In re Webster, 3 ROP Intrm. 229 (1992)
IN RE DAVID B. WEBSTER, Esq.
Respondent.

DISCIPLINARY PROCEEDING NO. 5-92

Supreme Court, Disciplinary Tribunal
Republic of Palau

Findings, conclusions and order of disbarment
Decided: November 13, 1992

BEFORE: ARTHUR NGIRAKLSONG, Acting Chief Justice; ROBERT A. HEFNER, Part-time Associate Justice; ALEX R. MUNSON, Part-time Associate Justice

FINDINGS

On July 12, 1991, the respondent, David B. Webster, was admitted to practice before this Court. This admission was based upon the facts in his application and pursuant to amended Rule 3 of the Rules of Admission which states:

> "Rule 3. Any attorney who is a salaried employee of the Republic of Palau National Government, or any state [sic] government of the Republic of Palau, or the Micronesian Legal Services Corporation (or any successor thereof) or the Trust Territory Government may practice law in Palau without complying with Rule 2(d) of these rules for a period of four (4) years, so long as the attorney is acting within the scope of his or her employment and maintains membership in good standing in the bar of any state, territory, or possession of the United States." (emphasis in original).

Prior to admission, the respondent submitted an application for admission. Included therein is an affidavit signed by ⊥230 respondent in which he states he was admitted as an attorney in Washington D.C.. No mention is made as to any admission or prior disciplinary proceedings in the State of Florida.

Rule 2 of the Palau Rules of Admission states, in pertinent part:

> "Any person . . . shall be certified for admission to practice before the courts of the Republic of Palau if he or she satisfies the following requirements: (a) Must be able to demonstrate proof of good moral character in the form of a certificate of good standing, issued within 30 days of the application for admission, from the bar of the jurisdiction(s) in which he or she practiced law prior to coming to Palau, said certificate to contain a statement that the applicant has not been the subject of original or reciprocal disciplinary proceedings in that jurisdiction, nor is the applicant currently under investigation in that jurisdiction for alleged violations of the canons of ethics or rules of admission." (emphasis added).

On February 14, 1990, the respondent executed a Consent Judgment with the Florida State Bar. Pursuant thereto, the respondent was, inter alia, suspended from the practice of law for eighteen months commencing on December 18, 1988. To date, respondent has not been reinstated to practice law in Florida. On May 6, 1992, respondent petitioned the Florida State Supreme Court for reinstatement to practice law and that petition is still ⊥231 pending.

In August of 1992, Associate Justice Sutton of this Court was advised of the Florida State Bar proceedings against the respondent and referred the documents relative thereto to the Acting Chief Justice. On August 31, 1992, and pursuant to Rule 4 of the Disciplinary Rules, he appointed a disciplinary tribunal (this panel) and he appointed disciplinary counsel (Barrie Michelsen, Esq.). Disciplinary Counsel (Counsel) began his investigation on September 14, 1992 and attempted to contact respondent at his office but respondent was not in the Republic of Palau. On that date, Counsel, left a letter at respondent's office which advised respondent of the investigation and the substance of the complaint (that he had failed to report that he was a suspended member of the Florida Bar) and gave the respondent until September 28, 1992 to respond. This was also pursuant to Rule 4 of the Disciplinary Rules.

Respondent left no address where he could be located. The personnel left in charge of respondent's office expected him back by September 22, 1992 but he did not return, nor were respondent's whereabouts learned anytime prior to September 28, 1992.

On October 9, 1992, Counsel filed a formal complaint against respondent pursuant to Rule 5. Up to that time the whereabouts and address of respondent were unknown so Counsel mailed by certified mail a copy of the complaint and Notice of Hearing for November 9, 1992 to respondent's Palau office and to respondent's last known address in Florida.

⊥232 On October 9, 1992, after the above events occurred, Counsel received a facsimile letter from respondent (Exhibit A which has been submitted to this panel) in which he states, inter alia, that Counsel could contact him through his attorney in Florida. The attorney's phone number and fax number were given in the letter. Counsel, on October 9th, faxed the Complaint and Notice of Hearing to the fax number of respondent's attorney and receipt was acknowledged of the fax but the reply stated the attorney was not authorized to accept service. This Court also faxed a copy of the Notice of Hearing to respondent's counsel on October 9, 1992.

On October 14th, a Mr. Egan of the Florida State Bar was in communication with Counsel and the latter asked for assistance in locating respondent and to serve the complaint.

On November 4, 1992, Counsel received another fax letter from respondent (Exhibit B which has been submitted to this panel) in which he stated he received a copy of the complaint on October 25, 1992.

Respondent did not appear at the hearing held on November 9, 1992.

CONCLUSIONS OF LAW

The requirements of Rule 4 of the Disciplinary Rules have been complied with. Although respondent did not submit any evidence or argument before Disciplinary Counsel filed his report and the formal complaint, this was due to the failure of the respondent to leave any word as to his whereabouts between September 15, 1992 and September 28, 1992. Rule 4 provides that Counsel shall forthwith ⊥233 notify respondent of the substance of the complaint. By leaving a copy at his office, no further notification was necessary or required under Rule 4.

Rule 8 of the Disciplinary Rules states that service of the formal complaint shall be by personal service. Rule 5(a) provides that proceedings before the Disciplinary Tribunal shall be governed by the Republic of Palau Rules of Civil Procedure. Rule 5(b) of the Civil Procedure Rules, provide that personal service of a document other than a summons and complaint in a regular civil matter can be accomplished by personal delivery to the party or by mailing it to him at his last known address. Service by mail is complete upon mailing. It is concluded that service of the disciplinary complaint was effective as of October 9, 1992, and the requirement of Rules 5 and 8 of the Disciplinary Rules have been met.[1]

Although Rule 3 of the Rules of Admission exempted respondent from complying with Rule 2(d) (take and pass a bar examination), it did not exempt respondent from Rule 2(a). The latter rule obligates ⊥234 the applicant to inform the Court of the admission and any disciplinary proceeding (current or prior) of all jurisdictions in which the applicant has been admitted.

The fact that the respondent was suspended from the practice of law in the State of Florida at the time respondent applied for admission to the Palau Supreme Court means that he was ineligible to be certified to practice in this jurisdiction. By failing to divulge to the Supreme Court of Palau the Florida Bar suspension, respondent misrepresented and concealed a material fact in his application for admission to practice law in this jurisdiction.

Upon review of this matter and letters sent to Disciplinary Counsel by respondent, the Court finds no mitigating circumstances.

The panel finds numerous aggravating factors:

1. Respondent knew at the time of his application and admission to practice law in this jurisdiction he concealed a material fact which would have

[1] This panel also notes that it appears that service of the complaint would be sufficient on other grounds in respondent's home State, Florida. In *The Florida Bar v. Bergman*, 517 So. 2d 11 (Fla. 1987), the Florida Supreme Court found that the Bar's good faith attempt to serve Bergman at his last known address was sufficient. Instructive are the following words of the Bar's referee which the Florida Supreme Court approved: "It would be unduly burdensome to expect the Florida Bar to find every respondent who chooses to move and not notify The Florida Bar of his whereabouts. Further, if actual notice was made mandatory, a respondent could avoid prosecution simply by making himself unavailable to The Florida Bar service, presenting an obvious threat to the protection of the public." We approve of this reasoning but find it unnecessary to apply it in this case.

prevented his admission.

2. Faced with the uncontradicted facts of his suspension and prior disciplinary record, he still denies any allegations of wrongdoing (Exhibit B, Pg. 3)

3. Respondent has raised substantive "defenses" which are patently without merit:

(a) He claims this Court has no jurisdiction over him as authority is derived from the Department of Interior and this Court cannot discipline him. The argument seems to be that he operates independently of ⊥235 this Court. Respondent's position was created by Department of Interior Secretarial Order 3142. His letter of appointment from Assistant Secretary Guerra (as required by Secretarial Order 3142) includes a Statement of Work and Authority under which he would function. This Statement referenced Public Law 2-7 (2 PNC 501 *et seq.*) which in turn (sec. 502) requires that he be admitted to practice in the court's of Palau. It is clear beyond peradventure that not only was it required that he be admitted to practice in this Court, but he knew that it was a requirement. After his appointment by the Department of the Interior, it was necessary for this Court to amend Rule 3 of the Rules of Admission to include an attorney for the Trust Territory Government so that respondent could be admitted without the necessity of passing the Palau Bar Examination. This was done by Court Order on June 3, 1991. Then, respondent applied and was admitted to practice. Now his claim appears to be that that was all unnecessary. Clearly, it was not. Additionally, it is elementary that each court has inherent authority to control the admission of those attorneys who wish to practice before it and therefore to discipline those so admitted. Respondent's defense of no jurisdiction is frivolous.

(b) He asserts that he was not under suspension on July 12, 1991. There is no doubt the respondent is still ⊥236 not licensed to practice in Florida. He claims that since he could petition for reinstatement (as he has done on May 6, 1992), he is not under suspension. Additionally, he claims that since he remains a member in good standing in the Washington, D.C. bar, he has satisfied Rule 3 of the Rules of Admission. Rule 2(a) of said Rules is clear. It required respondent to provide a certificate of good standing in <u>all</u> jurisdictions in which respondent has been admitted prior to his application in this Court and to divulge not just current but all prior disciplinary actions against him.

(c) Respondent claims the concealment of the Florida disciplinary action was not material. However, in his October 8th letter to Counsel (Exhibit A, Pg. 2), respondent concedes: "My lawyer and I had an agreement with the Bar attorney that no contact in Palau would be made, until after my contract was completed. (January, 1993)" This demonstrates not only how material the misrepresentation was but also it shows the active and continuous effort to

conceal it from this Court. Respondent further compounds his excuse for concealment by asserting in his October 8th letter (Exhibit A) that: "If asked [by the Department of Interior and the Chief Justice of this Court] whether I had ever been under a suspension order, I would have indicated [it]".

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VIOLATIONS

Pursuant to the above findings and conclusions, the respondent, David B. Webster, has violated the following Rules:

1. Rule 2(e), Disciplinary Rules - Misrepresenting or concealing a material fact in his application for admission.

2. Rule 2(f), Disciplinary Rules - Suspension by competent authority in the State of Florida.

3. Rule 2(h), Disciplinary Rules - Any act or omission which violates the American Bar Association Model Rules of Professional Conduct. Rule 8.1 of the Model Rules states it is an affirmative duty of a bar applicant to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter.

SANCTION

If an applicant's misrepresentations are not discovered until after he is admitted to the bar, he not only may be disciplined, but disbarment is the sanction. *People v. Culpepper*, 645 P 5 (Colo. 1982); *People v. Mattox*, 639 P 2d 397 (Colo. 1982); *Florida Board of Bar Examiners v. Leaner*, 250 So 2d 85 2 (Fla 1971); *In re Jordan*, 106 Ill 2d 162, 478 NE 2d 316; *In Re Howe*, 257 NW 2d 420 (ND 1977); *Attorney Grievances Comm. of Maryland v. Gilbert*, 307 Md 481, 515 A 2d 454 (1986); and *In re Elliott*, 235 SE 2d 111 (SC ⊥238 1977).

Rule 3 of the Disciplinary Rules lists all types of discipline (disbarment, suspension, public censure, private censure, fine or community service) which may be imposed. Disbarment is the only appropriate discipline to be imposed in this case.

ORDER

It is the Order of this Court that respondent, David B. Webster, be disbarred and his name stricken from the roll of attorneys licensed to practice in the Republic of Palau.

Costs and attorney's fees are assessed against respondent. Counsel shall submit his bill for costs and attorney's fees within twenty days of this decision and shall serve the same on respondent. Respondent shall then have ten days to file a written objection, if any. Thereafter,

any single member of this tribunal shall issue an order setting forth the specific amount of costs, attorney's fees and interest to be assessed against respondent.