In re Shadel, 6 ROP Intrm. 252 (1997)
In the Matter of DAVID F. SHADEL, Respondent.

DISCIPLINARY PROCEEDING NO. 1-97

Supreme Court, Appellate Division
Republic of Palau

Decision and order
Decided: November 14, 1997

Disciplinary Counsel: Scott R. Benbow

Counsel for Respondent: Kevin N. Kirk

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

BEATTIE, Justice:

This is a disciplinary proceeding in which David Shadel, an attorney licensed to practice law in the Republic of Palau, is charged with three counts of making false statements of material fact to a tribunal in violation of ROP Professional Conduct Rule 2(h). The complaint arises from Shadel's representation of Pacific Savings Bank ("PSB") with respect to a subpoena and notice of deposition served upon the bank.

After conducting a hearing, we find the following facts.

FACTS

In early 1997, David Shadel was serving as counsel for defendants in a pending civil action, *Chin v. Rdialul, et al.* , Civil Action No. 289-96. On January 31, 1997, Gerald Marugg, plaintiff's counsel in *Chin*, served subpoenas for records on three local banks: Bank of Hawaii, Bank of Guam and PSB. The subpoenas required a representative of each of the banks to bring certain documents to Marugg's office on February 17, 1997. Shadel had planned to be off-island on vacation on February 17, and called Marugg to request that the document production be postponed until after his vacation. For reasons not apparent in the record, Marugg refused to postpone the document production date, and on February 7 filed a "Notice of Depositions" which scheduled depositions of bank document custodians for February 17 for purposes of document ⊥253 production pursuant to the subpoenas.

Shadel, who regularly represents Bank of Hawaii and Bank of Guam, obtained their authorizations to file a motion to postpone the document production. Shadel then prepared a document entitled "Emergency Motion for Protective Order, to Quash Subpoenas, for Attorney Fees, and For Other Relief" (the "Emergency Motion"). On the morning of February 10, 1997, Shadel telephoned Tim Taunton, managing director of the PSB, to discuss the subpoenas. Shadel

told Taunton that he planned to be on vacation on February 17. He asked Taunton if he would "go along" with the request to postpone the matter until he returned from vacation. Taunton did not understand what the February 17 proceedings concerned but authorized Shadel to seek a delay of behalf of PSB.

Later in the morning of February 10, Shadel filed the Emergency Motion, which states that it is filed on behalf of defendants Abby Rdialul, Rachel Rdialul and Gainy Rdialul, as well as the Bank of Hawaii, Bank of Guam and PSB. The Emergency Motion contended, among other things, that "Plaintiff's conduct in this regard constitutes harassment, annoyance, and oppression, is in bad faith, is causing undue expense and burden on defendants and movants, may violate Rule 11, and otherwise is such as to warrant an order requiring plaintiff or his attorney to pay the attorney fees of defendants and movants in connection herewith."

Marugg received a copy of the Emergency Motion on the afternoon of February 10 and telephoned William Ridpath, whose firm regularly represents PSB, to ascertain whether Shadel had the authority to represent PSB on this matter. Ridpath called Taunton and faxed him a copy of the Emergency Motion. Upon learning that the Emergency Motion contained accusations that Marugg had engaged in conduct consisting of harassment and bad faith, Taunton became extremely upset and asked Ridpath to "do whatever he needed to do" to disassociate PSB from the Emergency Motion. Ridpath drafted a document entitled "Notice of Appearance" and faxed it to Taunton. The Notice of Appearance states that "Pacific Savings Bank, Ltd. is not represented by defendants' counsel [Shadel] in this matter and does not join in defendants' Emergency Motion . . . ."

On February 11, Shadel received a message that Taunton had called and wanted to speak with him. Shadel telephoned Taunton, who heatedly scolded Shadel for filing what Taunton perceived to be an "out-and-out" attack on Marugg. Shadel had not mentioned anything to Taunton about seeking attorney fees from Marugg for harassment or bad faith conduct during their February 10 conversation. Shadel explained that he would file something saying ⊥254 he did not represent PSB. Taunton told Shadel that he wanted Ridpath to file such a document, but that if he and Ridpath could reach some sort of agreement for him to do it that was fine, but that Taunton wanted to make sure it was done. Taunton did not authorize Shadel to proceed on PSB's behalf.

Shadel then telephoned Ridpath to discuss the matter. Ridpath told Shadel that Taunton wanted Ridpath to take over representation of PSB and wanted Ridpath to file something to notify the court. Shadel said he wanted to be the one to file the notification. Shadel prepared an amendment to the Emergency Motion and faxed a copy to Ridpath for his review. Ridpath never provided Shadel with a copy of the Notice of Appearance which he had prepared.

Shadel and Ridpath did not speak to each other again before the hearing on the Emergency Motion. Ridpath did not know about the hearing and did not attend. The hearing was held on February 12, 1997 at 1:30 p.m. At the beginning of the hearing, Associate Justice Larry W. Miller asked Shadel who he represented. Shadel explained that he "talked to Mr. Taunton yesterday, I talked to Bill Ridpath this morning, and I still represent the Pacific Savings

Bank as far as I know right now." Shadel continued, "Tim was not happy with certain of the language in the motion impugning plaintiff's counsel's conduct insofar as it was violative of Rule 11 or unethical or something like that, but other than that he still wanted to proceed on it."

Shadel stated later in the hearing that,

> Another problem [with the subpoenas] is that the banks want me present when they produce their documents. They don't want to just produce documents and not have me as their attorney there.
>
> The banks don't want to have to produce their records unless I'm there present, and I'm not going to be there [on February 17.] . . .
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> Basically the banks want me there when they produce their documents and also we take the position they need to be sworn in and certainly the defendants take the position that there need to be witnesses who can produce certain documents who can then authenticate the documents at a deposition . . . .

⊥255 The fact that I'm counsel both for the defendants and here the subpoenaed witnesses is rather unique, but it shouldn't detract from the fact that the defendants themselves have an objection to the process.

The Bank of Hawaii and the Bank of Guam, Shadel's regular clients, both have a policy of requiring their attorneys to be present when documents responsive to a subpoena are produced. PSB did not have a policy which required counsel's presence at a document production.

DISCUSSION

The three counts against Shadel all involve alleged violations of ROP Professional Conduct Rule 2(h), which proscribes "any act or omission which violates the ABA Model Rules of Professional Conduct." Specifically, the three counts each allege that Shadel violated Model Rule 3.3(a) by "knowingly mak[ing] a false statement of material fact or law to a tribunal." Violations of the disciplinary rules must be demonstrated by clear and convincing evidence. ROP Professional Conduct Rule 5(e).

In Count One, disciplinary counsel alleges that Shadel knowingly made a false statement of material fact to the court on February 10, 1997 when he filed pleadings representing that PSB was joining the emergency motion when, in fact, the bank had authorized Shadel only to join a request for a delay of the February 17 discovery response date.

We find that it has not been established by clear and convincing evidence that the filing of the Emergency Motion violated Model Rule 3.3(a). Before filing the Emergency Motion, Shadel secured Taunton's agreement to include PSB as one of the parties seeking the delay of the

February 17 proceedings. Although Shadel failed to go into detail concerning the contents of the Emergency Motion and did not tell Taunton that he would be including allegations of misconduct against Marugg in the motion, its primary focus was to postpone the February 17 proceedings and quash the subpoenas. Although it would have been better practice to inform Taunton about the request for attorney fees against Marugg and to obtain PSB's specific authorization, we do not think that the failure to do so amounted to knowingly making a false ⊥256 statement to the Court.[1]

Count Two is another matter. In Count Two, disciplinary counsel alleges that Shadel knowingly made a false statement of material fact when he told the court during the February 12 hearing that he continued to represent PSB and that it still wanted to proceed on the Emergency Motion. Much had transpired between the time Shadel filed the motion on February 10 and the hearing on February 12. Although the testimony of Shadel conflicted somewhat with the testimony of Taunton and Ridpath, we find the later testimony more credible. That testimony indicates that Taunton expressed extreme displeasure with Shadel before the February 12 hearing and in no uncertain terms told him that PSB wanted to disassociate itself with the Emergency Motion. Shadel offered to file something which said that he did not represent PSB, but Taunton wanted Ridpath to prepare the document. The conversation ended with the clear understanding that Shadel no longer represented PSB and the only question was who would tell the court--Shadel or Ridpath. When Shadel then talked to Ridpath concerning the matter, nothing changed. Ridpath told him that Taunton wanted Ridpath to take over the representation of PSB.

Thus, before the February 12 hearing, Shadel had been informed by both Taunton and Ridpath that he should no longer be representing PSB in connection with the Emergency Motion. Nonetheless, at the hearing, Shadel told the court that he was representing PSB and that it still wanted to proceed on the Emergency Motion, although it was "not happy with certain language in the motion impugning [Marugg's] conduct." When Shadel told the court that he had talked to Taunton and to Ridpath about the matter and that he still represented PSB, he implied that Ridpath and Taunton confirmed that he was still representing PSB when in fact it was just the opposite. Nor was it true that PSB still wanted to proceed on the Emergency Motion. Accordingly, he violated Model Rule 3.3(a) by making the foregoing statements to the court at the February 12 hearing.

Finally, Count Three alleges that Shadel knowingly made a false statement of material fact during the February 12 hearing when he stated that "The banks want me present when they produce their documents." Shadel admits that he mis-spoke when he told the court that the "banks" wanted him to be present when producing the subpoenaed documents because it was only two of the banks, Bank of ⊥257 Hawaii and Bank of Guam, who wanted him present. We find that it has not been shown by clear and convincing evidence that Shadel knowingly made any misrepresentation when he used the term "banks" to refer to the banks he represented. Surely, it was a careless remark which could reasonably be interpreted to mean all the banks, including PSB. But a violation of Model Rule 3.3(a) requires more than a negligent false statement.

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[1] We note that it was Marugg, not PSB, that lodged the complaint which initiated this disciplinary proceeding.

Sanctions

In determining an appropriate sanction, we refer to factors considered as either aggravating or mitigating circumstances by the ABA Standards for Imposing Lawyer Discipline. *See In the Matter of John S. Tarkong* , 4 ROP Intrm. 121, 131 (1994). The factor that is the most relevant to this particular case is the existence of prior disciplinary offenses, which is an aggravating circumstance. Mr. Shadel's law firm received a public censure for a disciplinary offense in 1993. *See In the Matter of Kirk and Shadel*, 3 ROP Intrm. 285 (1993). More recently, Mr. Shadel received various sanctions for disciplinary offenses relating to dishonesty and conduct prejudicial to the administration of justice. *In re Shadel* , 5 ROP Intrm. 265 (1996). A mitigating factor to be considered is that Mr. Shadel has cooperated fully with the disciplinary prosecutor, who has recommended leniency in this matter.

Considering these factors and the context in which the disciplinary offense arose, we publicly censure Mr. Shadel for his conduct and order him to perform 25 hours of free legal services representing indigent criminal defendants in accordance with the directions of the court. Shadel shall keep records of the time he spends on any such cases and submit them to the court upon completion of each such case. Additionally, we order Shadel to pass the multi-state bar ethics examination the next time it is offered in Palau, which we anticipate will be in July of 1998. In the event that a passing score is not achieved, further remedial sanctions may be appropriate.

Because the disciplinary prosecutor is a government lawyer, we assume that there are no costs of this proceeding, but the disciplinary prosecutor shall notify the court and Respondent of any costs for which he seeks reimbursement, and Respondent shall pay them.

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NGIRAKLSONG, CHIEF JUSTICE, concurring and dissenting in part:

I concur with my colleagues that David Shadel violated ABA Model Rule 3.3(a) by knowingly making a false statement of material fact or law to the Court as charged in Count II of the disciplinary complaint. I further concur that there is insufficient evidence to prove Count I, that Shadel knowingly made a false statement of material fact to the Court when he filed pleadings representing that Pacific Savings Bank was joining the emergency motion.

I disagree, however, with the majority's determination that there is insufficient evidence to prove Count III, that Shadel knowingly made a false statement of material fact during the February 12 hearing when he stated that "The banks want me present when they produce their documents." I disagree also with the majority's sanction, which I consider to be disproportionately lenient to the nature of the violations and the existence of prior disciplinary offenses.

With respect to Count III, I would go along with the majority if nothing pertinent

proceeded the February 12 hearing. A lot, however, did happen before the hearing. Shadel had been informed in no uncertain terms by an incensed Taunton that Shadel should no longer represent the Pacific Savings Bank in connection with the emergency motion. Ridpath had also informed Shadel of the same before the hearing. Having been so told, Shadel nonetheless asserted that the "banks" wanted him present at the document production, without qualification or exclusion of Pacific Savings Bank. Given the circumstances leading up to the February 12 hearing, Shadel had to have known that the Pacific Savings Bank would not require his presence at the document production. I cannot believe Shadel's assertion that he merely "mis-spoke." I find by clear and convincing evidence that under the circumstances, Shadel knowingly made a false statement before the Court when he used the word "banks" which obviously included the Pacific Savings Bank.

SANCTION

Finally, the majority's public censure of Shadel and an order to perform 25 hours of free legal service and take and pass the Multistate Professional Responsibility Exam is not a strong enough sanction. This Court has stated that the purpose of a sanction is ". . . to impose the discipline that is necessary to protect the public, the legal profession, and the Courts." *In re Tarkong*, 4 ⊥259 ROP Intrm 121, 132 (1994). The same Court, quoting the ABA Standards for Imposing Lawyer Discipline, has also explained that prior disciplinary offenses and dishonesty are aggravating factors to consider in issuing appropriate sanctions. These two aggravating factors are present in this case. Shadel's law firm was censored in 1993, *In the matter of Kirk and Shadel*, 3 ROP Intrm. 285 (1993), and just last year, Shadel was sanctioned and ordered to perform 100 hours of free legal service and complete a four credit legal education ethics course for offenses relating to dishonesty and conduct prejudicial to the administration of justice. *In re Shadel*, 5 ROP Intrm. 265, 270 (1996), These sanctions do not appear to have had any effect on Shadel's conduct. Stiffer penalties are required to protect the judicial system from such unethical behavior. I, therefore, believe that a minimum sanction for a third time violation requires a suspension from the practice of law.