

In re Rechucher, 7 ROP Intrm. 28 (1998)
IN THE MATTER OF JOHN K. RECHUCHER,
Respondent.

DISCIPLINARY PROCEEDING NO. 6-96

Supreme Court, Disciplinary Tribunal
Republic of Palau

Hearing: February 13, 16-17, 19-20, 1998
Decided: March 26, 1998

Disciplinary Counsel: Mark Doran, Esq.

Counsel for Respondent: David F. Shadel, Esq.

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; and LARRY W. MILLER, Associate Justice.

BEATTIE, Justice:

In this disciplinary proceeding, attorney John K. Rechucher is charged with the violation of a number of the Court's rules of professional conduct. The charges pertain to actions taken by Rechucher while he was both Ngardmau State's governor and its attorney.

Having conducted an extensive hearing, we reach the following conclusions.

FACTS

In 1985, respondent John K. Rechucher took office as a member of the Legislature of the First Constitutional Government of Ngardmau State. In 1987, Aichi Kumangai, the governor of Ngardmau State, became unable to finish his term and the legislature selected Rechucher to replace him.

129 In 1988, the Ngardmau State Legislature selected Sadang Silmai as governor for the state's Second Constitutional Government. ¹ Rechucher served as a legislator during Silmai's term. In 1992, Rechucher was reelected as a legislator for the state's Third Constitutional Government and his colleagues selected him to be governor. Rechucher was sworn into office as governor in February 1993.

On February 27, 1993, Ngardmau State entered into a "Memorandum of Understanding" with JKR Construction Company, a company owned by Rechucher and run by his wife, Bessie Iyar. Pursuant to the memorandum, the state agreed to hire only workers from JKR Construction Company to perform the tasks necessary to complete Capital Improvement Projects for the state.

¹ The Ngardmau State Constitution provides that the governor is to be selected by the members of the state legislature.

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The memorandum provided that the state could hire other workers at any time it found that another arrangement would cost the state less money and would be more beneficial to the state government.

On June 23, 1993, Rechucher commenced an attorney-client relationship with Ngardmau State. Ngardmau State Law 3-4 authorized Rechucher to represent Ngardmau State in lawsuits against former governor Sadang Silmai to recover misappropriated public funds. Pursuant to State Law 3-4, Rechucher filed several lawsuits against Silmai.

During Rechucher's term as governor and while he was an attorney for Ngardmau State, the state hired JKR Construction Company to perform a number of capital improvement projects, including state generator, state power plant, state boat repairs, state school, state building, state dock, abai renovation and softball field fence. These projects were not bid out in accordance with the Republic's procurement laws, 40 P.N.C. §§ 601-663. Rechucher testified that he was not aware of the Republic's procurement laws until 1996 and left procurement matters to Matsuda Rechucher, Rechucher's nephew and Ngardmau State's alleged procurement officer.² The procurement law and procedures for giving the public notice of the invitation for bids on the projects were not followed. JKR Construction Company was the only bidder on the projects. Each time JKR Construction company was selected to conduct a project, Rechucher notified the state legislature of his conflict of interest stemming from his roles as the state's governor and the beneficiary of the project contracts. He did not note the conflict pertaining to his role as the state's attorney. The legislature approved each of the projects nonetheless.

DISCUSSION

The complaint filed by disciplinary counsel contained 13 counts, charging Rechucher with the violation of a Variety of the Court's professional conduct rules. The Court dismissed four of the counts before the disciplinary hearing.³ Although the remaining 130 nine counts allege that Rechucher violated a number of rules, it is unnecessary to look at each of those rules in detail. The counts can be broken down into two basic categories: 1) those alleging violations of ABA Model Rule of Professional Conduct 1.8(a), pertaining to attorney-client transactions and 2) those alleging violations of Model Rule 8.4(c) and Palau Disciplinary Rule 2(a), concerning offenses related to dishonesty.⁴

² Pamela Martinelli, an employee of the Office of the Public Auditor, testified that she had never seen any documents naming Matsuda Rechucher as Ngardmau State's procurement officer; Martinelli suggested that John Rechucher was the true procurement officer of Ngardmau State. We see no need to resolve this factual dispute for purposes of this opinion.

³ In an order dated November 10, 1997, the Court instructed disciplinary counsel and counsel for Rechucher to file briefs on several pertinent legal issues. Much to our dismay, no briefs were ever filed. Because the parties did not submit the requested briefs, we proceeded to analyze the complaint on our own and decided to strike four of the claims because they bore no relation to potential rule violations.

⁴ Attorneys practicing in Palau are subject to disciplinary action for violating the American Bar Association Model Rules of Professional Conduct. *See* ROP Professional Conduct Rule 2(h).

A. Attorney-Client Transactions

Model Rule 1.8(a) states:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

Business transactions between attorneys and their clients are not prohibited, but they are highly disfavored. American Bar Association and the Bureau of National Affairs, *ABA Lawyer's Manual on Professional Conduct*, § 51-503 (1991). Because attorneys have important fiduciary responsibilities to their clients, they should be wary of entering deals with those whom they represent. *See Spilker v. Hankin*, 188 F.2d 35 (D.C. Cir. 1951); *Giovanazzi v. State Bar of California*, 619 P.2d 1005 (Cal. 1980). Attorneys may be liable for violating Rule 1.8(a) even if they have no intent to defraud their clients. *ABA Lawyer's Manual*, § 51-503.

Rechucher entered into an attorney-client relationship with Ngardmau State when he signed Ngardmau State Law 3-4.⁵ This relationship continued throughout the time that JKR Construction Company was bidding on Ngardmau State construction projects, entering into construction contracts with Ngardmau State government and receiving payments from the state for its work. Thus, the rules of professional responsibility applied to Rechucher in his dealings with the state. 131

The first requirement of Rule 1.8(a) is that any transaction between an attorney and his client be “fair and reasonable” to the client. The attorney bears the burden of proof on this issue. *See Clancy v. State Bar of California*, 454 P.2d 329, 333 (“It is incumbent upon the attorney to show that the dealings are fair and reasonable and were fully known and understood by the client.”); *see also Rufolo v. Midwest Marine Contractor*, 912 F. Supp. 344, 349-50 (attorney “bears the burden of showing the utmost in good faith, that complete disclosure has been made, that the client has a full understanding of the facts and possible legal consequences, and that the agreement reached was fair.”).

⁵ In order for Rule 1.8(a) to apply, an attorney-client relationship must exist. Center for Professional Responsibility, American Bar Association, *Annotated Model Rules of Professional Conduct*, Rule 1.8 (2d ed. 1992).

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Rechucher has not met his burden of proof in this case. He submitted no evidence from which we could consider whether his construction contracts with the state were “fair and reasonable” to the state. Even if such evidence had been adduced, moreover, we have found that the procurement laws of Palau, a primary purpose of which is to ensure fairness and propriety in government contracts, were not followed.

For one thing, the projects were not bid out in a manner designed to attract any bidders other than JKR Construction Company. The state placed bidding notices only in the Ngardmau State offices in Ngardmau and Koror. This hardly gave other companies fair notice that the state was accepting bids for construction projects.

Although Matsuda Rechucher may have been the state's procurement officer, respondent Rechucher had a responsibility as an attorney entering into a business transaction with his client to make sure that the terms were fair and reasonable to the client and that all the bidding procedures were conducted so as to remove any taint of self-dealing.⁶ That Rechucher claims to have been unaware of procurement law does not excuse, and if anything, compounds, his failure to fulfill this responsibility. Respondent Rechucher cannot place the blame on Matsuda Rechucher for his own failure to comply with the rules of professional conduct for attorneys.

The state legislature’s approval of the construction contracts with JKR Construction Company does not show that the deals were fair and reasonable. The law requires us to examine the contracts with an objective lens, not through the subjective views of the client. Moreover, Rule 1.8(a) requires a showing that the attorney gave the client a reasonable opportunity to seek the advice of independent counsel. Here, Rechucher submitted no evidence showing that he suggested to the legislature that it seek the advice of another attorney with respect to the deals involving L32 Rechucher’s personal businesses.

⁶ Respondent Rechucher may also have had certain responsibilities in his role as governor to verify that proper bidding procedures were followed. However, in this proceeding we focus only on Rechucher’s action as an attorney.

B. Dishonesty

Model Rule 8.4(c) states:

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Palau Disciplinary Rule 2(a) provides that an attorney may be subject to disciplinary action for:

(a) The commission of any act involving moral turpitude, dishonesty or corruption in the course of his conduct as an attorney or otherwise

We cannot find by clear and convincing evidence that Rechucher violated either of these rules. Although Rechucher's failure to adhere to the procurement laws is conduct we would not expect of a licensed attorney, Rechucher was open and above board in his actions. There was no proof that he attempted to trick the state government or hide important information from them. Unlike Rule 1.8(a), these rules are violated only if the attorney has a wrongful intent,⁷ and such an intent has not been proven by clear and convincing evidence.

C. Sanctions

This Court determines appropriate sanctions by reference to the ABA Standards for Imposing Lawyer Discipline. *See In re Shadel*, 6 ROP Intrm. 252, 257 (1997); *In the Matter of John S. Tarkong*, 4 ROP Intrm. 121, 131 (1994). Mitigating factors include the fact that Rechucher does not have a prior disciplinary record and has cooperated with disciplinary counsel. However, his self-serving motives and failure to see any problems with his conduct are aggravating factors.

We find that public censure is a proper sanction in this case. Rechucher and other attorneys should be apprised of the close scrutiny this Court will give to transactions between attorneys and their clients. In addition, we find it appropriate to require Rechucher to pay the disciplinary counsel's costs of investigating and prosecuting this matter. Disciplinary counsel should submit an itemized list of his costs and attorney fees to the Court and to Rechucher. Once Rechucher receives the itemized list, he shall have ten days to object to the amount requested. In the absence of any objection, he shall pay the amount within thirty days. If an objection is filed, it shall be set for further proceedings.

⁷ *See In re Chase*, 702 P.2d 1082, 1088 (Or. 1985); *but see Lawyer's Manual*, § 101-402 (acknowledging that In a few cases negligence has been found to constitute a violation of Rule 8.4).