



By the order of the court, Judge David A Wiseman

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FOR PUBLICATION

**IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

IN RE THE MATTER OF:)	CIVIL CASE NO. 10-0340
)	(Case 2007-08)
)	
DOUGLAS F. CUSHNIE)	ORDER RE: DISCIPLINARY ACTION
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_____)	

I. INTRODUCTION

THIS MATTER came before the Court on June 29, 2011 at 1:30 p.m. in Courtroom 223A for Respondent’s Disciplinary Hearing. Douglas Cushnie, Esq. (hereinafter “Respondent”) was represented by attorney, Earle A. Partington, Esq. George L. Hasselback, Esq. served as the court appointed Disciplinary Counsel. This Disciplinary Complaint arose out of an incident involving Ms. Elizabeth Blanco Matsunaga (hereinafter “Ms. Matsunaga”).

Respondent is claimed to have violated Model Rule 1.4(a), in that he failed to give his client a reasonable and timely accounting despite repeated demands for such, and Model Rule 1.5(a), in that he collected an unreasonable fee from his client, to wit, money he was not entitled to.

After hearing oral argument and reviewing the file, the Court finds that Respondent violated Model Rule 1.4(a), in that he failed to give his client a timely accounting, but does not find that Respondent violated Model Rule 1.5(a).

1 **II. FACTS**

- 2 1. On or about February 5, 1999, Respondent was named as a Defendant in a Complaint filed by Ms.
3 Matsunaga which alleged that Respondent had violated his fiduciary and ethical duties to Ms.
4 Matsunaga.
- 5 2. On or about December 15, 2006, the CNMI Supreme Court found that Respondent failed in his duty
6 to account to his client in a reasonable and timely manner and further found that Respondent had
7 taken money from his client’s trust account to which he was not entitled.

8 **III. DISCUSSION**

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10 In the present case, Respondent is accused of violating Model Rules 1.4(a) and 1.5(a). The Model
11 Rules of Professional Conduct, adopted by the American Bar Association are applicable in the CNMI
12 through the Commonwealth Disciplinary Rules and Procedures, Rule 2. NMI R. Dis. P. 2; *Bisom v.*
13 *Commonwealth*, 2002 MP 19 ¶ 55. The Court will begin its analysis by determining whether Respondent
14 violated Model Rule 1.4(a).

15 Model Rule 1.4(a) requires an attorney to communicate with his or her client. The Rule provides
16 in pertinent part that a lawyer shall “promptly comply with reasonable requests for information and consult
17 with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client
18 expects assistance . . .” Model Rule 1.4(a).

19 In *Matsunaga v. Matsunaga*, the Supreme Court agreed with the trial court that Respondent violated
20 his duty of loyalty by failing to notify Ms. Matsunaga of the \$8500 retained in his general account as an
21 advance on a contingency fee and failed to notify Ms. Matsunaga that he was claiming his contingency fee
22 based on the value of the 1.2 hectares freed from the leasehold. *Matsunaga v. Matsunaga*, 2006 MP 25 ¶
23 31.

24 Here, it is undisputed that Respondent’s client was Ms. Matsunaga. Therefore, Respondent had a
25 duty to communicate with his client and keep her apprised of all matters relating to his services. Reasonable

1 communication between a lawyer and a client is necessary for the client to effectively participate in the
2 representation. By failing to notify Ms. Matsunaga about the \$8500 fee or that he was placing it in his
3 general account as an advance on a contingency fee, it goes without saying that Respondent failed to
4 communicate with his client.

5 During the hearing, Respondent claimed that it was difficult to speak with Ms. Matsunaga because
6 she did not speak English. As a result, Respondent usually spoke with her son, Frank. Respondent claims
7 that he told Frank the \$8500 should be held in a trust account for appellate work and for any other matters
8 which arose in the future - herein lies the problem. Respondent owed a duty of loyalty and a duty to
9 communicate with his client, not to Frank. Instead, this line was blurred, when Respondent decided to
10 represent Frank in his personal matters and used some of the \$8500 to pay for those services. As a result,
11 Respondent violated Model Rule 1.4(a) in that he failed to communicate with his client. The next issue to
12 address, is whether Respondent collected an unreasonable fee from Ms. Matsunaga.

13 Determination of reasonable attorney fees is guided by Rule 1.5 of the Model Rules. *Camacho v.*
14 *J.C. Tenorio Enters., Inc.*, 2 NMI 509 (1992). Model Rule 1.5(a) states that “[a] lawyer shall not make an
15 agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” The Rule
16 sets out a number of factors to be considered in determining the reasonableness of a fee.¹ Before
17 addressing whether Respondent’s fees were unreasonable, the Court would first like to point out the
18 uncharged possible violation of Model Rule 1.15 (c) and (d), in that Respondent failed to safeguard Ms.
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21 ¹ Model Rule 1.5(a) lists the following factors a court should consider when determining the reasonableness of a fee:
22 (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to
23 perform the legal service properly;
24 (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other
25 employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

1 Matsunaga’s property.

2 Model Rule 1.15 discusses an attorney’s obligation to safeguard a client’s property. Subsection (c)
3 of said section provides “[a] lawyer shall deposit into a client trust account legal fees and expenses that
4 have been paid in advance, *to be withdrawn by the lawyer only as fees are earned* or expenses
5 incurred.”(Emphasis Added). Subsection (d) further provides:

6 “Upon receiving funds or other property in which a client or third person has
7 an interest, *a lawyer shall promptly notify the client or third person*. Except
8 as stated in this rule or otherwise permitted by law or by agreement with the
9 client, *a lawyer shall promptly deliver to the client or third person any funds
or other property that the client or third person is entitled to receive and,
upon request by the client or third person, shall promptly render a full
accounting regarding such property.*” (Emphasis Added).

10 In *Matsunaga v. Matsunaga*, the Supreme Court agreed with the trial court that Respondent was not
11 entitled to the \$8500 advance that Respondent had placed in his general account for work that he had not
12 yet performed. *Matsunaga v. Matsunaga*, 2006 MP 25 ¶ 31. Model Rule 1.15 makes clear that an attorney
13 may only withdraw fees which are earned. Here, Respondent placed \$8500 into his general account for
14 future services, none of which he had earned. Respondent further failed to promptly deliver such funds to
15 his client or render a full accounting regarding the monies he had placed into his general account. Such
16 actions could constitute a violation of Model Rule 1.15.

17 Regardless, this Court could not sanction Respondent for what it deems to be a possible violation
18 of Model Rule 1.15 since disciplinary proceedings are “adversary proceedings of a quasi-criminal nature”
19 where charges must be made known to Respondent before the proceedings begin and may not be amended
20 on the basis of the testimony of the accused. *In Re Ruffalo*, 390 U.S. 544, 551 (1968). Here, Respondent
21 was not charged with violating Model Rule 1.15 so the Court cannot sanction Respondent for violating said
22 Rule. Put a different way, the Court can only consider whether Respondent violated Model Rules 1.4 and/or
23 1.5(a) as alleged in the Complaint.

24 Regarding Rule 1.5(a), the Court is at odds as to whether a violation occurred. Rule 1.5(a) covers
25 the reasonableness of a fee, whereas, Rule 1.5(b) covers the scope of representation, including the basis for

1 a fee. Subsection (b) provides:

2 “The scope of the representation and the basis or rate of the fee and expenses
3 for which the client will be responsible shall be communicated to the client,
4 preferably in writing, before or within a reasonable time after commencing
5 the representation, except when the lawyer will charge a regularly
6 represented client on the same basis or rate. Any changes in the basis or rate
7 of the fee or expenses shall also be communicated to the client.”

8 Here, Respondent failed to go over the scope of his representation with Ms. Matsunaga including
9 whether he was going to hold some money in her trust account for future services or whether she wanted
10 to use that money to pay for her son’s legal fees. Instead, Respondent placed the \$8500 in his general
11 account and then used some of that money to pay for appellate work and the other portion to pay for her
12 son’s legal fees.² The Court views such action as another possible uncharged violation of Model Rule 1.5(b)
13 in that Respondent failed to go over the scope of his representation with Ms. Matsunaga or how the \$8500
14 would be disbursed. However, as discussed *supra*, because Respondent was not charged with violating Rule
15 1.5(b), the Court cannot make a ruling that Respondent violated said Rule.

16 Going back to whether Respondent’s fees were reasonable, the Court does not find that the
17 Disciplinary Counsel established that Respondent’s fees were unreasonable by clear and convincing
18 evidence. While it is true that Respondent collected a fee from his client, to which he was not entitled,
19 perhaps violating Model Rules 1.15(c), 1.15(d), and 1.5(b), no evidence was presented to show that the fees
20 he collected were unreasonable. Although there is a presumption that any fee he collected from his client
21 would be unreasonable since he was not entitled to collect the \$8500 from her without performing any work.
22 Respondent countered that point by testifying that the \$8500 was used for appellate work, as well as, the
23 representation of Ms. Matsunaga’s son. The only two people who can attest to whether Respondent’s fees
24 were reasonable are Respondent, himself, and Ms. Matsunaga’s son, who is deceased. Consequently, the
25 Court does not find by clear and convincing evidence that Respondent’s fees were unreasonable.

² What the Court finds especially troubling is the fact that no written agreement was entered into whereby Ms. Matsunaga agreed to pay for her son’s legal fees.

1 The Court cannot sanction Respondent for failing to safeguard Ms. Matsunaga's property, failing
2 to account for her property, failing to go over the scope of representation with Ms. Matsunaga, and for
3 failing to enter into a separate written agreement with Frank regarding the scope of his representation
4 because none of those violations were alleged in the Complaint. The only violations before the Court are
5 violations of Model Rules 1.4 and 1.5(a). As stated above, the Court cannot sanction Respondent for
6 violating Model Rule 1.5(a) because the Court does not find that the Disciplinary Counsel proved
7 Respondent's fees were unreasonable by clear and convincing evidence. However, the Court does find by
8 clear and convincing evidence that Respondent violated Model Rule 1.4 by failing to communicate with his
9 client and sanctions are appropriate for this violation.

10 11 **IV. CONCLUSION**

12 The Commonwealth courts have the inherent power and duty to regulate the practice of law, both
13 in and out of court. *Matsunaga v. Matsunaga*, 2001 MP 11 ¶ 19. The standard of proof for establishing
14 allegations of attorney misconduct is clear and convincing evidence. *In re Disciplinary Proceedings of*
15 *Rhodes*, 2002 MP 2 ¶ 3; *Saipan Lau Lau Dev., Inc. v. Superior Court (San Nicolas)*, 2001 MP 2 ¶ 30.

16 Professional responsibility is the basic requirement for all attorneys, trial assistants, and other
17 officers and administrators of the court in order to maintain the highest possible level of morality in the
18 judicial system. *In re the Matter Villanueva*, 1 CR 952. The purpose of a disciplinary action against an
19 attorney is not to punish the attorney, but rather to guard the administration of justice, maintain the dignity
20 of the court and the integrity of the profession, and to protect the public. In determining the appropriate
21 sanction, the court considers the nature of the misconduct, the cumulative weight of the violations, and the
22 harm to the public and the profession. *Saipan Lau Lau Dev., Inc. v. Superior Court (San Nicolas)*, 2001 MP
23 2 ¶ 38. After considering those factors, the Court deems the following sanctions appropriate in this matter.

24 **IT IS ORDERED** that the sanction deemed appropriate in this matter is a reprimand or public
25 censure. The Court hereby orders that the publication of this order shall constitute the sanction or reprimand

1 for attorney Douglas Cushnie.

2 **IT IS FURTHER ORDERED** that Douglas Cushnie shall reimburse the Court for any expenses
3 incurred from said publication, as well as, for Court costs associated with the prosecution of this case.
4 Respondent shall have ten (10) days from the date of this Court's invoice to pay the costs associated with
5 this case.

6
7 **SO ORDERED** this 27th day of July, 2011.

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9 _____ / s / _____

10 **David A. Wiseman, Associate Judge**