In re Perrin, 10 ROP 162 (2003)
In the Matter of
DAVID C. PERRIN,
Respondent.

DISCIPLINARY PROCEEDING
NO. 03-01

Supreme Court, Disciplinary Tribunal
Republic of Palau

Issued: September 22, 2003
⊥163
Disciplinary Counsel: Douglas Parkinson

Counsel for Respondent: Pro se

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

Appeal from Supreme Court, Disciplinary Tribunal.

PER CURIAM:

Before the Tribunal is Respondent's Motion for Relief from Judgment pursuant to Civil Procedure Rule 60(b). Disciplinary Counsel has filed a response to the motion, and Respondent has filed a reply.

Rule 60(b) has six subparts and Respondent has not indicated which category entitles him to relief. After a review of Respondent's arguments, we presume his challenge to be pursuant to Rule 60(b)(6), as none of the more specific provisions comport with his arguments. Rule 60(b)(6) relief is appropriate only where extraordinary circumstances exist. *Irruul v. Gerbing*, 8 ROP Intrm. 153, 154 (2000). For the reasons set forth below, however, we find that none of Respondent's arguments have merit and the motion is denied.

The facts surrounding this case are amply set forth in our June 13, 2003 Decision and we will not repeat them here, but rather proceed to discuss Respondent's specific objections. Woven throughout his argument is a contention we rejected when we found him to have engaged in the unauthorized practice of law, namely that an attorney may switch over to an admission pursuant to Rule ⊥164 3(b) of the Admission Rules when his admission pursuant to Rule 3(a) expires. Respondent asserts that Rule 3(b) "carves out an exception to Rule 3(a)'s time limit by recognizing efforts to comply with Rule 2(d)." (Resp. Answer at 12.) To repeat from the June 13 Decision–the only Rule of Admission that could have applied to Respondent's case is Rule 3(a). That rule states in part: "Any practice of law after the expiration of this four (4) year period, . . . without first having complied with Rule 2(d) of these rules, constitutes the unauthorized practice of law." Respondent was admitted under this rule and was bound by its

strictures. Any resort on his part to Rule 3(b) obscures the true issue and the basis of the violation which was that he continued to practice law after his four-year exemption under Rule 3(a) expired. The fact that we address issues raised by Respondent in the instant motion that concern Rule 3(b) does not mean that Respondent was entitled to any consideration under that subsection.

Respondent points to his discussion of statutory construction principles and accuses the Tribunal of failing to read his brief on that issue. Quite the contrary. We accept the first principle of statutory construction as outlined in his brief, which we consider dispositive, but that principle applies to the whole of Rule 3 and not just to Rule 3(b). Respondent asserted that the plain meaning of Rule 3(b) applied to his case and quoted *Senate v. Nakamura*, 7 ROP Intrm. 212, 216-17 (1999) (quoting *Conn. Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992)), to the effect that

> if the language of a statute is clear, the Court does not look behind the plain language of the statute to divine the legislature's intent in enacting the legislation. . . . "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"

Respondent then spent four pages of his brief doing precisely what he contended was not necessary: he attempted to divine the intent of the drafters of subsection (b) rather than rely on the plain and unambiguous meaning of the language of the only provision–Rule 3(a)–that applied to his circumstance. There was no need to compare old Rule 3(b) to new Rule 3(b), no need to explore policy bases, and no need to discuss whether the rule is penal in nature or how to interpret the rule to further the public good and convenience. We need look no further than Rule 3(a)'s absolute bar to practice after four years. The language of the rule is plain, unambiguous, and admits of no more than one interpretation. Thus, Respondent's repeated assertion of a "good faith" reliance on a "legally defensible" interpretation[1] of Rule 3(b) is unavailing.

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[1]At several points in his motion, Respondent relies on an e-mail and a memorandum that he represents are communications from two other attorneys that he asserts support his "good faith" interpretation of Rule 3(b). First, we note that these consultations did not occur until May of 2003. Respondent does not contend that he contacted other attorneys in December of 2001, when he states he carefully reviewed the new Admission Rules and considered the impact that they could have on his continued employment in Palau. He does not suggest that he sought independent legal advice in December of 2002, when he was first reminded that his admission was due to lapse on February 16, 2003, nor did Respondent assert that he consulted other attorneys in March of 2003, when he was informed that his admission had lapsed in February. Because these opinions were not obtained when Respondent was formulating a position on this issue, but were procured only after disciplinary proceedings had begun, they are not evidence of Respondent's good faith.

Second, even if we overlook the *post hoc* nature of the consultations, there is little in the communications that is helpful to Respondent. Gerald Marugg's discussion of Rule 3 directly contradicts several of Respondent's arguments. First, Mr. Marugg directly refers to Rule 3(a)'s four-year limitation: "Practice by an attorney after the expiration of the 4-year period without having taken and passed the

⊥165 Respondent first challenges our failure in his view to take into consideration relevant mitigating factors. We did indeed consider the mitigation factors listed in the ABA Standards for Imposing Lawyer Discipline ("ABA Standards") and found none of them compelling enough to mitigate Respondent's conduct especially when taken in conjunction with the aggravating circumstances set forth in the Decision. However, we will explicitly address the mitigating factors specifically argued by Respondent in the instant motion.

First, we agree that Respondent has never before been found to have violated the Disciplinary Rules and that he cooperated in the proceedings. Second, although it is correct to state that the Disciplinary Counsel did not offer evidence that Respondent's violation was aggravated by selfishness or dishonesty, the absence of such evidence is a neutral factor and is not automatically considered a mitigating one. Third, where Respondent seeks to rely on a rule and propounds an interpretation of that rule that directly contradicts its plain meaning, Respondent's assertion that he relied on a "good-faith" interpretation is not a mitigating factor. As stated, there can be no reasonable dispute about the meaning and effect of Rule 3(a) in relation to Respondent.

Finally, there was no interim rehabilitation in this case. The only way to rehabilitate the unauthorized practice of law is to cease practicing. The fact that Respondent re-registered for the MPRE and began to have his work supervised does not mitigate the fact that he continued to practice law. Respondent's reliance on *In re Goddard*, 8 ⊥166 ROP Intrm. 267 (2001), in this regard continues to miss the point. The difference between the situation in *Goddard* and Respondent's case can be summed up by reference to the *Goddard* decision itself: "[Mr. Goddard] has averred that he has not engaged in the practice of law in Palau since February 2000, and will not do so until he becomes a member of the bar." Respondent, regardless of anything else he did, continued in the unauthorized practice of law.

Respondent next challenges the Tribunal's finding of aggravating factors. Once again Respondent misunderstands that the relevant rule as applied to him is Rule 3(a), not Rule 3(b). Respondent's reliance on a rule that clearly does not apply to his case and his refusal to admit

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Palau bar exam 'constitutes the unauthorized practice of law.'" Moreover, Mr. Marugg's exposition of Rule 3(a) stands in stark contrast to Respondent's theory of how Rules 3(a) and (b) interact. Mr. Marugg states that Rule 3(a) applies to an attorney "whose graduation from law school was more than four years ago (otherwise 3(b) could also be applied to an attorney)." Clearly the "otherwise" refers to a graduation less than four years prior to admission. Respondent then asked Mr. Marugg a follow-up question: "do you see anything in the rule which makes 3(a) and 3(b) disjunctive – *i.e.*, which provides that a person falling under 3(a) *could not* also fall under 3(b)?" Mr. Marugg's response was that he agreed and referred Respondent to the parenthetical quoted above. Thus, Mr. Marugg's view appears to be that both Rules 3(a) and (b) could apply to the same individual only where an attorney licensed in another jurisdiction applied for admission to the Palau Bar within four years of his or her graduation from law school. Thus, Mr. Marugg's view supports none of Respondent's main contentions.

By comparison to Mr. Marugg's response, the response of Ken Barden does comport more closely with Respondent's view on Rule 3(b). However, Mr. Barden's response, because it focuses exclusively on Rule 3(b) and does not address the absolute bar to practice under Rule 3(a), cannot be a source for Respondent's good faith reliance.

that that reliance is wrong, is clearly an aggravating factor that the Tribunal was well within its rights to consider.[2]

Respondent also asserts that the import of our decision is "that a *mere allegation* of the unauthorized practice of law, no matter how misguided, requires an attorney to immediately cease the practice of law" and that "[a]n attorney who challenges the allegation is automatically engaged in a pattern of misconduct and refusal to admit the wrongfulness of his or her actions, even if the challenge is in good faith" (emphasis in original). Every attorney has a right to defend his interpretation of a rule. If, however, that interpretation is ultimately rejected and found not to be brought in good faith, he must then live with the consequences. In this case, Respondent's persistent disregard of the plain meaning of Rule 3(a) was an aggravating factor to be considered when determining a sanction for his unauthorized practice of law. *See Beery v. State Bar of Cal.*, 739 P.2d 1289, 1296 (Cal. 1987) ("Increased discipline is warranted by an attorney's 'apparent lack of insight into the wrongfulness of his actions.'" (citation omitted)).

Respondent's third challenge, which is to the severity of the sanctions imposed, is also off the mark. First, Respondent argues that the only sanction that was appropriate was "admonition." Disciplinary Rule 3 sets forth the sanctions available to the Disciplinary Tribunal. "Admonition" is not among them. Respondent's resort to the ABA Standards in this regard is misplaced because our use of the ABA Standards in previous cases were as a reference for identifying aggravating and mitigating factors, and not to determine sanctions. The Disciplinary Rules specify the sanctions available and, as Respondent points out, "'it is incumbent upon the sanctioning court to observe scrupulously its own rules.'" (Resp. Br. at 4 (quoting *Matter of Thalheim*, 853 F.2d 383, 390 (5th Cir. 1988))).

Second, it could be argued that "admonition" is the equivalent of the private censure permitted by Disciplinary Rule 3. However, such a sanction in this case would have been wholly inadequate. Respondent cites to *In re Wolff*, 6 ROP Intrm. 205, 216 (1997), to the effect that "the purpose of the disciplinary system is not punishment but the protection of the public and the courts from ⊥167 attorneys who are failing to either adhere to the required standards of conduct or to discharge their professional duties." Rather than, in the words of Respondent, "making a mockery" of this principle, the sanction imposed in this case corresponds directly to Respondent's disdain for the first rule of admission: "[O]nly those persons admitted to the practice of law before the courts of the Republic of Palau may practice law in the Republic of Palau." Admission Rule 1. The first line of protection for the public and the courts is to ensure that those who purport to be "licensed" attorneys actually are. Respondent violated this rule and the aggravating factors as described in the June 13, 2003 Decision and this Order make clear that that violation was flagrant, ongoing, and, despite Respondent's protestations to the contrary, without good faith.

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[2]Respondent cites to *Cushnie v. Oiterong*, 4 ROP Intrm. 216, 222 (1994), in support of his proposition that we should "resolve all doubts in favor of the signer of the pleadings." However, *Cushnie* is a Rule 11 case and Respondent has presented no authority that the same standard should apply in disciplinary cases. Moreover, *Cushnie* is distinguishable. It holds: "Sanctions are not appropriate where there are differing interpretations of the law." There can be no differing interpretation of an absolute bar to practice.

Respondent also argues that the discipline imposed on him was inconsistent with that imposed in other cases. We agree that where violations and relevant factors are similar, comparable sanctions should follow. Respondent contends, and we agree, that the only case that involved a similar violation was *Goddard*. Upon a finding that Mr. Goddard engaged in the unauthorized practice law, the Disciplinary Tribunal forbade him from practicing law until he passed the bar examination, placed him on probation for a period of two years, and required that he pay "the amount he should have paid as bar dues . . . : a total of $1000." Thus, the actions taken in the two cases are, if not identical, consistent.[3]

We turn finally to Respondent's challenges to factual findings made in regard to his reliance on Rule 3(b).[4] It is first necessary to emphasize that the factual findings that Respondent disputes were *dicta* within the Decision because they were made in response to Respondent's claim that he was entitled to admission under Rule 3(b) and had conformed his conduct to that rule's requirements. As we have emphasized repeatedly, Rule 3(b) does not apply to Respondent. Nevertheless, in the interest of comprehensiveness, we will address those challenges here.

First, Respondent argues that the Tribunal was incorrect when it stated that he had not sought admission under Rule 3(b). We disagree. On December 10, 2002, ⊥168 Respondent was reminded by e-mail that his bar admission would expire on February 16, 2003. On this same day he was advised that he had not passed the MPRE and was informed of the date of the next administration of the MPRE. From that information he would have known that it was impossible for him to pass the Palau bar examination before his admission expired. Even though this issue was brought to his attention, he never sought admission pursuant to Rule 3(b). Respondent continues to assert that the bar examination application that he filed in May 2002, constituted admission for Rule 3(b) purposes even though that application never mentions that rule. No credible argument can be made that Respondent's application to become an unrestricted member of the Palau bar by passing the bar examination pursuant to Rule 2 was actually intended to seek restricted admission under a separate unmentioned rule in the event he failed to pass that examination. His assertion to that effect casts doubt on his claim of good faith reliance on his belief that he was entitled to admission under Rule 3(b).

Respondent also challenges the Tribunal's view that the off-island trip that caused him to

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[3]Respondent also makes a conclusory statement that the sanctions in this case somehow violate his rights under the Palau Constitution to equal protection, to due process, to be free of excessive fines, and in contravention of the prohibition against degrading punishment. Respondent offers a general assertion that the sanctions are unjust, but he offers no authority on how these rights apply to his case nor how we should analyze his claims. Thus, we give these allegations the same depth of treatment that Respondent did, and we find that they are meritless.

[4]Respondent's assertion that the Tribunal "was required to limit its factual findings to those facts established by clear and convincing evidence," misapprehends the burden of proof in disciplinary cases. Disciplinary Rule 5(e) states: "The standard of proof for establishing allegations of misconduct shall be clear and convincing evidence." Respondent admitted to the instances of practice with which he was charged. The only question was whether that practice was unauthorized. That purely legal question was found against him. Thus, the finding of a violation was by clear and convincing evidence. The Disciplinary Tribunal need not find each individual fact that it considers when discussing the violative conduct or applicable aggravating factors by clear and convincing evidence.

miss the March MPRE test administration was undertaken at his "behest." In regard to that trip Respondent stated in a February 11, 2003 memorandum:

> I have reviewed the accompanying circular which the Chief provided me and believe that I should go directly from Fiji to Port Moresby to attend the March 3-7 World Trade Organization trade policy course (along with someone from the Ministry of Finance or Foreign Affairs) rather than come back here. . . . Therefore, I think I should attend the March 3-7 workshop in Papua New Guinea.

(Ex. 17 to Disciplinary Counsel's Report at 5.) Thus, Respondent's assertion that "nothing in the evidence shows that Respondent requested to be sent on any of the trips and the suggestion to the contrary reflected [by] the ['behest'] language is simply false" is itself false. By Respondent's calculus he had conflicting responsibilities: to his employer and also to strictures of Rule 3(b). That rule permits a law school graduate to practice law in Palau "so long as the employee is making all efforts to comply with Rule 2(d)." In our view, Respondent's failure to advise his employer that he would have a scheduling conflict if he extended his trip means he was not making "all efforts" as required by that rule.

Because none of Respondent's challenges warrant a modification of the June 13, 2003 Decision, his motion for relief from judgment is hereby denied.