R. 3. Finally, and most obviously, a previous Tribunal held that Respondent was subject to Rule 14's prerequisite following his fourth disciplinary violation—and promptly suspended him as was required. *In re Shadel*, 16 ROP Intrm. at 267. We agree with the holding of the former Tribunal and decline to read Rule 14 as being entirely meaningless.[2]

With our ultimate duty in mind, we turn now to the specifically applicable factors in considering the required sanction.

Aggravating Factors

(a) Prior Disciplinary Offenses

Respondent has four prior sanctions for ethical violations, including a previous suspension of four months issued at the end of 2009. He was reinstated on or about May 21st 2010, when his suspension was set to expire, and committed the instant violations on or before July 3, 2012, when he submitted the 2012 Stipulation which misrepresented the attorney's fees being billed and failed to disclose that they had been deducted from the debtor's payments prior to receiving Court approval. Respondent committed this violation barely two years after returning to practice, a length of time that does not come close to being "relatively remote in time" from his previous

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[2] In perhaps the most galling and tone deaf argument raised in this entire case, Respondent compares a mandatory suspension from the practice of law—which is a privilege, not a right—after a *fourth* disciplinary violation to mandatory minimums in criminal sentencing which, he notes, are currently subject to political challenges in the United States. Respondent's disregard for the fundamental constitutional, racial, and social concerns intertwined in the mass incarceration of a predominantly minority population under United States drug policy so shocks the senses that it manages—stunningly—to be even more offensive than it is unpersuasive.

suspension. Moreover, Respondent's 1996, 1997, and 2009 violations all involved dishonesty or deception of adverse parties, law enforcement, or the Court. Respondent stands before this Tribunal on similar acts of dishonesty. We find his disciplinary history deeply troubling.

(b) Dishonest or Selfish Motive

Respondent disclaims any dishonest or selfish motivation for his mishandling of attorney's fees, because he asserts that his clients would simply have paid him those fees eventually regardless of whether they were collected from Ise. As the previous Tribunal did, we disagree. *See In re Shadel*, 16 ROP at 266. Respondent's wrongful billing of attorney's fees is decidedly in his self interest.

First, legal representation is not cheap—not even by the standards of a financial institution or business that has the assets to engage in commercial lending. A lawyer who is able to regularly and successfully collect attorney's fees from a debtor can effectively hold himself out to his clients, and to potential future clients, as a free or low cost employee, a highly attractive proposition that is certain to be taken into account by clients when considering their choice of counsel. For a lawyer in private practice, client acquisition and retention is a major and compelling motivation to stretch the ethical rules when handling the collection of attorney's fees.

Second, not all legal invoices get paid without dispute. Sometimes clients feel the amount of billable time an attorney claims was unreasonable; sometimes they dispute the attorney's effectiveness; sometimes they simply do not have the money and cannot pay what was agreed. Shifting attorney's fees to a debtor, either by wrongful automatic payroll deduction or as part of a Court order acquired under false pretenses, alleviates these possible concerns for an attorney.

Finally, the simple truth is that the imposition of attorney's fees—prior, as it is clear Respondent is collecting them, to the offset of outstanding debt—extends the amount of time it takes a debtor to pay off his debt. A debtor who takes longer to pay off his debt accrues more interest on his debt and is more likely to default, generating billable hours for the attorney. It is patently in the interest of a debt collection attorney to stretch a debt out instead of collecting it immediately.

For all these reasons, we find a selfish or dishonest motive in Respondent's acts.

(c) Pattern of Misconduct

A "pattern," in legal terms, is "a mode of behavior or series of acts that are recognizably consistent." *Black's Law Dictionary* 1308 (10th Ed. 2014). We note two distinct and separate patterns of misconduct in Respondent's behavior. First, recognizing that this factor is in some way duplicative of factor (a), we cannot ignore that this is the fourth disciplinary violation Respondent has been found to have committed that involved affirmative acts of dishonesty, and his fifth overall sanction in

a period of approximately 13 years. That is unquestionably a pattern of unethical practice. Many, if not most, attorneys complete their entire careers without being found to have committed a single ethical infraction; this Tribunal was unable to find another attorney in this jurisdiction who was disciplined on five separate occasions for ethical violations.

Second, Respondent unquestionably has been engaging in these billing practices and affirmative misrepresentations to the Court in a number of cases, and based on Respondent's further admissions following trial (that this error "perpetuated itself in more than one case") this Tribunal is convinced that this practice was extensive. Indeed, it was the pattern itself—the series of acts that were recognizably consistent enough to allow the Tribunal to discern the mechanical workings of Respondent's accounting software—that allowed the Tribunal to conclusively identify the practice despite Respondent's vehement denial of it and failure to provide any credible explanation for the evidence demonstrating it.

We would, however, emphasize that the sanction in this case does not take into account Respondent's apparent and obvious violations of both the ABA Model Rules and the binding precedent of the Appellate Division where he failed to disclose fees being collected to the Court in matters other than the Ise case. This Tribunal heard and considered the evidence presented from Respondent's other cases for two purposes. First, Respondent failed to adequately explain his ledgers and accounting sheets when asked about them on the stand. He failed to produce requested records prior to trial, so the Tribunal analyzed the similar ledgers in evidence and compared them to the corresponding available public judicial records so as to fully understand the mechanics of his accounting system.[3] Second, and most critically, Respondent's actions and records in other collection cases in evidence were considered with regard to Respondent's credibility as a witness—credibility, we found, that he all but entirely lacks.

(d) Multiple Offenses

This Tribunal stands convened to impose discipline solely for the singular offense of which Respondent was found liable, so the factor of multiple offenses is inapplicable.

(e) Bad Faith Obstruction of the Disciplinary Proceeding by Intentionally Failing to Comply With Rules or Orders of the Disciplinary Agency

Prior to trial, Disciplinary Counsel served Respondent with a subpoena for an extensive number of his files which, Counsel reasonably believed, would evidence the

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[3] Respondent also argues that this Tribunal should not award restitution to the MLSC defendants in question—something it likely cannot do, and that we have never suggested it might do—further illustrating his fundamental refusal to accept the judgment of this Tribunal and the bases of its decisions.

practices alleged in the Complaint. Respondent moved to quash this subpoena, a motion that was not resolved until the date of trial. However, on the date of trial the parties agreed that the files Respondent provided—far fewer than those that were requested—were sufficient to proceed, and as such the subpoena was effectively withdrawn. While our eventual analysis of the testimony and documents in evidence led to our understanding that the subpoenaed records are unquestionably relevant (and would have greatly illuminated the pattern and practice displayed in this case), we cannot find bad faith or obstruction in Respondent's challenging of the subpoena given that Disciplinary Counsel consented to moving forward with trial.

(f) Submission of False evidence, False statements, or Other Deceptive Practices During the Disciplinary Process

Our previous Decision found that portions of Respondent's testimony, whether as a result of inexcusable ignorance or of perjury, were conclusively false. We find this factor highly relevant, because an attorney who stands accused of ethical violations and fails to adequately research the facts surrounding alleged issues in his own work product cannot then rest on his own ignorance as a defense. Indeed, Respondent identified at trial that his partner, Kevin Kirk, was perhaps the best person to answer certain software and accounting questions presented by the Disciplinary Counsel. With the absolute right to call Kirk as a witness, Respondent made the presumably strategic decision not to do so, as was his right as well. But without such alleged corroboration or explanation, Respondent's testimony stood as wholly lacking in credibility and demonstrably incorrect, and we consider this factor relevant.

(g) Refusal to Acknowledge Wrongful Nature of Conduct

We consider this factor broadly, as it again involves this Tribunal's subjective evaluation of Respondent's emotional state. We acknowledge that this factor cannot justly or constitutionally be held against an attorney purely for defending his own factual innocence at trial. *See In re Shadel*, 16 ROP at 266. But just as a criminal defendant may be given consideration for remorse or mitigation after he is found guilty by a judge or jury, so too may an attorney after his factual defense from ethical allegations has failed. Yet several details from Respondent's post-trial filings concern us, filings in which Respondent has continued to evidence denial of the wrongful nature of his actions.

Throughout his Motion to Reconsider, where Respondent presented nearly 70 pages of argument and evidence that was largely available at the time of trial yet held back for either strategic or other reasons, and in his sanctions brief, Respondent consistently calls his unethical billing practices and the affirmative misrepresentations to the Court about such in his stipulations a "failure to supervise" or "failure to monitor" the accounting being done at his firm. That, however, is only part of what Respondent was found to have done, because it is not his secretary's signature, or his accountant's signature, or his law partner's signature that asserts to the Court that the statements

in his debt collection stipulations, including the 2012 Stipulation, are true—it is his. No member of his staff stood before the Court and assured the Court, either expressly or by implication, that the documents Respondent submitted truthfully represented the case at bar. Nor was it Respondent's secretary, or his accountant, who took an oath as a member of the Palau Bar to uphold and obey the laws of this Republic. Respondent presented testimony to this Tribunal that was false, and submitted documents to the Court that were also false. Those alone would be sufficient to warrant significant sanctions, even absent the purported "failure to monitor" the collection of fees, and we are troubled that he so readily dismisses such conduct as mere negligence, particularly given his ethical history.

Respondent's briefing and testimony asserted remorse, as any competent lawyer knows they should—but his actions, his choice of language, and his continued attempts to deflect from his conduct demonstrate a failure to appreciate what he has done wrong.

(h) Vulnerability of Victim

Both parties discussed the victim, Ise, at some length during trial and in their sanctions briefing. The Tribunal's primary concern is that Ise was a debtor operating pro se, and clearly had some belief that Respondent would be acting within the requirements of the law. We do not consider the disputed and unproven issue of whether or not Respondent informed Ise of his right to retain counsel, but it is an ethical reality that an attorney must treat unrepresented persons differently than he might treat opposing counsel. *See, e.g.*, ABA Model Rule of Professional Responsibility 4.3 (Dealing with Unrepresented Persons).

Respondent's briefing however, for lack of a better term, attempts to put the victim on trial. Respondent argues that "Ise was not some ingénue or inexperienced with attorneys and finance" and charges Ise with a deceptive motivation, an attempt to skirt the order of the Court, and an unexplained refusal to pay this debt while he was paying off other debts. Beyond the fact that it is Respondent, and not Mr. Ise, who is on trial here, the latter of these allegations assume facts not in evidence and represent little more than an attempt to obfuscate the actual basis for this sanction—Respondent's actions. The ABA Model Rules of Professional Conduct exist to hold attorneys to a higher standard than those outside of the profession, and it is under these rules, inapplicable to Ise as he is not an attorney, that Respondent is being evaluated.

Nevertheless, we emphasize what the Tribunal cannot consider, despite the repeated attempts of Disciplinary Counsel to invoke it: this decision has nothing to do with the fact that Ise's $6,000 debt ballooned to approximately $30,000 in total payments. The sanctions imposed today considers Respondent's improper billing and reporting of attorney's fees, which, based on the evidence before the Tribunal, constituted only an extremely small portion of Ise's total payments. It cannot be overstated that Ise's debt ballooned primarily because it remained outstanding and accruing interest for nearly

20 years, a fact that falls on the creditor who extended a loan Ise could not repay and on Ise himself—not on the Respondent. Even if Ise's debt had been accruing interest only at the statutory post-judgment rate of nine percent, and never at the legal consumer credit rate, a $6,000 debt that went unpaid for 20 years would nearly triple over that time period at that rate. The practice of extending and taking out loans that cannot be paid back in a timely fashion is a financially crippling one and surely a question that policymakers must consider, but it is not an attorney disciplinary issue.

(i) Substantial Experience in the Practice of Law

The parties do not dispute that Respondent has been practicing law for over thirty years, is highly familiar with the Palauan legal system, and has been engaged in debt collection practice for a significant portion of that time. We are further frustrated, however, that Respondent is before this Tribunal on yet another case involving billing of attorney's fees, considering his express history of admonishment by the Court regarding his billing practices. *See Whipps v. Nabeyama*, 17 ROP 9, 11–12 (2009) (citing *W. Caroline Trading Co. v. Kloulechad*, 15 ROP 127, 129 (2008) (reiterating to Respondent that the Court, not Respondent's stipulation, determines the reasonableness and availability of attorney's fees). Respondent's substantial experience in the practice of law includes substantial direction from the Appellate Division that he may not do what he has been doing. *See id.*

(j) Indifference to Making Restitution

Respondent testified, and it appears undisputed, that a repayment offer of $4,000 was extended to Ise but that Ise rejected this offer. Respondent further testified, and the records reflect, that the unapproved attorney's fees were eventually removed from the ledgers prior to the final accounting of Ise's debt. We accept these facts in Respondent's favor as evidence of his prompt willingness to make restitution, and that restitution was in fact offered prior to this disciplinary case.

<u>Mitigating Factors</u>

Many of the mitigating factors are merely the opposite of the aggravating factors, and as such are inapplicable or applicable as discussed above: (1) absence of prior disciplinary record; (2) absence of dishonest or selfish motive; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to the disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (12) remorse; (13) remoteness of prior offenses.

Respondent has argued no other mitigating factors among those considered by this Tribunal, but instead invokes the hardship and repercussions that a suspension would impose on his employees, his law partner, and his family. While such consequences are unquestionably regrettable, the responsibility for those consequences falls squarely on the shoulders of an offending attorney, just as they would on a criminal defendant who had children and employees. To absolve or pardon Respondent because his actions

harm not just debtors, but also his family, would be to deem the ethical rules toothless and leave the residents of this jurisdiction—his employees and family included—at further risk. We cannot do so.

SANCTION

Having considered the aforementioned aggravating and mitigating factors, we are obligated to "impose a penalty that protects the public, the legal profession, and the courts from similar future conduct." *In re Shadel*, 16 ROP at 267. Given Respondent's extensive legal experience, we do not believe this behavior would have been prevented by further continuing legal education or by requiring Respondent to retake the Multistate Professional Responsibility Exam—a sanction previously imposed upon him in 1997 which has proven to be ineffective. *See In re Shadel*, 6 ROP Intrm. at 257. Nor do we see how supervision by another attorney, Respondent's suggestion, would likely be effective, given that Respondent's offense involves deception of the legal entity that already exists to supervise his practice—the Court itself. *See Whipps*, 17 ROP at 11–12. Finally, we cannot ignore the fact that Respondent, having already served a definite suspension from the practice of law after his fourth disciplinary violation, nevertheless stands before us again to be sanctioned for the fifth time. *See In re Shadel*, 16 ROP at 267. Our fundamental duty—to protect the public, the profession, and the courts—requires that we ensure there will not be a sixth.

In consideration of the offenses found in this case and Respondent's lengthy disciplinary history, it is DECREED AND ORDERED by this Tribunal that the Respondent, David F. Shadel, shall be DISBARRED and his name stricken from the rolls of attorneys and trial counselors authorized to practice law in the Republic of Palau. The following further obligations are hereby imposed:

1. Respondent shall make full and prompt restitution by refunding to Jose Ise any and all attorney's fees collected above and beyond that authorized by order of the Court—that is, any fees exceeding a gross total of $382.50, that being the sum of the fees authorized by the Court in the 2007 Order and the 2012 Further Order that were put before this Tribunal. Further, Respondent shall recalculate any interest due after removing the improper attorney's fees and refund any excess amount that he collected to Jose Ise. Respondent shall submit proof of his calculation and his payment to the Chief Justice within thirty (30) days of this Order.

2. Respondent is not responsible for attorney's fees for prosecuting this case, as Disciplinary Counsel is a government attorney. Respondent shall, however, be responsible for the actual reimbursable costs of pursing this action in the event that Disciplinary Counsel notifies the Tribunal and Respondent of such costs. *See In Re Shadel*, 16 ROP at 267.

3. Respondent shall notify by registered or certified mail, return receipt requested, all clients he currently represents in pending matters of his disbarment and his consequent inability to act as an attorney after the effective date of this order. He shall advise clients to seek legal assistance elsewhere. ROP Disc. R. 12(a).

4. In his cases where litigation or administrative proceedings are currently ongoing, Respondent shall further advise the client of the importance of prompt substitution of counsel in his place. Notice shall be given to the attorney or attorneys for any adverse parties or to the parties themselves if pro se, and such notice shall state the place of residence or means of contact for Respondent's client so that opposing counsel or an adverse party may contact the client to inquire as to substitution of counsel. *Id.*

5. In the event that a client, whose case is pending before a court or agency, does not obtain substitute counsel before the effective date of this order, Respondent shall promptly move for leave to withdraw on or about that date. ROP Disc. R. 12(b).

6. This order is effective thirty (30) days after its entry. ROP Disc. R. 12(c).

7. Between the date of this order and its effective date, Respondent shall not accept any new retainers or engage as an attorney for another in any new case or legal matter of any nature. During such time, Respondent may wrap up and complete any matters which are currently pending as of the date of this order. *Id.*

8. Within ten (10) days from the effective date of this order, Respondent shall file with the Court an affidavit showing (a) that he has complied with the provisions of this order and the Disciplinary Rules, and (b) that he has notified all other jurisdictions in which he is admitted to practice of this disciplinary action, as may be required by the rules of such jurisdictions. Respondent's affidavit shall set forth the residence or address where later communications may be directed to him. ROP Disc. R. 12(d).

9. Respondent shall keep and maintain records of the steps taken by him pursuant to this order and the corresponding Disciplinary Rules so that proof of compliance with these rules will be available in the event further or subsequent proceedings are necessary. Such proof of compliance will be a prerequisite to any petition for reinstatement. ROP Disc. R. 12(g)

10. For the next five (5) years Respondent shall advise the Clerk of the Supreme Court of Palau of his current physical address, his current mailing address and a current phone number or email address.

Pursuant to ROP Disciplinary Rule 12 (e)–(f), the Chief Justice shall cause notice of Respondent's disbarment to be published in a newspaper of general circulation in Palau and shall transmit certified copies of this Decision and Order to all judges within the Republic of Palau and the administrative agencies therein.