

In re Shadel, 5 ROP Intrm. 265 (1996)
IN THE MATTER OF DAVID F. SHADEL, Esq.,
Respondent.

DISCIPLINARY PROCEEDING NO. 9-95

Supreme Court, Disciplinary Tribunal
Republic of Palau

Decision and order
Decided: October 10, 1996

Disciplinary Counsel: Raynold Oilouch

Counsel for Respondent: Richard L. Johnson

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice

NGIRAKLSONG, Chief Justice:

Disciplinary Counsel filed a complaint against David Shadel, an attorney licensed to practice law in the Republic of Palau. The complaint concerns Shadel's conduct following a traffic accident. **¶266** Many of the pertinent facts are contested. After conducting a hearing, we find the following facts.

At approximately 7:30 p.m. on December 12, 1994, Shadel was driving his truck on the main road in Koror, Palau. Shadel made a left turn onto the road leading to the old McDonald Memorial Hospital. Dixon Taro, who was then four years old, was in the cross-walk of that road. After Shadel made the turn, the left front portion of his truck, near the headlight, hit Taro, who went underneath the truck.

Shadel stopped his truck and saw the boy partially underneath the truck. When the boy began screaming and writhing in pain, Shadel held him to the ground in an attempt to keep him from suffering further injuries. An ambulance arrived, and the boy was transported to the hospital. Before any police officers arrived to investigate the scene, Shadel picked up several hard candies that had been in the street in front of and along the left side of the truck and put them in his pocket.

Police Officer John Deck Timarong arrived at the scene in a marked patrol car with its blue lights flashing and its siren activated. Timarong was wearing a full dress police uniform and a badge. Timarong told Shadel not to touch anything and they waited for other public safety officers to arrive at the scene.

Then officer Imetengel arrived at the scene to join in the investigation. Shadel told Imetengel that the boy had run into the side of the truck, near the driver's door. The officers then

In re Shadel, 5 ROP Intrm. 265 (1996)

turned their attention to a sketch which had been made of the accident scene. While they were examining and discussing the sketch, Officer Imetengel heard some noise near the spot where Shadel was standing. When he examined that area, he saw some hard candies on the street next to the driver's door of Shadel's truck. He asked Officer Timarong if he had seen any candy on the street before, and Timarong said he did not. They asked where the candy came from, and Shadel said he had picked up the candy earlier, so he had dropped it to show where it had been. But Shadel did not drop any candy in front of the truck's left headlight. He only dropped candy by the driver's door of the truck, where he had told the officers the boy hit the truck.

Continuing his investigation of the scene, Imetengel saw a small zori underneath the truck. He bent down to examine it, and Officer Lakobong told him to wait and he would get a flashlight. Imetengel continued his investigation of the scene while Lakobong got the flashlight. When Lakobong returned with the flashlight and shined it under the truck, they saw that the zori was gone. They 1267 discussed the disappearance of the zori with each other, and Imetengel then took the flashlight and shined it into the back of the truck. There, on a corner of the truck bed, they saw the zori. Imetengel asked Shadel who had put the zori there, and Shadel admitted that he had picked it up and put it there. By that time, it appeared to Officer Imetengel that Shadel was "trying to make this crime scene upside down" and he directed Timarong to take Shadel into custody and to transport him to the police station. Shadel was charged in a five-count information with speeding, failure to signal while turning, reckless driving, negligent driving, and obstruction of justice. He entered into a plea agreement under which he pled nolo contendere to reckless driving, and the remainder of the counts were dismissed. *ROP v. Shadel*, Case No. 32-95.

The disciplinary complaint charges Shadel with violating Rules 8.4(c) and 8.4(d) of the American Bar Association Model Rules of Professional Conduct. These rules apply to attorneys practicing in Palau. ROP Professional Conduct Rule 2(h). The complaint also charges Shadel with violating ROP Professional Conduct Rule 2(a). "The standard of proof for establishing allegations of misconduct shall be clear and convincing evidence." ROP Professional Conduct Rule 5(e).

Dishonesty

Counts One and Two of the complaint allege violations of Model Rule 8.4(c) and ROP Professional Conduct Rule 2(a). Model Rule 8.4(c) provides that "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." ROP Professional Conduct Rule 2(a) prohibits "[t]he commission of any act involving . . . dishonesty"

Disciplinary Counsel claims that Shadel's conduct in picking up the candy, telling the officers that the child ran into the door of his truck, dropping the candy near the door of the truck and telling the officers that that was where he found the candy, and removing the zori from underneath the truck amounted to dishonesty. Shadel testified that he picked up the candies because it was Christmas and he wanted to make sure the little boy got his candies back. He said nobody identified himself as a police officer, and he was not sure that a police investigation was

In re Shadel, 5 ROP Intrm. 265 (1996)

being conducted. Regarding the zori, he said he picked it up so it wouldn't get lost. Moreover, he claims that his conduct was a result of a haze of confusion brought on by the tragic accident and his role in it.

While we understand that a person may be subject to unclear thinking in the moments immediately after an accident, the evidence **¶268** does not paint as benign a picture of Shadel's actions as he would have us believe. After the accident, Shadel was thinking rationally enough to restrain the child from movement in order to prevent aggravation of his injuries. He instructed witnesses to call for an ambulance. He prevented a bystander from taking the child to the hospital in his personal car, realizing that injuries could be aggravated by movement and transportation of the boy by a nonprofessional. We view these actions as showing that Shadel was thinking rationally under the circumstances and capable of exercising reasonable judgment.

Although one can view Shadel's picking up the candies as motivated by factors other than an intent to mislead the police, his other actions are less ambiguous. Particularly disturbing is his dropping the candies on the street by the door of his truck while the police officers' attention was diverted elsewhere. Moreover, when confronted by the police, he told them that he dropped the candies to show where they had been before he picked them up. In fact, he did not drop them in the same location as he had found them. He dropped them all by the driver's door of the truck and none in front of the truck. When this conduct is considered in the light of his statement to the officers that the boy ran into or collided with the side door of his truck (when, in fact, the front of the truck struck the boy), the inference is that he relocated the candies to support the version of events that he wanted the police to believe. It is also worth mentioning that, if Shadel's testimony that he never saw the boy is true, then Shadel did not know how the boy came to be underneath his truck and he made his statement to the police without regard for its truth or falsity.

Additionally, after being told not to touch anything, Shadel removed a zori that was underneath the truck and placed it on the rail of the truck bed. He claims that he moved the zori so it would not get lost, but if that was his concern, he could have called the officers' attention to the zori where it laid rather than disobeying the instructions not to touch anything.

The foregoing actions of Shadel, when viewed together, lead us to find that Shadel engaged in this conduct with the intent to mislead the police and impede their investigation of what had occurred at the accident scene. Any suggestion that Shadel did not know that police were on the scene is incredible. One officer arrived in a marked car with its blue lights flashing and the siren wailing. Some officers were in uniform as well. Also, Officer Timarong told Shadel not to touch anything until the other officers arrived.

¶269 Therefore, Shadel's conduct constitutes dishonesty within the meaning of Model Rule 8.4 (c) and ROP Professional Conduct Rule 2(a). Although in most cases the rule is applied in cases arising out of a lawyer's conduct in dealing with a client or in the context of litigation, the rule applies to conduct occurring outside of the practice of law as well. *See The Florida Bar v. Poplack*, 599 So.2d 116 (Fla. 1992)(Attorney's false statement to police officer investigating disabled car constituted conduct involving dishonesty and misrepresentation for which attorney

was disciplined.).

Conduct Prejudicial to the Administration of Justice

Model Rule 8.4(d) prohibits an attorney from "engag[ing] in conduct that is prejudicial to the administration of justice." Although Model Rule 8.4(d), like 8.4(c) is generally applied with regard to conduct occurring in the context of an attorney's professional activities, its applicability is broad enough to cover other activities that bear on the fitness to practice. *See Matter of Howe*, 257 N.W.2d 420 (N.D. 1977) (Failure to disclose material fact on bar application is conduct prejudicial to the administration of justice). And, while Model Rule 8.4(d) has been criticized for its vagueness, there can be little question of its applicability where, as here, an attorney deliberately engages in dishonest conduct designed to impede a police investigation.

Shadel contends that he did not violate this rule because the results of the investigation and the ensuing criminal action against him were not prejudiced. We reject this argument. Shadel's conduct interfered with the police investigation of the accident. An official investigation of an accident scene is part of the administration of justice. *See State ex rel. Okl. Bar v. Bourne*, 880 P.2d 360, 363 (Okl. 1994) (the administration of justice encompasses the system of justice as a whole). Moreover, the fact that Shadel eventually pled *nolo contendere* to some of the charges does not mean that prejudice to the administration of justice is absent. The focus is on whether the conduct "causes or has the potential to cause harm or injury . . ." to the administration of justice. *See In re Bouchier*, 909 P.2d 1234, 1237 (Or. 1996) (quoting *In re Altstatt*, 321 Or. 324, 334, 897 P.2d 818 (1990)). Shadel's conduct harmed the investigation of the accident in that he impeded the police officers and diverted their efforts from the investigation of the accident. Thus, Shadel violated Model Rule 8.4(d).

1270

Sanctions

There is no doubt that Shadel is truly and sincerely remorseful about what occurred. We also note that his judgment may have been clouded somewhat by the terrible scene he was confronted with, although not to such a degree as to excuse his conduct. These are mitigating factors to be considered in imposing sanctions for Shadel's violations of the Disciplinary Rules. On the other hand, Shadel has been previously disciplined for violations of the rules regarding conflicts of interests and forbidden communications with a party represented by counsel. *See In the Matter of the Law Office of Kirk and Shadel*, 3 ROP Intrm. 285 (1993). That is an aggravating factor to be considered. *In the Matter of John S. Tarkong*, 4 ROP Intrm. 121, 131 (1994). Considering these factors together with the circumstances of Shadel's violations, we impose sanctions as follows:

IT IS ORDERED that Shadel shall

1. Perform 100 hours of free legal services representing indigent criminal defendants in accordance with the directions of the Court;
2. Within six months from the date hereof, complete a four- credit continuing legal

In re Shadel, 5 ROP Intrm. 265 (1996)

education ethics course that has been accredited by a state bar of the United States and, within such time, submit an affidavit to the Court specifying the name of the course attended (or, if completed by listening to audio tapes, the name and date of the course taped) and the date thereof; and

3. Pay the costs of the present proceeding.

SO ORDERED this 10th day of October, 1996.

MILLER, Justice, dissenting:

Our disciplinary process requires each member of the panel to assess the evidence and to determine whether a violation of the disciplinary rules has been demonstrated by clear and convincing evidence. The inferences drawn by my colleagues are not unreasonable and, were I sitting in appellate review of their findings, I would uphold them. For my own part, however, sitting as an independent factfinder, I do not believe that it has been clearly and convincingly established that respondent violated the disciplinary rules for which he is today sanctioned. Unlike my colleagues, I cannot discern in respondent's actions -- with the **L271** degree of certainty our rules require -- an intent to mislead or otherwise act dishonestly.

As the majority acknowledges, picking up the candies, although ill-advised in retrospect, was not clearly nefarious, but may have been motivated by sympathy for the injured boy.¹ The majority does not, however, acknowledge the "Catch-22" that respondent thereby created for himself: Had he not tried to replace the candies on the ground, he would have been equally open (if not more so) to an accusation that he had tampered with evidence. Thus, I do not take as harsh a view of his decision to do so. Moreover, I do not attach particular significance to the fact that he acted while the police officers' attention was "diverted elsewhere", *see supra*, given his immediate acknowledgment -- both as to dropping the candy and moving the zori -- that he had done so. What remains, therefore, is the fact that his placement of the candies did not match their original scattering which, according to a witness, formed an arc from the driver's door (where respondent placed them) to the front of the car. While it is possible to infer that "he relocated the candies to support the version of events that he wanted the police to believe," *see supra*, and, as I presume the majority means to say, that he did so with knowledge that that version was false,² such an inference is not inevitable. Whether or not one credits respondent's assertion that he acted without thinking at all, it is simply not sufficiently clear to me that one can infer from this discrepancy an actual intention on respondent's part to obstruct or misdirect the police investigation. I therefore respectfully dissent.

¹ Respondent testified that he picked up the candies in order to return them to him. The only witness to respondent's actions at that time, whose testimony the majority otherwise credits, stated that respondent picked up the candy, while (or perhaps after) saying to the boy, "Oh, you lost your candy."

² I would not, and I do not understand the majority to, discipline respondent simply because his version of what happened was wrong, or even because he offered his own version without a sufficient basis for doing so.