In re Wolff, 6 ROP Intrm. 205 (1997)
IN THE MATTER OF MARTIN WOLFF,
Respondent.

DISCIPLINARY PROCEEDING NO. 3-96

Supreme Court, Disciplinary Tribunal
Republic of Palau

Opinion
Decided: April 2, 1997
Amended: August 15, 1997

Disciplinary Counsel: John Corderman, Scott Campbell

Counsel for Respondent: Marvin Hamilton

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

MICHELSEN, Justice:

INTRODUCTION

Although the Respondent herein has already been disbarred, [1] this Tribunal is convened again to consider separate charges of ⊥206 misconduct arising from the representation of Zacheus Kotaro in *ROP v. Kotaro* , Criminal Case No. 162-95. Both Disciplinary Counsel and Respondent agree that a disbarred attorney may apply for reinstatement at a later time. See Rule 13, ROP Supreme Court Disciplinary Rules and Procedure. For that reason, charges of misconduct against an attorney do not become moot upon disbarment. Findings regarding other allegations of misconduct should be made so that such findings can be considered in determining any future petition for reinstatement.

PROCEDURAL OBJECTIONS

Respondent raises some procedural objections to these proceedings. First, he argues a lack of jurisdiction because a number of time frames established in the Disciplinary Rules were allowed to be enlarged by the Tribunal. Early on, the Chief Justice made a determination to defer these proceedings until a contempt of court charge arising out of the same incident was resolved. [2] Another delay was necessitated by the original Disciplinary Counsel leaving Palau on short notice because of a family illness, which required a new Disciplinary Counsel to be appointed. Because not all time periods set by the rules were met, it is argued that the Tribunal has lost

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[1] *In The Matter of Wolff*, 5 ROP Intrm. 249 (1996).

[2] Processing of complaints shall not be deferred or abated because of substantial similarity to the material allegations of pending criminal or civil litigation, unless authorized by the Chief Justice in his discretion for good cause shown. Rule 7(a), Disciplinary Rules.

jurisdiction, or that dismissal is warranted as a "sanction against the Tribunal" for missing the deadlines found in the Disciplinary Rules.

We do not believe the argument has merit. Except where the rules otherwise provide, proceedings before the Tribunal are governed by the Rules of Civil Procedure of the Palau Supreme Court. Rule 5(a), Disciplinary Rules. Rule 6(d) of the Civil Rules provide that an enlargement of time may be ordered by the court "at any time in its discretion," with or without motion or notice. The Tribunal therefore has the authority to enlarge the established time periods as necessary. No assertion being made here that any prejudice occurred to the Respondent, and Counsel for Respondent having found no supporting authority for his argument, we hold that the Tribunal continues to have jurisdiction over this matter, even though some of the time periods had to be enlarged.

⊥207 The Respondent also says that his due process rights are violated because there is no appeal from a disciplinary proceeding. *In re Webster*, 4 ROP Intrm. 198 (1994). If that argument is to be made, it is properly addressed to the Appellate Division.

FACTUAL BACKGROUND

The criminal charges against Wolff's client, Kotaro, were extremely serious. The criminal information alleged felony gun possession charges, and consequently carried a mandatory fifteen year jail sentence if a conviction occurred. Kotaro had an obvious motive to influence the testimony of two key witnesses; his estranged wife and her domestic helper Precy Balcita. Not surprisingly, the trial court ordered that the Defendant have no contact with any witnesses, and mentioning specifically Gloria Kotaro and Precy Balcita, as a condition of bail.

Later the government moved to revoke Kotaro's bail. One of the bases of the motion was the allegation that "there has apparently been substantial influence exerted over witnesses Gloria Kotaro and Precy Balcita from sources which could only be directly or indirectly from the Defendant." Government motion dated September 6, 1995. This request was denied, but Justice Hoffman made as unambiguous as possible the "no contact" order:

> that if Gloria Kotaro attempts to telephone him, he is to hang up; that if Gloria Kotaro attempts to see or talk to him in person, he is to walk away; and that any matters about the children of Gloria Kotaro that need to be discussed with her are to be communicated through her attorney.

The trial commenced on Monday, December 4, 1995. The next week, Mr. Wolff's cross-examination of Gloria Kotaro made clear that the previous Friday, December 8, Defendant Kotaro picked up Gloria, brought her to Wolff's office, and Wolff questioned her for a considerable period of time with Kotaro observing the interrogation.

Wolff's cross-examination of Gloria Kotaro during the Kotaro trial included the following:

Vol. 1, Page 100, Line 4:

Q. Wasn't it just last Friday night, Mrs. Kotaro?

⊥208

A. No.

Q. Weren't you at my office last Friday night, Mrs. Kotaro, from eight o'clock till midnight?

A. I was in your office, but I wasn't, I wasn't there from eight to twelve.

Vol. 1, Page 100, Line 18:

Q. And you didn't leave until close to midnight, did you?

A. It was not midnight when I left. I was there for like an hour.

Q. Isn't it true that we were all concerned about the curfew? Wasn't it late enough for you and I was concerned about the curfew, you getting home before the curfew?

Vol. 1, page 102, Line 25:

Q. Why did you lie to me Friday night?

A. Maybe I just wanted to tell you what you want to hear, or maybe I felt sorry for Zacheus. But I just took an oath, and I have to tell the truth.

Vol. 1, Page 149, Line 14:

Q. Mrs. Kotaro, who brought you to my office Friday night?

A. Zacheus.

Q. Zacheus Kotaro?

A. Uh-huh.

Vol. 2, Page 1, Line 11:

Q. And, in fact, you sat in my office, and you told me two different versions of what happened. And both times, you were sitting right in front of Mr. Kotaro, weren't you?

A. Yeah, he was around, yes.

Q. Pardon me?

⊥209

A. Yes.

Q. And Mr. Kotaro never said a word to you, did he?

A. No, he's talking. At times he, you know, when we're talking, he'll be suggesting some things too.

Q. Did he tell you what to come and say to me?

A. Yes.

Vol. 2, Page 2, Line 16:

Q. Yeah. Now during the break, you were speaking with the Special Prosecutor and your attorney, weren't you?

A. Uh-huh. Yes. Yes.

Q. And prior to that break, your attorney had no knowledge that you were at my office with Mr. Kotaro any time, did he?

A. No.

Vol. 2, Page 4, Line 10:

Q. And what did the Special Prosecutor say?

THE COURT: Is that relevant in any way?

Q. I don't know judge.

THE COURT: We'll this isn't, it's not a deposition. If you have some reason . . .

Q. Yeah, I have a reason, I want to know if she was coached on what to say right now.

Vol. 2, Page 13, Line 20:

Q. Are you now saying that Zacheus Kotaro, the defendant, did tell you to come to Court and lie?

A. Did I say that?

Q. I'm asking you. Are you saying that he told you to come to Court and lie?

⊥210

A. Well, you and Zacheus suggested one time, the last Friday night, when I was in the meeting at, when I was with you two at the office. You were suggesting that I come to the Court and tell the story which I, I did not, and I'm telling the truth now.

Vol. 2, Page 14, Line 20:

A. When you were sitting there across from me, you were telling me the things that I'm, that I was supposed to come here and say.

Q. Wasn't I telling you the very things you had told me previously in another meeting? And wasn't I asking you is that what you're going to say?

A. No, you were not, you were not asking.

Vol. 2, Page 15, Line 13:

A. You didn't say to come and lie, but you were making a story that you wanted, you and Zacheus wanted me to come and say it, but I never said it. I have never said it here.

Vol. 2, Page 105, Line 22:

Q. Isn't it also true that last Friday night I told you that as long as you told the truth in this courtroom, you had nothing to worry about?

A. No, you didn't tell me that.

Q. Mrs. Kotaro, didn't I told you that as long as you came into this courtroom and told the truth, that if you were prosecuted for anything in connection with this case, Zacheus would pay for me to defend you?

A. No, that's not what you said.

Q. Mrs. Kotaro, didn't that conversation take place right after you told me that the prosecutor had threatened to charge you if you testify the way he wanted?

A. I don't remember that. I didn't say that.

From this cross-examination from the trial, a summary of ⊥211 Mr. Wolff's recollection of the meeting can be constructed.

Gloria Kotaro arrived at Mr. Wolff's office at around 8 o'clock in the evening. She was

brought there by Defendant Kotaro. Mr. Wolff discussed the case with her until it got so late there was concern that the meeting had to terminate because of the curfew. During these discussions, Defendant Kotaro was present, and Wolff offered to defend Gloria if she was prosecuted for anything in connection with this case, and Defendant Zacheus would pay for this defense, if she "told the truth" on the witness stand. [3] Gloria's attorney [4] knew nothing of the meeting until the day of the cross-examination.

Respondent testified at the Disciplinary Hearing, but his testimony was inconsistent from his representations during the cross-examination during the trial. He now states that the meeting was of much shorter duration, that Mr. Kotaro was expressly ordered out of his office and made to sit in the reception area during the interrogation of Gloria. He also stressed it was not a pre-arranged meeting, and that he phoned Gloria's lawyer the very next day (a Saturday) to inform him of the meeting.[5]

He further testified that, at the close of the Kotaro trial for that week, he was feeling too ill to make the trip to his home in Babeldaob, so he took some medication and was asleep in his office when he was awakened by the unexpected arrival of Defendant Kotaro, who told him that Gloria wanted to speak to him. Although still feeling the effects of the medication, he nonetheless allowed them in. He also tried to unobtrusively tape the discussion but testified his efforts failed. [6] At the disciplinary hearing, Gloria reaffirmed that he made the offer ⊥212 to defend her in any subsequent proceedings brought against her if she "told the truth" during Kotaro's trial, and that Kotaro would pay for the defense.

LEGAL ANALYSIS

Respondent argues that this Tribunal ought not to consider his statements during cross-examination because questions of counsel are not evidence. It may well be correct to state that questions of counsel are not evidence in the trial in which the questions are asked, but in these proceedings they may be considered admissions. By making the factual assertions in the questions, Wolff "manifested his adoption or belief in [their] truth." Rule 801(d)(2)(B), ROP Rules of Evidence. Consequently in these proceedings they may be considered admissions. This result is reinforced by the obligation of an attorney not to "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence," [7] and that "[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person." [8] Unless Respondent means to suggest that

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[3] Gloria states the offer of free legal defense was conditioned upon her testimony being consistent with the defense.

[4] She was using Micronesian Legal Services Corporation regarding potential domestic law litigation.

[5] Her attorney Mr. Kirschenheiter testified he had no recollection of any such phone call.

[6] For a discussion of the ethical considerations regarding taping of conversations by lawyers, see "Propriety of Attorney Surreptitious Sound Recordings of Statements by Others Who are or may become involved in Litigation," 32 A.L.R. 5th 715 (1995).

[7] Rule 3.4, Model Rules of Professional Conduct.

[8] Rule 4.1, Model Rules of Professional Conduct.

his efforts were directed at eliciting false testimony at the *Kotaro* trial, he should not now be heard to argue that the representations implicit in his questioning of Gloria should be disregarded.

Having to choose between Mr. Wolff's representations made soon after the event in question, and his later contradictory testimony, we find that his earlier statements are likely a more accurate rendition of what happened.

The original Disciplinary Counsel alleged sixteen different counts of misconduct based upon Wolff's evening meeting with Gloria, and its aftermath. The current Disciplinary Counsel withdrew two of the counts at the close of evidence. Rather than examine each of Disciplinary Counsel's counts *seriatim*, we will proceed to that part of the complaint that identifies the misconduct that the facts show occurred here. However, we will begin by stating our agreement with the statement of counsel for respondent that the "no contact" provision in the order granting ⊥213 Kotaro bail did not obligate defense counsel to report violations of the order.

Rule 1.6 of The Model Rules states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
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> > (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
> >
> > (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

The comment to the rule emphasizes that:

> [t]he confidentiality rules applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

If defense counsel were obligated to report any and all violations of conditions of bail that were observed, the defense attorney becomes an enforcement arm of the government, and any benefit gained therefrom would be more than off-set by the resulting damage to lawyer-client relations. Here, Defendant Kotaro's trip to Wolff's office with Gloria was not *per se* a criminal act, nor did Wolff reasonably believe it was likely to result in imminent death or

substantial bodily harm to Gloria. Therefore, he did not have a duty to report the fact that he saw ⊥214 his client with Gloria.

But he did have other duties to the Court. Wolff knew that Justice Hoffman had made a judicial determination that the administration of justice in the *Kotaro* case required that Kotaro have no contact with Gloria. When faced with Kotaro blatantly violating that Court order by showing up at his office with Gloria in tow, Wolff took advantage of the opportunity created, and interrogated the adverse witness. Therefore he was an active participant in the very kind of event that Justice Hoffman wanted to prevent; an opportunity for Kotaro to influence his estranged wife's testimony. We believe his involvement in, and efforts to create a benefit for his client from, an on-going violation of the Court order was engaging in conduct that was prejudicial to the administration of justice, and constitutes misconduct pursuant to Rule 8.4(d) of the Model Rules of Professional Conduct.[9]

The only other charge we believe needs to be addressed separately is the allegation by the Disciplinary Counsel that Wolff's efforts that night were directed at encouraging Gloria Kotaro to commit perjury, by coaching her and otherwise encouraging her to falsely testify. Wolff's position is that he was only exhorting her to tell the truth, and to let him know what her testimony would be. As the above extracts from the Kotaro trial transcripts make clear, Gloria's firm impression was that the Friday night session with Wolff was for the purpose of having her testimony realigned with the defense. Her testimony before this Tribunal in that regard was consistent with her original testimony. The standard of proof in finding professional misconduct is one of clear and convincing evidence. Rule 5(d) Disciplinary Rules. We conclude the evidence presented regarding this charge does not reach this standard. But we do note facts plead by the Disciplinary Counsel as part of the "perjury" count of the complaint, but not charged as a separate violation, that could have been a separate charge. As earlier noted, Gloria was told (according to Wolff's version) that if she "told the truth," and that if she was prosecuted for anything in connection with the testimony, his client would pay Wolff's legal fees, and Wolff would defend her.

Our first observation is that a fair interpretation of the ⊥215 expression, "telling the truth" is, in this context, code language meaning she was to adopt Kotaro's defense. Obviously, if Gloria testified generally consistent with her earlier statements to the Government, she was not in danger of facing further proceedings. Her only danger of subsequent prosecution would be if she recanted her previous statements at that point in the trial.

Rule 3.4(b) prohibits a lawyer from "offer[ing] an inducement to a witness that is prohibited by law." The comment to that subparagraph states:

> it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert a contingent fee.

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[9] It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.

A proffer of free future legal services is an inducement to a witness to influence testimony. The fact that the inducement is payment in a form other than cash is not a successful evasion of the rule. *The Florida Bar v. Lopez* , 406 So. 2d 1100 (Fla. 1981) (lawyer suspended after asking two defendants to testify in favor of the client in return for dropping them from the suit); *In re Rosen* , 438 A.2d 316 (N.J. 1981)(lawyer offered to represent the witness free in a careless driving suit); *In re Shamy* , 282 A.2d 401 (1971)(lawyer provided a loan to witness); *People v. Belfor*, 591 P.2d 585 (Col. 1979)(lawyer performed legal work for witness and settled a judgment against witness in exchange for testimony).

We want to make clear that it is not a defense that the inducement to the witness was to provide what the lawyer believes is truthful testimony.

> "[P]ayment . . . to a witness to testify in a particular way, . . . to prevent a witness' attendance at trial, . . . to make him 'sympathetic,'. . . are all payments which are absolutely indefensible . . . The payment of a sum of money to a witness 'to tell the truth' is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true." *In re Robinson* 136 N.Y.S. 548, 556 (1912); quoted in *ABA/BNA Lawyers Manual on Professional Conduct* 61:708.

⊥216 This additional violation of the rule was brought to light at the time of Wolff's cross-examination. However, since he was not technically charged with this violation, we do nothing more than note it at this time.

We therefore reach the issue of what sanction should be imposed for the violation of Rule 8.4(d).

The purpose of the disciplinary system is not punishment but the protection of the public and the courts from attorneys who are failing to either adhere to required standards of conduct or to discharge properly their professional duties. In this regard, Respondent has already had imposed the ultimate sanction: disbarment. Any sanction beyond disbarment would be punitive rather than ameliorative, and consequently no other sanction will be imposed at this time. The fact that Wolff violated Rule 8.4(d) under the facts and circumstances related herein shall be considered when and if he applies for reinstatement at some later date.