*In re Shadel*, 16 ROP 244 (2009)
**In the Matter of DAVID SHADEL,**
**Respondent**

Disciplinary Proceeding No. 08-008

Supreme Court, Disciplinary Tribunal
Republic of Palau

Heard: April 6, 2009
Decided: April 17, 2009
p.245
Disciplinary Counsel: William L. Ridpath

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; KATHERINE A. MARAMAN, Part Time Associate Justice

PER CURIAM:

This is a disciplinary proceeding in which David F. Shadel ("Respondent") is alleged to have engaged in the unauthorized practice of law in violation of Rules 4.1(a), 4.3, 4.4 and 8.4 (c) of the ABA Model Rules of Professional Conduct.[1] After a hearing on the matter, and in consideration of the parties' memoranda, pleadings and testimony, the Tribunal finds that Respondent violated Rule 4.4 of the Model Rules of Professional Conduct.

## BACKGROUND

The allegations arise from a complaint filed by Imelda Robles, a defendant in a collection matter in which Respondent acted as counsel for the Plaintiff. Ms. Robles contends that Respondent made misrepresentations to the court and to herself, and threatened her during the course of collecting a judgment debt owed to Respondent's client. A complaint was filed against Ms. Robles in October, 2007, for passing bad checks at WCTC in the amount of $680.72. Respondent, attorney for WCTC, entered into a stipulation with Ms. Robles for the repayment of this debt. The stipulation required Ms. Robles to pay the principle on the debt, pre-judgment interest, court costs, returned check fees, punitive damages, post-judgment interest and present and future attorney fees. The stipulation waived certain protective provisions of RPPL 7-11, provided that Ms. Robles pay $137.50 an hour in attorney fees, and that 40% of her future gross income would be used to satisfy her debt. The trial court entered judgment against Ms. Robles and an Order in Aid of Judgment adopting the terms of the stipulation in November, 2007.

Ms. Robles is a single mother of two and was unemployed in November, 2007, when the Order in Aid of Judgment was executed. Subsequently, she failed to pay her $1,082 debt. After obtaining employment with Islands Horizon Corporation in early January, 2008, Ms. Robles failed to inform Respondent of such, as stipulated to in November, 2007. Respondent filed a

[1]The Model Rules have been incorporated into the ROP Disciplinary Rules and Procedures by Disciplinary Rule 2(h).

"Motion for Contempt and Further Hearing" on January 28, 2008, against Ms. Robles for failing to make payments on her debt. On February 4, 2008, Respondent met with Ms. Robles alone in the Chambers of the trial court before the second order in aid of judgment was executed. It is this discussion and the circumstances surrounding it which is at issue in this disciplinary action.

Ms. Robles contends that during this p.246 discussion, she was informed that she must make payments of $100 bi-weekly towards her debt. She claims she then informed Respondent that she only made roughly $200 bi-weekly, had to pay $250 per month in rent, and could not afford these payments. The primary allegation in Ms. Robles' initial letter complaint was that Respondent then told her "things that were not true also, like going to jail or I must pay before anything else." Therefore, according to Ms. Robles, she agreed to pay $200 per month. The trial judge then entered the room and was told that Ms. Robles agreed to pay $200 per month.

Ms. Robles originally stated that she understood the agreement to mean that she would pay the $200 per month by herself. However, she later testified that she knew the money was supposed to come out of her paychecks, but that she told her employer not to do so, as she didn't want her employer involved in her personal debts. Respondent's understanding and that which was contained in the court Order in Aid of Judgment issued on February 6, 2008, was that the $200 would be deducted directly from her paycheck from Islands Horizon.

Ms. Robles made a payment of $100 on February 15, 2008. She failed to make further payments, which resulted in a "Further Motion for Contempt and Further Hearing" by Respondent on May 7, 2008. Prior to this, Ms. Robles had sent Respondent several letters detailing her expenses as well as her monthly income indicating that she had no means of paying her debt and wished to change the monthly payment plan. She testified at the hearing that she had around $1,000 in back rent and $700 in electric bills at the time, in addition to her children's schooling costs. In addition, Islands Horizon, Ms. Robles' employer, sent a letter to Respondent explaining its policy that it would not deduct money from an employee's paycheck without the employee's consent, that Ms. Robles had not given her consent, and that therefore it would not pay Respondent on her behalf.

Rather than responding to Ms. Robles or to Islands Horizon, Respondent filed another "Further Motion for Contempt, Relief and Hearing" summoning Islands Horizon to appear before the Court. On July 10, 2008, Islands Horizon and Ms. Robles' employer Jamie Catacutan were ordered to appear in Court. That same day, Islands Horizon made a $606.73 payment to satisfy Ms. Robles' debt. Later that month, Islands Horizon paid an additional $100 towards the debt.

In August, 2008, Ms. Robles telephoned Respondent's office to ask what her outstanding debt was and was informed that, despite her $856.73 in payments, she still owed $1,599.76 in attorney fees, accrued during the filing of the multiple motions for contempt filed by Respondent every month Ms. Robles did not satisfy her judgment. Ms. Robles did not remember agreeing to pay such excessive attorney fees. Thereafter, she filed a complaint with the Court on August 15, 2008, alleging harassment and misrepresentation by Respondent.

The Court subsequently sustained allegations of ABA Model Rules 4.1(a) (truthfulness in statements to others), 8.4(c) p.247 (engaging in dishonest conduct), 3.3(a)(1) (candor toward the tribunal), 4.3 (giving legal advice to an unrepresented person), and 4.4 (conduct intended to harass), for a hearing to determine whether there was substantial evidence to support a finding that Respondent violated these rules.

Both Ms. Robles and Respondent testified at the hearing on April 6, 2009. Ms. Robles testified that between September, 2007 and January, 2008, she was a single, unemployed mother of two. She had incurred four months of back rent and electricity bills by January, 2008, and her electric had been shut off completely. She lived with her brother at the time, who was providing money for food for her and her children, but who did not lend any other financial support. Ms. Robles did not remember many of the events surrounding the underlying case that led to her interactions with Respondent. What she did remember was that she got a letter stating that she had passed bad checks and needed to see Respondent to resolve them. She went to his office some time in November or December, 2007, where she agreed that she had passed bad checks and needed to pay for them. She informed him of her financial situation, and he told her she wouldn't have to start paying for the checks until she found employment. She did not remember signing the stipulation that resulted from that meeting, although she acknowledged that the signature on the document was hers, and that it was possible she signed the document.

Ms. Robles next stated that she met with Respondent for a second time in January, 2008, wherein they discussed that she had gained employment. She told him again that she had other debts she needed to pay off, and that she couldn't afford to pay 40% of her income. He suggested she pay $100 per paycheck and she told him she could not afford that.[2] She testified that at this point he said that she must pay this debt "before anything else." She therefore agreed to pay $100 per paycheck, starting in the end of January. She admitted, however, that she missed the first payment because she wanted to pay for her back rent and electric first. After missing this payment, she received a letter demanding that she appear in court on February 4, 2008.

On February 4, 2009, Ms. Robles states she went to the courthouse and met alone with Respondent in the chambers of Judge Salii. She adamantly denied having representation throughout these proceedings.[3] Ms. Robles testified that during this meeting, Respondent again stated that she needed to pay $100 bi-weekly towards her debt, and she again informed p.248 him that she could not afford to pay that much at a time. She testified that he then stated that he told her "you are lucky that I am not bringing you to court and putting you in jail for passing bad checks." She then became scared that she would go to jail, and stated that she couldn't leave her children and go to jail, so she agreed to the payment terms contained in the order in aid of judgment of February 4, 2009. Thus, when Judge Salii came into the room and asked her

[2]Although Respondent maintained that $100 was less than 40% of her bi-weekly income, his own Exhibit D showed that she made between $230 and $300 bi-weekly, averaging around $250. One hundred dollars is precisely 40% of $250.

[3]Although she admitted that she wrote an affidavit in August, 2008, which was drafted by attorney Richard Brungard, she maintained that this was in relation to his representation of her employer Palau Horizon, and not his representation of her in this matter. She also admitted that she had obtained the services of Micronesian Legal Services Corporation ("MSLC") in relation to a family law case involving the father of one of her children, but denied that she spoke to them about this matter.

whether she agreed to pay she stated that she did. When cross-examined as to why she could remember this conversation, but not the specifics of the previous conversations with Respondent, she stated that when someone says the word "jail" to you, you remember it, because it scares you.

After the order in aid of judgment had been executed, Ms. Robles testified that while walking down the stairs of Judge Salii's chambers, Respondent said to her "you are lucky I am just asking you to pay because I can put you in jail for passing bad checks." Thereafter, Ms. Robles made one payment of $100, but could not continue to make payments, and wrote a letter to Respondent to that effect. In May, 2008, she got another letter from the court asking her and her employer to appear before the court. She testified that at that time, Respondent told her she was a liar for telling her employer that she would pay her debt herself, but then failing to pay. She also testified that Respondent threatened her employer that he could have the business shut down for not having a valid FIB license. It was because of this threat, she claimed, that her employer finally paid off her original debt in August, 2008. She stated that she continues to pay her employer $5 per paycheck for paying her debt.

Respondent's cross-examination of Ms. Robles attacked her credibility as a witness. Through cross-examination, it was shown that Ms. Robles was not completely truthful at times, and that she was purposefully eluding the payment of these debts so that she could pay others. It was also established that Ms. Robles has a computer secretary degree and a Bachelor of Arts from a four year university in the Philippines. Cross-examination additionally revealed that Ms. Robles won a monetary settlement in her custody case, and that she paid off several debts other than the one at issue in this matter over the last several years.

Respondent's testimony vehemently denied making the alleged threats against Ms. Robles. He stated that it is standard practice to negotiate stipulations with defendants in collection cases, and to have them drafted outside of the presence of the defendants, to be signed later. Respondent testified that Ms. Robles came to his office in November, 2007, where he asked if she could pay 50% of her future wages towards her debt. When she said that she could not, they agreed on 40%. He testified that he went through each section of the stipulation with Ms. Robles, but did not explain precisely the meaning of the rights she was waiving in certain sections of RPPL 7-11. Respondent additionally stated that he told Ms. Robles to go see her lawyers at MSLC before signing the stipulation. He then told her to wait in the outside office while he had his secretary draft the stipulation for her to review.

Respondent denied that he met with Ms. p.249 Robles in January, 2008, and stated that their next meeting was on February 4, 2008, in Judge Salii's chambers. When asked if he made the alleged threat that day, Respondent stated "No. What good would it do to have her in jail?" He further testified that he did not have Ms. Robles review the order in aid of judgment, as that has always been his practice. He stated that he writes the proposed orders, and these orders have been signed in the hundreds by the judges of this Court. Indeed, Respondent submitted many orders in aid of judgment waiving identical provisions of RPPL 7-11 that have not been reviewed first by the defendants, and have been signed by judges of this Court.

Respondent denied making a statement to Ms. Robles' employer about shutting them

down because of the FIB law, but he did admit to sending them a document addressing the issue. Moreover, he denied the allegation that Ms. Robles did not know what she was signing when she signed the stipulation. Respondent maintained that Ms. Robles was represented by Mr. Brungard, who is hostile towards him. He stated that Mr. Brungard has accused him in the past of taking advantage of people who cannot pay their debts. Respondent claims that this is absolutely not true, and that he has a lot of respect for the people he deals with professionally. Lastly, Respondent stated that he no longer includes the waivers regarding attorney fees and preservation of funds sufficient for basic living expenses in his stipulations, because the judges stopped signing the orders including these stipulations. He claimed he did not know why, but that something changed with the court several months ago.

## STANDARD OF REVIEW

The burden in a disciplinary proceeding is on Disciplinary Counsel to show by clear and convincing evidence that Respondent violated the ABA Model Rules of Professional Conduct. *In re Schluckebier,* 13 ROP 35, 39 (Disc. Proc. 2006) (citing ROP Disciplinary Rule 5(e)). Not every fact must be proven by clear and convincing evidence in order to find that a respondent violated a certain provision of the rules. *In re Perrin*, 10 ROP 162, 167 (Disc. Proc. 2003). Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence. . . but less than evidence beyond a reasonable doubt." BLACK'S LAW DICTIONARY at 577 (7th Ed. 1999).

## DISCUSSION

### A. Rule 4.1 (a)

Rule 4.1(a) states that "in the course of representing a client, a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person." It is alleged that Respondent violated this rule because "Respondent threatened he could seek to have Ms. Robles sent to jail for writing the bad checks if she did not make payment on the judgment . . . ." Second Amend. Compl. at ¶ 11. We sustained this allegation for a factual determination at the hearing, as there are conflicting versions of the exact words exchanged between Respondent and Ms. Robles on February 4, 2008.

Initially, Ms. Robles stated that Respondent told her things that were not true, p.250 "like going to jail or I must pay before anything else." This statement was later quoted in detail in her affidavit of August 7, 2008, and claimed Respondent stated "[y]ou need to pay this amount before anything else. If you do not I will bring you to court and you might go to jail because you wrote a bad check." Robles Affidavit at ¶ 9. In its September 3, 2008 Order, this Court stated that "Shadel told Complainant she would go to jail for failure to pay the debt or that she must pay the debt before anything else." Sept. 3, 2008 Order at ¶ 3. Thereafter, these quotes were used variably in Tribunal orders and argued variably in motions before the Tribunal.

It is a true statement that in the Republic of Palau, a person can be prosecuted for passing

a bad check and can be sent to jail as a consequence. *See* 17 PNC § 1906. If the Tribunal believes that Respondent stated that he *could* seek to have Ms. Robles sent to jail, then he did not make a false statement and did not violate Model Rule 4.1(a). If the Tribunal believes that Respondent stated that Ms. Robles *would* go to jail, then he did make a false statement, and he would be in violation of the Rule. However, Disciplinary Counsel has the burden of proving by clear and convincing evidence that Respondent has violated a particular rule. In this instance, we cannot find clear and convincing evidence that Respondent stated that Ms. Robles *would* go to jail if she did not pay her debt. Therefore, we do not find that Respondent violated Rule 4.1(a) of the Model Rules.

**B. Rule 4.3**

Rule 4.3 states that a lawyer "shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." It is alleged that Respondent "overreached" in dealing with Ms. Robles both in drafting a one-sided stipulation and in presenting the further order in aid of judgment of February 4, 2008 to Judge Salii without first giving the documents to Ms. Robles to review and in failing to suggest that Ms. Robles obtain the advice of counsel.

Disciplinary Counsel cites to interpretations of Rule 4.3 finding that a lawyer who drafts a document which, on its face, is so one-sided as to put him on notice of the likelihood of unconscionability, should either tell the party to obtain counsel, or explain the substantive provisions of the document so that the party fully understands what he or she is signing. Resp. to Mot. For Judgmt. on the Pleadings at 3 (citing *The Florida Bar v. Belleville*, 591 So.2d 170, 172 (Fl. 1991). He argues that Respondent knew he was drafting what could be an unconscionable stipulation and order in aid of judgment, and therefore violated Rule 4.3 in failing to explain the substantive provisions of the document to Ms. Robles, and for likewise failing to suggest that she obtain counsel.

Respondent first argues that he did, in fact, tell Ms. Robles to speak with her counsel at MSLC, and second argues that he is under no affirmative duty to counsel an opposing party. First, we find Ms. Robles' testimony credible to the extent that she denied that Respondent ever told her to seek legal counsel. Respondent's counsel questioned Ms. Robles on this matter as p.251 follows:

> Q: Do you remember telling [Respondent] that if you wanted to, you could talk to your lawyer at MSLC and have them look at [the stipulation]?
> A: No.
> Q: You don't remember?
> A: No. There's no, there's no conversation like that.
> Q: You knew you could have, didn't you?
> A: No.
> Q: You didn't?
> A: No, he never mentioned anything about that.

Audio Tr. at 2:54:50. Although Ms. Robles was unsure of many aspects of her conversations with Respondent, she was quite sure about this issue, and we find her testimony credible. Conversely, we do not find Respondent's testimony credible that he instructed her to speak with her attorney at MSLC. We therefore find by clear and convincing evidence that Respondent did not tell Ms. Robles to obtain legal advice.

However, we do not find that Respondent violated Rule 4.3 of the Model Rules. We are unwilling, through this proceeding, to adopt a new interpretation of Rule 4.3 requiring attorneys drafting potentially unconscionable contracts with unrepresented parties to suggest that they seek the advice of legal counsel. While we think this is good practice, we cannot now find the contract retroactively unconscionable. Thus, we find that there is not clear and convincing evidence that Respondent violated Rule 4.3.

In addition, while we think that it is also good practice to submit documents to opposing parties for review before submitting them to the court, we cannot find that this equates to a violation of the Model Rules of Professional Conduct. Therefore, we agree with Respondent and find that he did not violate Rule 4.3 of the Model Rules.

**C. Rule 8.4 (c)**

Rule 8.4 (c) states that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The allegation surrounding Rule 8.4 (c) is vague,[4] but refers to the circumstances surrounding Respondent's treatment of this matter with respect to his unrepresented opposing party. In this jurisdiction, a violation of Rule 8.4 (c) requires a finding that Respondent acted with wrongful intent. *See In re Rechurcher*, 7 ROP 28, 32 (1998) (finding that there must be clear and convincing evidence of intent).

While we do not find it to be good practice to include waivers of substantive statutory rights in a stipulation with an unrepresented party, we do not find clear and convincing evidence that failing to explain these rights amounts to the level p.252 of deceit and misrepresentation required by Rule 8.4 (c). We likewise do not find clear and convincing evidence that Respondent intended to defraud Ms. Robles. Ms. Robles is well-educated, and had she read the stipulation, she would have read the plain language that she was waiving certain rights in a statute regarding attorney fees and otherwise. She is educated enough to have known to ask what those rights were before signing the document. The fact that she was waiving rights was not hidden from her by Respondent. Therefore, we find that there is not clear and convincing evidence that Respondent violated Rule 8.4 (c).

**D. Rule 4.4**

Rule 4.4 states that "[i]n representing a client, a lawyer shall not use means that have no

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[4]The Second Amended Complaint states that "[s]uch actions by Respondent also constituted dishonest and deceitful conduct, and were misrepresentations of law and fact, and therefore were a violation of Rule 8.4 (c)."

substantial purpose other than to embarrass, delay, or burden a third person." It is alleged that Respondent made a statement to Ms. Robles to the effect that if she did not pay this debt before any other debt, then she might/would/could go to jail. Ms. Robles testified that he said this once to her on February 4, 2008, in the chambers of Judge Salii, just before the execution of the second order in aid of judgment, and again just after that order was entered, on the stairway outside of Judge Salii's courtroom.

We first find that there is clear and convincing evidence that this statement was made at both of the instances alleged. We find the exact wording of the statement irrelevant, but rather find that there was a threat made to the effect that if she did not pay, she may go to jail. The issue here is whether or not these statements amount to using "means that have no substantial purpose other than to embarrass, delay, or burden a third person."

Disciplinary Counsel argues that these statements amount to harassment of a third person, as their only purpose was to threaten Ms. Robles. Counsel focused on the second statement in the stairway, and pointed out that the purported "substantial purpose" of negotiating a stipulation and order in aid of judgment with Ms. Robles had already passed. In other words, the order had already been signed, and negotiations were finished, so any further statements were meant to pressure and harass Ms. Robles into doing something she had already agreed to do.

Respondent makes several arguments refuting this charge. The first is that Respondent never made such statements to Ms. Robles. The second is that, even if he did make these statements, the ABA intends for lawyers to be able to make threats of criminal prosecution to opposing parties. The third is that there was a substantial purpose in making the statements, namely, to get Ms. Robles to pay her debt.

We reject Respondent's first argument, as we find that these statements were, in fact, made to Ms. Robles. Respondent's second argument purports that because the ABA formerly expressly prohibited such threats and then subsequently removed the express provision from the current Model Rules of Professional Conduct, that its intent was to allow for the conduct. The former rule, Disciplinary Rule 7-105 ("DR 7-105") stated that "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." In revising the ABA Rules of Professional Conduct in 1989, this rule p.253 was omitted, as being redundant and unnecessary. Because Palau has adopted the revised ABA Model Rules of Professional Conduct, Respondent argues that threatening criminal prosecution in a civil case is permissible here.

As further support for this argument, Respondent cites ABA Formal Opinion 92-363 (1992), where the ABA found that "legitimate and ethically sound pressure tactics" were permissible negotiation strategies in related civil matters. The ABA set out what it felt were appropriate parameters for the use of threats of criminal prosecution. In balancing a lawyer's duty to zealously advocate for his client versus unwarranted threats to an opposing party, the ABA stated "such a limitation on the lawyer's duty to the client is not justified when the criminal charges are well founded in fact and law, stem from the same matter as the civil claim, and are used to gain legitimate relief for the client." ABA Form. Op. 92-363 at 1001:121.

We rejected this argument in ruling on Respondent's Motion for Judgment on the Pleadings and to Dismiss, and found that the ABA may allow for these threats, but only if accompanied by an offer to refrain from seeking criminal prosecution, an exchange for the third part of the test, which is to gain legitimate relief for the client. *See* ABA Form. Op. 92-363 at 1001:121 (stating "[a] threat of criminal prosecution is likely to be of use in advancing a civil claim only if it is accompanied by an offer . . . to refrain from instigating the prosecution"). Respondent now argues that the ". . ." cited in our Order denying Respondent's Motion are material because they omit the language "implicit or explicit" in modifying the term "offer."

We reject this argument, as we do not find that Respondent even implicitly offered to refrain from criminal prosecution during his "negotiations" with Ms. Robles. Nor do we find that the offer was made in order to satisfy some legitimate relief for Respondent's client. Rather, we do not find that the threats made, particularly those on the stairs, were part of a negotiation at all, but were instead simply harassing statements to try to force Ms. Robles into paying the debt which she already agreed she needed to pay.

Moreover, the ABA did not omit Rule 7-105 because it was a bad rule, or because they wanted to encourage threats of criminal prosecution. They omitted it as "redundant" and "unnecessary," meaning that the purpose of the rule was already integrated into other sections of the Model Rules. We find that Rule 4.4 encompasses the essence of Rule 7-105, in forbidding unnecessarily burdensome negotiation tactics. Respondent's statements were exactly such tactics.

Likewise, we reject Respondent's third argument, that these threats had a substantial purpose. Ms. Robles admitted during the November, 2007, meeting that she needed to pay for her bad checks. She signed a stipulation to that effect, and agreed to the entry of an order in aid of judgment of the same. She was well aware of the need to pay her debts, and at no point stated that she wouldn't pay. Had she stated such, Respondent could have told her that he could seek to have her prosecuted for passing bad checks if she did not agree to pay. But that is not what happened, because Ms. Robles p.254 consistently agreed that she needed to pay.

In addition, Respondent's counsel admitted that there is no case in Palau that he knows of where a debtor has been sent to jail for failure to pay a debt. Thus, even though it is true that Respondent could seek to have Ms. Robles prosecuted, he admitted that he had no intention of ever doing so. Thus, they were empty threats, and ones made outside of the context of negotiation. We find that the statements made more closely resemble harassment than an honest offer to refrain from prosecution in exchange for an agreement to pay. Therefore, we find clear and convincing evidence that Respondent violated Rule 4.4 of the Model Rules.

**CONCLUSION**

We find clear and convincing evidence that Respondent violated Rule 4.4 of the ABA Model Rules of Professional Conduct. The 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. There, the Court additionally stated that "[i]n considering the appropriate sanction, we consider it our duty to impose the discipline that is necessary to protect the public, the legal profession, and the courts." *Id*. at 132. The parties are hereby directed to submit briefing on appropriate sanctions on or before May 18, 2009.