

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No.: **08-J-10742-RAP**
)
DAVID PHILLIP SCHLUCKEBIER) **DECISION**
)
Member No. 179034)
)
A Member of the State Bar.)

I. INTRODUCTION

By order filed on January 23, 2008, respondent David Phillip Schluckebier was disbarred in Illinois. As a result, the State Bar of California initiated this proceeding. (Bus. & Prof. Code, § 6049.1;¹ Rules Proc. of State Bar, rules 620-625.) The Office of the Chief Trial Counsel of the State Bar of California (State Bar) was represented by Christine Souhrada. Respondent did not appear in person or by counsel.

The issues in this proceeding are limited to: (1) the degree of discipline to be imposed upon respondent in California; (2) whether, as a matter of law, respondent's culpability in the proceeding would not warrant the imposition of discipline in California under the laws or rules applicable in California at the time of respondent's misconduct in Illinois; and (3) whether the proceeding lacked fundamental constitutional protection. (Section 6049.1(b).)

¹Unless otherwise noted, all statutory references are to this code.

Respondent bears the burden of establishing that the conduct for which he was disciplined in Illinois would not warrant the imposition of discipline in California and/or that the proceedings lacked fundamental constitutional protection. Unless respondent establishes one or both of these, the record of discipline in the Illinois proceeding is conclusive evidence of culpability of misconduct in California. (Section 6049.1(a) & (b).) Since respondent did not participate in this proceeding, the court focuses on the degree of discipline to be imposed.

For the reasons indicated below, the court recommends, among other things, that respondent be disbarred.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on December 16, 2008, and was properly served on respondent on that same date at his official membership records address by certified mail, return receipt requested, as provided in Business and Professions Code section 6002.1(c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.)

On December 23, 2008, a notice scheduling a status conference for January 22, 2009, was properly served at respondent's official address. The court judicially notices its records which indicate that this correspondence was returned by the United States Postal Service (USPS) to the court on January 20, 2009 with the notation "unknown." Respondent did not participate in the status conference. A copy of the status conference order was properly served on respondent at his official address on January 23, 2009. It, too, was returned as undeliverable by the USPS with the notation "Moved, left no address."

Respondent did not file a responsive pleading. On February 26, 2009, a motion for entry of default was properly served on respondent at his official address by certified mail, return

receipt requested. It advised him that, if he was found culpable, minimum discipline consisting of disbarment would be sought. He did not respond to the motion.

On April 1, 2009, the court entered respondent's default and enrolled him inactive effective three days after service of the order. The order was properly served on him at his official address on that same date by certified mail, return receipt requested. It was returned to the court on May 21, 2009, marked "Moved, left no address."

The State Bar's other attempts to locate and contact respondent were fruitless. This included contacting respondent's last known employer in Palau,² who believed he might still be in China, as well as sending correspondence to possible email addresses for him.

The matter was submitted for decision without hearing on April 21, 2009.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 7, 1995, and has been a member of the State Bar at all times since.

B. Facts

Business and Professions Code section 6049.1(a) provides, in pertinent part, that a certified copy of a final order by any court of record of any state of the United States, determining that a member of the State Bar committed professional misconduct in that jurisdiction shall be conclusive evidence that the member is culpable of professional conduct in this state.

The court admits into evidence the certified record of the disciplinary proceedings in Illinois, a copy of which was attached to the NDC as Exhibit 1. The court judicially notices the applicable Illinois ethics rules attached to the NDC as Exhibit 2.

² The court judicially notices that respondent's official address has been in Palau since August 1999.

Respondent was admitted to the practice of law in Illinois.

The record of the proceeding conclusively establishes that respondent was disbarred in Illinois by order of the Illinois Supreme Court issued on January 23, 2008 on the basis of the following facts:

Between 1998 and 2004, respondent lived in the Republic of Palau. In 2002, he married Hong Kun Xue AKA Xue Hong Kun (Xue).

Xue operated a restaurant that included a massage parlor and a house of prostitution. From 2002 to 2004, respondent was aware that Xue operated the restaurant as a prostitution business.

Between 2002 and 2004, Xue deposited a portion of the funds she received as a result of operating her prostitution business into a Palau bank account which she held jointly with respondent. Respondent knew that a portion of the funds Xue deposited into the joint account were derived from her operation of a prostitution business.

During this time, Title 17, Chapter 36, Section 3(3) of the Palau National Code provided that “the acquisition, possession, or control of property by any person who knows that the property constitutes the proceeds of a crime” constituted the offense of money laundering. Title 17 of the Palau National Code also defined prostitution as a crime. By holding the joint account with Xue, respondent knowingly acquired, possessed, or controlled funds that constituted the proceeds of a crime in violation of the Palau National Code.

In 2004, Xue was criminally charged with, among other things, money laundering in the matter entitled *Republic of Palau v. Hong Kun Xue, a/k/a Xue Hong Kun* (Republic of Palau, Trial Division, CR 04-244). Respondent was called to testify as a witness during Xue’s criminal trial.

During his sworn testimony, respondent testified that the funds he and Xue deposited into their joint account were derived from wedding gifts, his family and his salary. His testimony was false. He knew that the deposited funds were the proceeds of Xue's prostitution business.

Respondent was licensed to practice law in the Republic of Palau and worked as an attorney for the Senate Legal Counsel Office. After Xue's criminal trial, the Attorney Disciplinary Tribunal of Palau (Tribunal) conducted an investigation of respondent. The disciplinary counsel issued a preliminary finding but recommended that respondent be given an "extra opportunity to respond to the allegations that he was aware of his wife's prostitution business." Neither respondent nor his attorney responded.

Palau disciplinary counsel brought a formal complaint against respondent charging him with falsely testifying under oath, knowingly receiving proceeds of his wife's illegal business and attempting to conceal or disguise the illegal nature of the money from his wife's illegal business. Respondent neither responded to the complaint nor appeared at the disciplinary hearing. Accordingly, the allegations of the complaint were deemed admitted. The Tribunal found by clear and convincing evidence that respondent testified falsely under oath, conduct that constitutes moral turpitude, dishonesty or corruption. It also noted that respondent once thwarted a police sting on Xue's business. On a day that he was present, undercover plainclothes officers entered the restaurant in search of evidence of prostitution. Upon their arrival, respondent discreetly conferred with his sister-in-law who then approached the officers to advise them that only regular massage services were available at the restaurant.

The Tribunal also found that respondent knowingly received proceeds of his wife's illegal business; knew that Xue was running a prostitution business at the restaurant she owned and operated; and attempted to conceal or disguise the illegal nature of the source of the money from his wife's business. The Tribunal disbarred respondent on January 9, 2006.

The Hearing Board of the Illinois Attorney Registration and Disciplinary Commission (Board) found by clear and convincing evidence, in its report filed October 11, 2007 (Illinois Board Report), that respondent engaged in the criminal act of money laundering as defined by the Palau National Code³ and thereby violated rule 8.4(a)(3) of the Illinois Rules of Professional Conduct (Illinois Rule). This rule prohibits a lawyer from committing a criminal act that reflects adversely on his or her honesty, trustworthiness or fitness as a lawyer in other respects.

The Board also found that by committing the crime of money laundering, respondent engaged in conduct that brings the legal profession into disrepute in violation of Supreme Court Rule 770. Rule 770 sets forth the types of discipline available, including disbarment, for violating the Illinois Rules of Professional Conduct or for conduct that tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute.

In addition, the Board found that respondent's false testimony during his wife's criminal trial violated rules 8.4(a)(4) and (5) and Supreme Court Rule 770. Rule 8.4(a)(4) prohibits a lawyer from engaging in conduct involving dishonestly, fraud, deceit or misrepresentation. Rule 8.4(a)(5) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice.⁴

In recommending disbarment, the Board gave significant weight to respondent's failure to participate in the disciplinary proceedings in Illinois and in Palau. In mitigation, it noted that respondent had no prior disciplinary record but that his prior good conduct was insufficient to outweigh the severity of his misconduct.

³ It also noted that the Palau National Code criminalizes prostitution.

⁴ In regard thereto, a lawyer shall not engage in adverse discriminatory treatment of litigants, jurors, witnesses, lawyers and others, based on sex, race, religion, or national origin, disability, age, sexual orientation or socioeconomic status unless these or similar factors are issues in the proceeding.

C. Legal Conclusions

1. Section 6106 (Moral Turpitude)

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is clear and convincing evidence that respondent violated section 6106 by engaging in acts of moral turpitude, namely, money laundering and giving false testimony at Xue's criminal trial. (*In the Matter of Rech* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 310, 315.) Accordingly, he wilfully violated section 6106.

2. Section 6068, subd. (d) (Employing Means Inconsistent with the Truth)

Section 6068, subdivision (d) requires an attorney from employing, for the purpose of maintaining the causes confided to him or her, those means only as are consistent with the truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

Although there is clear and convincing evidence that respondent wilfully violated section 6068, subdivision (d) by giving false testimony in Xue's trial, this charge is duplicative as it is based on facts establishing culpability for committing acts of moral turpitude. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786, 787.)

IV. LEVEL OF DISCIPLINE

A. Mitigation

Since respondent did not participate in these or the Illinois or the Palau disciplinary proceedings, no mitigating evidence was presented and the court could glean no significant mitigating factors. (Standard 1.2(e)(i), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions

for Prof. Misconduct⁵.) Respondent's approximately seven years of discipline-free conduct prior to the commencement of the misconduct are afforded only minimal weight. (*In re Naney* (1990) 51 Cal.3d 186, 196 [seven years]; *Kelley v. State Bar* (1988) 45 Cal.3d 649, 658 [seven and one-half years].)

B. Aggravation

Respondent engaged in multiple acts of wrongdoing. (Std. 1.2(b)(ii).)

Respondent's lack of participation prior to the entry of default in this proceeding is an aggravating circumstance. The court notes that he also did not participate in the Illinois and Palau disciplinary proceedings. (Std. 1.2(b)(vi).)

C. Discussion

The primary purposes of attorney disciplinary proceedings are the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys; and the preservation of public confidence in the legal profession. (Standard 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

Standard 1.6(b) provides that the appropriate sanction for the misconduct must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding and different sanctions are prescribed by the standards for those acts, the sanction recommended shall be the most severe. The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards." (*Id.* at p. 251.)

⁵Future references to standard or std. are to this source.

Standard 2.3 recommends actual suspension or disbarment for culpability of an act of moral turpitude, fraud, intentional dishonesty or of concealment of a material fact from a court, client or other person, depending on the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the attorney's acts within the practice of law.

The State Bar seeks disbarment and this court agrees.

The court found instructive *In re Berman* (1989) 48 Cal.3d 517, a disbarment case. He was convicted after he proposed a plan that would result in laundering money that he believed was obtained through drug sales and sought to have financial statements that he believed had false information given to banks to obtain loans and lines of credit for a company he partly owned. This conduct offered a sufficient indication of fraudulent intent to constitute moral turpitude. In mitigation, respondent offered that respondent was 63 years old and had three children. In aggravation, the court considered a prior instance of discipline for failing to perform services for which he was retained for which he was publicly reprovved. *Berman* is distinguishable from the present case in that the attorney participated in the proceedings and had one prior instance of discipline.

Further, in *In the Matter of Rech* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 310, disbarment was ordered based on the attorney's conviction of conspiracy to impair collection of federal income taxes. Among other things, he concealed the true ownership of property in order to prevent its forfeiture because of illegal drug trading, used a real estate venture to lauder cash which he knew came from illegal drug sales, concealed a former client's history of drug charges when bringing the former client into a real estate venture with another partner, hid cash proceeds from illegal drug sales several times for a former client, loaned him money to finance illegal drug trade and made intentional misrepresentations that he knew could endanger the lives of

others. In aggravation, the court considered multiple acts of misconduct. Mitigating factors included candor and cooperation, favorable character testimony, pro bono work, passage of considerable time since the misconduct and proof of subsequent rehabilitation, remorse (limited weight) and eight years of discipline-free practice (not significant weight). The mitigating factors were insufficient in light of respondent's repeated acts of misconduct over the course of years which constituted extremely serious misconduct. *Rech* presented greater misconduct than the instant case, however, unlike respondent herein, respondent Rech participated in the proceedings and presented substantial mitigation, albeit insufficient to overcome extremely serious misconduct over a several-year period. (*Id.* at p. 317.)

“Respondent’s criminal conduct and false testimony, although not in the discharge of his professional duties, indicate a complete disregard for personal integrity and honesty that strikes at the heart of an attorney’s duties of trust and loyalty.” (Illinois Board Report, page 8 (Ex. 1, Bates stamp page 13).) That statement expresses this court’s view of this matter. Honesty is one of the most fundamental rules of ethics for attorneys. (*Tomlinson v. State Bar* (1975) 13 Cal.3d 567, 577 [119 Cal.Rptr. 335, 531 P.2d 1119].) Dishonesty “is inimical to both the high ethical standards of honesty and integrity required of members of the legal profession and to promoting confidence in the trustworthiness of members of the profession. [Citations.]” (*Stanley v. State Bar* (1990) 50 Cal.3d 555, 567; see also, *Codiga v. State Bar* (1978) 20 Cal.3d 788, 793 [“[d]eceipt by an attorney is reprehensible misconduct whether or not harm results and without regard to any motive or personal gain. (Citations.)”].)

Respondent engaged in dishonest conduct for an extended period of time and as not offered any explanation for his behavior. Having considered the evidence and the law, the court feels that the only means of protecting the public from further misconduct by respondent is disbarment, and so, that is the discipline recommendation.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent David Phillip Schluckebier be disbarred from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this state.

It is also recommended that the Supreme Court order respondent to comply with rule 9.20, paragraph (a), of the California Rules of court within 30 calendar days of the effective date of the Supreme Court order in the present proceeding, and to file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order.

VI. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VII. ORDER REGARDING INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007, subdivision (c)(4). The inactive enrollment shall become effective three days from the date of service of this order and shall terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: July 15, 2009

RICHARD A. PLATEL
Judge of the State Bar Court