IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN RE DISCIPLINARY PROCEEDINGS OF
REYNALDO O. YANA and ANTONIO M. ATALIG,
Respondent-Appellants.

SUPREME COURT NO. 2012-SCC-0017-ADA
SUPERIOR COURT NO. 10-0284C

OPINION

Cite as: 2014 MP 1

Decided January 28, 2014

Reynaldo O. Yana, Saipan, MP, and Antonio M. Atalig, Saipan, MP, Respondents, Pro Se
Thomas E. Clifford, Saipan, MP, for Petitioner CNMI Bar Disciplinary Committee

BEFORE: JOHN A. MANGLONA, Associate Justice; F. PHILIP CARBULLIDO, Justice Pro Tem; ROBERT J. TORRES, JR., Justice Pro Tem.

PER CURIAM:

¶ 1 This case revolves around Respondents-Appellants Antonio M. Atalig ("Atalig") and Reynaldo O. Yana's ("Yana") (collectively "Appellants") alleged abuse of legal process to obtain over $1 million during their representation of the Administrator and certain heirs of the Angel Malite[1] Estate ("the Estate"). Appellants appeal a trial court order, which found Atalig in violation of Model Rule of Professional Conduct ("Rule" or "Rules") 3.3(a) and Appellants in violation of Rules 1.15(e), 8.4(a),

[1] Some filed documents refer to Angel Malite while others refer to Angel Maliti. This opinion will use Angel Malite because both parties use that spelling in their briefs.

8.4(c), and 8.4(d).[2] For the following reasons, we MODIFY the trial court's decisions. We find the Appellants failed to: keep disputed property separate, Rule 1.15(e); communicate with candor toward a tribunal, Rule 3.3(a); and follow the Rules of Professional Conduct, Rule 8.4(a). Those acts included conduct involving dishonesty, fraud, deceit, or misrepresentation, Rule 8.4(c); that prejudiced the administration of justice, Rule 8.4(d); and caused substantial harm to Appellants' clients, the public, and the legal profession. Accordingly, because Appellants violations were flagrant, weighty, and extremely harmful to the public and the profession, we modify the decision of the Superior Court, which suspended the Appellants indefinitely, and DISBAR both Yana and Atalig, effective immediately.

I. Factual and Procedural Background

¶ 2 Following the death of Angel Malite, the Estate Administrator retained Appellants and agreed to a contingency-fee agreement entitling them to a third of the recovered Estate. During the course of that representation, the Marianas Public Land Authority ("MPLA") eventually agreed to pay the Estate $3,450,000 in compensation for land taken from the late-Angel Malite, but the Office of the Attorney General ("AG") filed a civil action to prevent the Estate from receiving this payment, in large part because of Appellants' one-third contingency fee. In response, four heirs retained Atalig and signed a contingency-fee agreement promising to pay him a third of any payment he could secure for the Estate. Four other heirs retained attorney Stephen J. Nutting ("Nutting"). Together, these parties (the AG, Appellants, and Nutting) negotiated a settlement in which the civil court would retain the MPLA payment until the probate court entered an order of distribution, fees, and costs. The civil court accepted the settlement agreement and entered judgment accordingly.

¶ 3 The following day Appellants filed a motion for attorney fees with the civil court per their contingency agreement (even though the probate court had not entered an order of distribution, fees, and costs). The court scheduled a hearing, but the AG did not receive notice of the hearing. Nonetheless, the AG later learned of the hearing and made an appearance to request a continuance because of the lack of service. The court agreed, and the matter was re-scheduled.

¶ 4 Shortly thereafter, however, without a hearing and apparently *sua sponte*, the court entered an order approving Appellants' contingency fee request for a full third of the entire estate – not just a third of their client's share of the estate – pending a ten-day window for the heirs represented by Nutting to object. As before, however, Appellants failed to serve the AG and the heirs represented by Nutting. Thus, no opposition was filed within the ten-day period, resulting in the Appellants receiving a contingency fee of $1,138,500 – a third of the entire estate.

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[2] The Model Rules of Professional Conduct apply to attorney conduct in the Commonwealth via Rule 2 of the NMI Rules of Discipline.

¶ 5 A few days later, upon discovering the payment, the heirs represented by Nutting filed a motion with the probate court seeking a temporary restraining order that would compel Appellants to disgorge their attorneys' fees. The court denied the motion and the heirs subsequently filed for a writ of mandamus with this Court. We responded to the petition in *Malite v. Tudela*, 2007 MP 3, ultimately remanding the case back to the Superior Court to determine the propriety of the attorneys' contingency-fee agreement.

¶ 6 On remand in the probate court, the heirs filed a motion asking the court to order Appellants to disgorge the attorneys' fees, which the probate court granted. The order also required Appellants to compile a detailed billing statement. Despite the order, Appellants failed to disgorge the fees or provide a detailed billing statement, prompting the court to issue a contempt order.

¶ 7 After a hearing on Appellants' failure to comply with the contempt order, the probate court found the Appellants in contempt of court and then ordered them incarcerated and suspended from practicing law until the attorneys' fees were disgorged. While in jail for contempt, Appellants were eventually released from custody for two days each week to compile detailed billing statements and account for how the attorneys' fees were spent. The suspension, however, was later vacated.

¶ 8 Following the contempt order, the probate court found Appellants were not entitled to any fees and awarded the Estate of Angel Malite a judgment for the entire amount of these fees. As part of that order, the probate court noted Atalig had testified in court that he had spent all the fees, but told a news reporter immediately afterward: " . . . of course there is some left, but I'm not going to tell you how much." *In re Estate of Angel Maliti*, Civ. No. 97-0369 (NMI Super. Ct. Jan. 15, 2008) (Amended Order at 14 n.1).

¶ 9 Appellants appealed the contempt order to this Court, which became *In re Malite*, 2010 MP 20. In *In re Malite*, we upheld the fee disgorgement, contempt finding, and incarceration, but reversed on whether a contingent-fee agreement could be legally permissible.

¶ 10 Following this, Yana and Atalig's conduct was referred to the CNMI Bar Association Disciplinary Committee, which resulted in charges that Appellants violated Rules 1.15(e), 3.3(a)(1), 3.3(a)(3), 8.4(a), 8.4(c), and 8.4(d). The Superior Court found that Atalig violated 3.3(a) and that both Appellants violated Rules 1.15(e), 8.4 (a), 8.4(c), and 8.4(d). Based on these findings, the Superior Court indefinitely suspended Appellants until they satisfied certain conditions.

¶ 11 Appellants timely appealed.

II. Jurisdiction

¶ 12 We have jurisdiction to regulate attorney conduct. PL 10-26 §§ 1-2 (affirming the Supreme Court's duty to govern the practice of law in the Commonwealth); NMI R. DIS. 1 ("Any attorney . . . who practices law in the Commonwealth of the Northern Mariana Islands is subject to the disciplinary jurisdiction of the Courts of the Commonwealth . . . ."). We also have appellate jurisdiction over final

judgments and orders of the Superior Court of the Commonwealth. 1 CMC § 3102(a). Finally, the Supreme Court has inherent powers "necessary to complete the exercise of its duties." NMI CONST. art. IV, § 3.

III. Standard of Review

¶ 13 In attorney discipline cases, we review violations of the Model Rules of Professional Conduct de novo. *In re Lizama*, 2 NMI 360, 377 (1991). In so doing, "[w]hen the burden of proof at the trial court is that of clear and convincing evidence . . . ," *id.*, which is the standard for attorney discipline cases, NMI R. DIS. 9(g), "and the assigned error is that the evidence do[es] not support the trial court's findings of fact, the standard of review is whether the findings are supported by competent and substantial evidence." *In re Lizama*, 2 NMI at 377. We may "affirm, reverse, or modify the decision of the Superior Court, or remand the matter for further hearing." NMI R. DIS. 9(k).

IV. Discussion

¶ 14 Appellants appeal the Superior Court's findings that Atalig violated Rule 3.3(a) and both, acting in concert, violated Rules 1.15(e), 8.4(a), 8.4(c), and 8.4(d). We will start with Rule 3.3(a) before addressing Rules 1.15(e), 8.4(c), 8.4(d), and 8.4(a).

A. *Rule 3.3(a)*

¶ 15 The Superior Court found Atalig, but not Yana, violated Rule 3.3(a), which imposes a duty of candor toward the tribunal:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> . . .
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (1983). Atalig challenges this finding, arguing the rule did not apply to him at the time of the statements; and, even if it did, the ruling below improperly relied on facts the Superior Court inappropriately took judicial notice of in a previous order. We will discuss each in turn.

1. Applicability of Rule 3.3(a)

¶ 16 Rule 3.3 scope is limited to "the conduct of a lawyer who is representing a client in the proceedings of a tribunal." MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 1 (1983). Seizing on this narrow language, Atalig claims that because he appeared pro se throughout the period when his alleged misconduct occurred, he was not representing a client in front of a tribunal.

¶ 17 Atalig misreads the rule for two reasons. First, Rule 3.3(c) declares that the duty of candor imposed by Rule 3.3(a) "continue[s] to the conclusion of the proceeding." MODEL RULES OF PROF'L CONDUCT R. 3.3(c) (1983). A "proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed." MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 13 (1983). Because the probate case remained open for years following Appellants' representation of the heirs, Rule 3.3(a) remained in effect during the offending behavior.[3] Second, Rule 3.3 applies to attorney misrepresentations made to a tribunal where the attorney represents a client, including when the attorney is his own client. *See In re Glass*, 784 P.2d 1094, 1097 (Or. 1990) (concluding that because lawyers typically represent clients in litigation, a lawyer appearing on his or her own behalf "is his or her own client," and, therefore, liable under disciplinary rules for acts in the course of that representation). We, for example, have previously found an applicant to the CNMI Bar Association violated Rule 3.3(a) by lying in his bar application. *In re Rhodes*, 2002 MP 2 ¶ 20. These cases, and many more,[4] demonstrate an attorney violates Rule 3.3(a) if, while representing themselves, they misrepresent a material fact to a legal tribunal. Because the rule applies both throughout the life of a case and to attorneys representing themselves before a tribunal, we hold the Superior Court did not err by considering whether Atalig's conduct violated Rule 3.3(a).

2. Judicial Notice

¶ 18 In concluding Atalig violated Rule 3.3(a), the Superior Court took judicial notice of a fact the previous court had already noticed: "Atalig directly contradicted his testimony at an interview by news media immediately following the hearing." *In re Atalig,* Civ. Nos. 10-0285 and 10-0284 (NMI Super. Ct. May 16, 2012) (Amended Order at 8). That conclusion was drawn from Atalig testifying under oath that the attorney fees were gone, before allegedly telling an interviewer immediately afterwards: "[w]ell, of course there is some left, but I'm not going to tell you how much." *Id*. (quoting *In re Estate of Angel*

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[3] *See* Ariz. Ethics Op. 05-05 (2005) (concluding that an attorney who discovered post-representation that he offered false material evidence to a tribunal – i.e., perjurious testimony by the client during a direct examination – must take reasonable remedial measures under Rule 3.3 to cure the false evidence if the proceeding is still open).

[4] *See, e.g.*, *In re Rumsey*, 71 P.3d 1150, 1157-58 (Kan. 2003) (Original Proceeding in Discipline) (affirming that a lawyer violated Rule 3.3 because, while acting pro se, the lawyer filed a petition against a client and her mother, which falsely claimed they both engaged the lawyer); *In re O'Meara*, 834 A.2d 235, 237 (N.H. 2003) ("[A]n attorney representing himself is held to the same standards as an attorney representing a client, particularly the standard of candor toward the tribunal."); *In re Kornreich*, 693 A.2d 877, 888 (N.J. 1997) (per curiam) (finding that a lawyer violated Rule 3.3 in a traffic case where the lawyer represented himself and gave "false statements and false evidence designed to mislead the municipal court"); *In re Barker*, 572 S.E.2d 460, 461-62 (S.C. 2002) (per curiam) (suspending an attorney for violating Rule 3.3, among others, for making false statements during his divorce action regarding the length of the couple's continuous separation). *Contra Iowa Supreme Court Attorney Disciplinary Bd. v. Rhineheart*, 827 N.W.2d 169, 176 (Iowa 2013) (holding a lawyer who lied to a court during his divorce proceedings did not violate a rule equivalent to 3.3(a) "because he was not serving as an advocate representing a client . . . .").

Maliti, Civ. No. 97-0369 (NMI Super. Ct. Jan. 15, 2008) (Amended Order at 14-15). Atalig did not timely object then, but now argues taking judicial notice of the interview was plain error. We disagree.

¶ 19 The Commonwealth Rules of Evidence permit courts to take judicial notice in narrow circumstances. Substantively, the fact must be free of "reasonable dispute" because it is either "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." NMI R. EVID. 201(b). Newspaper articles generally, and statements during an interview specifically, are not always free of reasonable dispute. Ordinarily, then, courts only take "judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.'" *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (quoting *Premier Growth Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 401 n.15 (3d Cir. 2001)) (permitting judicial notice of books, magazine articles, and newspaper stories about a prominent painting, but limiting their evidentiary use to demonstrating "what information was in the public realm at the time").[5]

¶ 20 Procedurally, if a court takes judicial notice *sua sponte*, the adverse party is entitled to be heard on the "propriety of taking judicial notice." NMI R. EVID. 201(e).[6] Where, however, the "complaining party did not object to the judicial notice or request a hearing," pursuant to Commonwealth Rule of Evidence 201(e), the trial court's actions are "unreviewable except on a showing of plain error." *Norita v. Norita*, 4 NMI 381, 383 (1996). Reversal for plain error, in turn, is appropriate only if "substantial rights of the defendant are affected, and it is necessary to safeguard the integrity and reputation of the judicial process or to forestall a miscarriage of justice." *Id*. at 387.

¶ 21 Judicial notice was inappropriate here for at least two reasons. First, the factual basis of Atalig's statement – that either he or both Appellants still possessed some of the contingency fee – is certainly not generally known within the Commonwealth. Many people may believe it to be true, but it is not a fact beyond reasonable dispute. Speculation, no matter how well founded, cannot be judicially noticed. Second, there is no indication this statement could be readily verified such that its accuracy cannot reasonably be questioned. Perhaps the reporter misquoted Atalig. Perhaps Atalig lied. Or maybe he told the truth. Whatever the explanation, and regardless of whether the lower court struck upon the correct interpretation, the statement's accuracy is not beyond reasonable question. Had the court wanted to rely on the statement, it should have held proceedings to verify the veracity of the statement rather than simply taking judicial notice.

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[5] When a rule of this Court is patterned after a federal rule, it is appropriate to look to how the federal courts have interpreted that rule for guidance. *Sablan v. Elameto*, 2013 MP 7 ¶ 17.

[6] "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken." NMI R. EVID. 201(e).

¶ 22 Despite the error, the Appellants did not preserve the issue, thus we may only review for plain error. *Norita*, 4 NMI at 383. Under that standard, the trial court erred, but it did not commit plain error. Certainly, the trial court should not have considered the statement, and it should not have rested its conclusion that Atalig violated Rule 3.3(a) solely on a single piece of improper evidence. But even if that improper reliance violated Atalig's substantial rights, a proposition we are not convinced of, the error does not require undoing to "safeguard the integrity and reputation of the judicial process" because additional evidence supports that both Atalig and Yana violated Rule 3.3(a). *Norita*, 4 NMI at 383; *see* NMI R. DIS. 9(k) (providing that we may affirm or modify a judgment in a disciplinary matter on any grounds).

¶ 23 Lawyers have a duty of honesty towards courts. Comment 3 to Rule 3.3, for example, provides that "an assertion purporting to be on the lawyer's own knowledge . . . may properly be made only when the lawyer knows the assertion to be true or believes it to be true on the basis of a reasonably diligent inquiry." MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 3 (1983). Assertions not backed by a reasonably diligent inquiry violate Rule 3.3(a). *See, e.g.*, *Office of Disciplinary Counsel v. Price*, 732 A.2d 599, 605-06 (Pa. 1999) (holding that the failure to conduct a reasonably diligent inquiry into the accuracy of statements submitted to the court violates Rule 3.3(a)). So too, the "failure to make a disclosure, [which can be] the equivalent of an affirmative misrepresentation," may also violate Rule 3.3(a). MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 3 (1983); accord *In re Greene*, 620 P.2d 1379, 1383 (Or. 1980) (per curiam) ("A half-truth or silence can be as much a misrepresentation as a lie."). In determining whether a violation took place, a "lawyer's knowledge that evidence is false . . . can be inferred from the circumstances." MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 8 (1983); *id.* 1.0(f) (stating a "person's knowledge may be inferred from circumstances"); *see also In re Rhodes*, 2002 MP 2 ¶ 19 (relying on clear inferences to find Rhodes' testimony regarding his omission of a felony conviction on his bar application – that it was merely a clerical error – constituted a misrepresentation in violation of Rule 3.3(a)).

¶ 24 Here, Appellants submitted multiple billing statements and expenditure accountings the probate court consistently found unsatisfactorily vague, incomplete, and unreliable. Like the probate court, we find the lack of clear records suspect. First, Appellants possessed the money for only a matter of days before the heirs represented by Nutting filed a motion for disgorgement. At that point (if not earlier), Appellants had a legal duty to stop spending the money and keep track of what remained. Second, Appellants had several months to produce reasonably accurate statements and accountings but never did so.

¶ 25 Under these circumstances, it strains credulity to find an honest reason for Appellants' difficulties in providing records of what happened to more than a million dollars in the course of a few days. If they

splurged on cars, the dealership would have records. If they purchased homes, the seller would have records. If they bought a business, the business would have records. If they invested in the stock market, the brokerage firm would have records. If they wired the money off-island, the bank would have records. That Yana and Atalig could not come up with meaningful records following months of requests (not to mention the threat of contempt) demonstrates they did not make a reasonable inquiry before providing the probate court disingenuous financial information. As a result, from these circumstances, we can infer, as we did in *Rhodes*, that both parties made material misrepresentations. We, therefore, modify the trial court's ruling and hold both Appellants violated Rule 3.3(a).

B. *Rule 1.15(e)*

¶ 26 Moving to Appellants' alleged failure to keep disputed property separate, Rule 1.15(e) provides in pertinent part: "When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved." MODEL RULES OF PROF'L CONDUCT R. 1.15(e) (1983). Appellants argue settlement of the civil case extinguished their representation of the heirs and, with it, their obligations under Rule 1.15(e), which only applies to attorneys "in the course of representation." We disagree.

¶ 27 Under Rule 1.15(e), a lawyer's duty to safeguard funds does not end at the disbursal of an award, even when distributed by a court. Instead, the rule requires lawyers to handle all funds that may belong to clients *and* third parties in good faith both during and after a case has concluded. In *Iowa Supreme Court Attorney Disciplinary Bd. v. Rhineheart*, 827 N.W.2d 169 (Iowa 2013), for instance, an attorney kept all the funds received as part of a court judgment in a personal bank account, despite a contingency-fee agreement entitling him to just a third of the judgment. *Id.* at 175-76. Retaining the excess funds in a private rather than a trust account, the Iowa Supreme Court found, violated the attorney's duty to "not take advantage of the physical control of funds" when a dispute arises between the attorney and either a client or a third party. *Id.* at 181-182 (quoting 1 GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 19.7, at 19-14 (3d ed. 2005-2 Supp.)). Instead, when a dispute arises or an attorney knows (or ought to know) that his or her act will spark a dispute, the attorney "must keep 'the disputed portion of the funds . . . in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration.'" *Id.* at 182 (quoting IOWA R. PROF'L CONDUCT 32:1.15 cmt. 3). If, as a result, a lawyer has clear reason to know the funds will likely be disputed by their client or a third party, the lawyer must keep those funds safe and separate until the resolution of that disagreement.

¶ 28 In this case, Appellants entered into a contingency fee agreement with several – but not all – of the Malite Estate heirs. Although these agreements are usually limited to a third of the funds a client receives from a successful litigation, the agreement purportedly entitled Appellants to a third of the entire

Estate. Pursuant to that agreement, Appellants eventually sought to withdraw their contingency fee from the MPLA award, which the AG and several of the heirs disputed. Eventually, the parties reached a settlement agreement, providing that the civil court would hold the MPLA award in escrow while the probate court would decide how to distribute the funds. Despite that agreement, which left deciding distribution to the probate court, the civil court permitted Appellants to withdraw a third of the total estate ($1,138,500) without notifying the AG and the Nutting heirs. Several days after that erroneous disposition, the heirs represented by Nutting discovered the improper dispersal and filed a motion ordering Appellants to disgorge the funds in their possession. In response, Appellants testified they no longer had possession of the $1,138,500.

¶ 29 Those circumstances put Appellants on notice that they needed to safeguard the award. Appellants knew the AG and Nutting heirs would dispute the lack of process leading up to the award. Appellants also knew (or should have) that the AG and Nutting heirs would dispute the terms of the contingency-fee agreement. Under those terms, the Appellants purportedly had a claim to a full third of the estate even though only four-out-of-eighteen alleged heirs signed the agreement. Normally a contingency fee would only entitle an attorney to a third of his or her client's interest, which in this case would have been just over seven percent of the estate. Because of the defective agreement, however, Appellants pocketed not a third of their clients' shares in the estate, but rather *all* of it, as well as a sizeable portion of the other heirs' shares too. In spite of that knowledge (or, more likely, because of it), Appellants not only failed to keep the funds separate, as required by Rule 1.15(e), but quickly hid them. Because Appellants failed to keep the funds separate until the resolution of the dispute, despite a duty to do so, we affirm the Superior Court's Order finding that Appellants violated Rule 1.15(e).

C. *Rule 8.4(c)*

¶ 30 Rule 8.4(c), which proscribes a broad array of lawyer malfeasance, provides, in pertinent part, that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (1983). Each term carries a distinct meaning, *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990), though overlap exists among the terms. Dishonesty, the most general of the terms, means "conduct evincing 'a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness. . . .'" *Id.* at 768 (quoting *Tucker v. Lower*, 434 P.2d 320, 324 (Kan. 1967)). "Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." *In re Shorter*, 570 A.2d at 767. Fraud is a "generic term which embraces all the multifarious means . . . resorted to by one individual to gain advantage over another by false suggestions or by suppression of the truth." *Id.* at 767 n.12 (quoting 37 C.J.S. *Fraud* § 1 (1943)). Deceit meanwhile means "'the suppression of a fact by one bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that

fact.'" *Id.* (quoting 26 C.J.S. *Deceit* (1956)). And misrepresentation means a "statement made by a party that a thing is in fact a particular way, when it is not so; untrue representation[s]; [or] false or incorrect statements or accounts." *Id.* (quoting 58 C.J.S. *Misrepresentations* (1948)). Appellants argue the rule did not apply to them while they were suspended from the practice of law. We disagree.

¶ 31 Appellants' argument misses the mark for two reasons. First, much of the disputed conduct occurred before the probate court suspended the Appellants. Second, and more important, a suspension does not mean attorneys may discard their professional duties. For example, in *In re Baca*, 11 P.3d 426 (Colo. 2000) (en banc) (per curiam), a hearing committee disbarred an attorney who accepted an undivided forty percent interest in real property from a client and then, while suspended, misrepresented to third parties that the client was the sole owner (even though the client's ex-wife retained a fifty percent interest in the property) and abused legal process to attempt to deprive the client's ex-wife of the value of her interest in the property. *Id.* at 427. On appeal to the Colorado Supreme Court, the lawyer argued, like Appellants here, that his conduct was not governed by Colorado's Rules of Professional Conduct because the acts took place while he was suspended. *Id.* Rejecting that argument, the Colorado Supreme Court held that because suspended lawyers are still members of the bar, they "may be disciplined for engaging in conduct violating the rules of the profession even though [they were] suspended at the time of the conduct." *Id.* at 430.

¶ 32 Other courts agree. *See e.g.*, *In re Chavez*, 1 P.3d 417, 422, 427 (N.M. 2000) (per curiam) (disbarring a lawyer, in part, for ethical violations during a suspension because suspended lawyers remain subject to the same ethical and professional standards as every other member of the Bar); *In re Hereford*, 756 P.2d 30, 32-33 (Or. 1988) (en banc) (per curiam) (imposing an additional 126-day suspension on top of an attorney's original suspension for failure to pay various bar fees during the suspension because "suspended lawyers still have ethical obligations, the violations of which may lead to further sanctions"); *Florida State Bar v. Ross*, 732 So. 2d 1037, 1040, 1043 (Fla. 1998) (per curiam) (disbarring an attorney for conduct during a suspension because "despite the fact that an attorney is suspended, he or she remains a member of [t]he . . . Bar and, as such, is subject to the same extent as any other member of [t]he . . . Bar"). We adopt this reasoning. As a result, Rule 8.4(c)'s prohibition of dishonesty, fraud, deceit, or misrepresentation remains in effect during a suspension.

¶ 33 Appellants violated that prohibition by consistently providing inaccurate and unsatisfactory testimony, billing statements, and spending accounts meant to deceive the court into believing a falsehood: That the Appellants no longer had the money and had no way of tracking where it had gone. Those representations lacked honesty, probity, or integrity in principle because they failed to provide an accurate financial picture, despite the ability to get records from banks, businesses, and retailers, as well as affidavits from other individuals who received the funds. They were deceitful because they conveyed

inaccurate and inadequate information that both suppressed facts Appellants had a duty to disclose (e.g., what happened to the money) and offered misleading facts (e.g., unsatisfactorily vague, incomplete, and unreliable financial records) meant to deceive the court into issuing a ruling it would not make if it had accurate and thorough financial statements. And they were misrepresentations because they improperly held out false and misleading information – that Appellants had spent nearly a million dollars in a few days, but had no records or recollection of what happened to the money – as the truth. Appellants' claims defy common sense. Since dishonesty, deceit, and misrepresentation each violate Rule 8.4(c) independently, and Appellants engaged in all three, we affirm the Superior Court's Order finding Appellants violated Rule 8.4(c).

D. *Rule 8.4(d)*

¶ 34 Rule 8.4(d) provides in pertinent part that "it is professional misconduct for a lawyer to: engage in conduct that is prejudicial to the administration of justice." MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (1983). We have not had the opportunity to define what conduct is prejudicial to the administration of justice. Other courts, however, have found conduct prejudicial to the administration of justice is behavior that violates "an ethical duty owed to the legal system," which "affect[s] the ability of the system to fulfill its obligation to resolve disputes impartially and maintain the public trust." *In re Cummings*, 211 P.3d 1136, 1139 (Alaska 2009).

¶ 35 One form of conduct prejudicial to the administration of justice is failing to comply with court orders. For instance, in *In re Mayrand*, 723 N.W.2d 261 (Minn. 2006) (en banc) (per curiam), the Minnesota Supreme Court reviewed the disbarment of an attorney who, among other things, missed court deadlines and failed to respond to multiple show cause orders. *Id.* at 264, 267. Affirming the disbarment, the Court found the attorney's conduct – disobeying court rules and orders – was prejudicial to the administration of justice. *Id.* at 267. Similarly, in *People v. Davis*, 911 P.2d 45 (Colo. 1996) (en banc) (per curiam), the Colorado Supreme Court reviewed a 366-day suspension for, among other things, conduct prejudicial to the administration of justice. *Id.* at 47. Specifically, the attorney, who was a defendant in a civil action, failed to appear at his own deposition, failed to produce documents, and filed for bankruptcy days before trial. *Id.* That filing resulted in an automatic stay that stopped the trial. *Id.* Several months later, the lawyer moved to dismiss his bankruptcy, only to file a second bankruptcy petition on the eve of his newly reopened civil trial. *Id.* Upholding the suspension, the Court found that flaunting court rules and orders constituted conduct prejudicial to the administration of justice. *Id.* at 47-48.

¶ 36 Here, the probate court repeatedly ordered the Appellants to disgorge the contested contingency fees. As of the publication of this opinion, they have yet to disgorge *any* portion of these fees. The probate court also ordered the Appellants on several occasions to provide a statement of billing for the case and an

accounting of how the fees were spent. Appellants refused to comply with these orders in any meaningful way (even after considering the limitations incarceration for contempt placed on them). Because of Appellants' long-standing refusal to obey several court orders, we affirm the Superior Court's finding that Appellants violated Rule 8.4(d).[7]

E. *Rule 8.4(a)*

¶ 37 Rule 8.4(a) provides in pertinent part that "it is professional misconduct for a lawyer to: violate or attempt to violate the Rules of Professional Conduct." MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (1983). By its plain language, this rule is automatically violated if another rule is violated. *See, e.g., In re Wyatt*, 982 A.2d 396, 413 (N.H. 2009) (holding that a lawyer violated Rule 8.4(a) because he had violated another Rule of Professional Conduct). Therefore, as Appellants violated Rules 1.15(e), 3.3(a), 8.4(c), and 8.4(d), we affirm that they also violated Rule 8.4(a).

F. *Disbarment*

¶ 38 After concluding Appellants had violated the Model Rules of Professional Conduct, the Superior Court suspended Appellants indefinitely. The suspension would continue until Appellants satisfied several conditions such as disgorging ten percent of the disputed attorney fees and presenting a viable payment plan to address the other ninety percent. We may "affirm, reverse, or modify the decision of the Superior Court, or remand the matter for further hearing," NMI R. DIS. 9(k), based on "'the nature of the misconduct, the cumulative weight of the violations, and the harm to the public and the profession.'" *In re Roy*, 2007 MP 28 ¶ 7 (quoting *In re Giberson*, 581 N.W.2d 351, 354 (Minn. 1998)). As part of that analysis, we also consider aggravating and mitigating factors. *See Commonwealth v. Lot No. 218-5 R/W*, 2013 MP 5 ¶¶ 16-18 (evaluating aggravating and mitigating factors before levying a sanction).

¶ 39 In determining the appropriate sanction, the ABA Standards for Imposing Lawyer Sanctions is instructive. *See Saipan Lau Lau Dev. v. Superior Court*, 2001 MP 2 ¶ 71-73 (relying on the ABA Standards for Imposing Lawyer Sanctions). According to those guidelines, disbarment is appropriate when, among other actions, a lawyer: (1) knowingly converts client property and causes injury or potential injury to a client," Am. Bar. Ass'n, Standards for Imposing Lawyer Discipline § 4.11 (1992); (2) "engages in . . . intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice," *id.* § 5.11(b); (3) "knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding," *id.* § 6.21; or (4) "with intent to deceive the court, makes a false statement, submits a false document, or

[7] Our conclusion, however, does not mean that disobeying a court order is a per se violation of Rule 8.4(d). Circumstances may exist where an attorney disobeys a court order, but does not violate Rule 8.4(d). See MODEL RULES OF PROF'L CONDUCT R 8.4(d) cmt. 4 (1983) ("A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.").

improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding." *Id.* § 6.11.

¶ 40 Here, Appellants hid significant sums of money they knew they might have to return to their clients. Then they consistently dissembled regarding the money's whereabouts and continued to do so even after the contempt order, presumably because they wanted to keep the money for themselves, even though such deceptions demonstrate a lack of fitness to practice law and violated a court order, which is prejudicial to the administration of justice. What is more, they did so intentionally, repeatedly giving the probate court misleading information in an attempt to deceive the court into letting them keep a larger share of the wrongfully held fees, which, in turn, meant a smaller inheritance for the Malite heirs. In short, Appellants' actions offer ample grounds for disbarment.

¶ 41 That conclusion is reinforced by reviewing the long list of aggravating and mitigating factors offered by the ABA Standards for Imposing Lawyer Sanctions. After surveying that list, we see only aggravating factors. Appellants, both experienced attorneys, engaged in a pattern of misconduct involving multiple offenses, *supra* Section IV.A(3) & IV.B-E, in pursuit of a dishonest and selfish motive: to keep money belonging to the Malite heirs for themselves. Since these acts came to light, Appellants have refused to make restitution, *supra* ¶ 36, or even acknowledge the wrongfulness of their actions. Oral Argument at 2:05:22-26, *In re Yana and Atalig*, 2012-SCC-0017-ADA (NMI Sup. Ct. June 28, 2013) (explaining that they were sorry for spending the money "because [they] went to jail for it," not because of the harm suffered by the Malite heirs).

¶ 42 Disbarment is also supported by our case law. In *In re Rhodes*, 2002 MP 2, an attorney filed an application for limited admission. *Id.* ¶ 5. In that application, the attorney represented "he had never been a party to, or otherwise involved in, any action or legal proceedings, either civil, criminal, or quasi criminal." *Id.* He also represented he was up-to-date on his student loans. *Id.* Four years later, Rhodes applied for regular admission to the Commonwealth Bar. *Id.* ¶ 7. In that application, in contrast to his earlier one, Rhodes admitted that more than twenty years earlier he had been convicted of felony Assault with Intent after robbing a gas station at knifepoint. *Id.* He also admitted he had not made any student loan payments since 1992, six years prior to filling out his limited-admission application in 1998. *Id.* As a result of Rhodes' material omissions in his limited-admission application, and the fact that felons may not practice law in the Commonwealth, we disbarred him. *Id.* ¶¶ 13-14, 23.

¶ 43 Appellants' conduct exceeds Rhodes. Whereas Rhodes omitted material facts on one occasion, Appellants' have continued to omit and misrepresent key facts. And, while Rhodes failed to pay back his student loans to his creditor, creditors accept the risk of non-payment as part of the transaction. That is why they charge interest. Appellants, on the other hand, have failed to pay over a million dollars to the

Malite heirs who had no relationship to the Appellants and had not accepted the risk of Appellants absconding with a third of the cash value of the Estate.

¶ 44 Examining the case law of other jurisdictions for types of conduct that justifies disbarment also compels disbarment of Appellants. For instance, in *In re Mayrand*, 723 N.W.2d 261 (Minn. 2006) (en banc) (per curiam), the Minnesota Supreme Court disbarred an attorney because of the cumulative weight and severity of his offenses, *id.* at 269; to wit, that he, among other things, missed deadlines and failed to: provide refunds to clients for unearned fees, cooperate with disciplinary proceedings, or respond to orders to show cause. *Id.* at 264, 267. Meanwhile, in *In re Chavez*, 1 P.3d 417 (N.M. 2000) (per curiam), the New Mexico Supreme Court disbarred Chavez for misappropriating client funds, *id.* at 422-23, and continuing to practice law while suspended, *id.* at 425. In so doing, the Court emphasized that misappropriating client funds is an egregious breach of conduct that, even in the absence of other violations, typically warrants disbarment. *Id.* at 422.

¶ 45 The conduct in those cases pales in comparison to the gravity of Appellants' misconduct. Like those cases, Appellants engaged in a wide variety of inappropriate conduct. But unlike those other cases, Appellants' misconduct also involves keeping more than a million dollars the probate court ordered them to disgorge. That distinction demonstrates Appellants' conduct demands disbarment.

¶ 46 Accordingly, because of the flagrant nature of the conduct, the immense weight of the violations, and the considerable harm to the public and the profession, we disbar Yana and Atalig, effective immediately.

G. *Additional Requirements*

¶ 47 In addition to disbarring rather than indefinitely suspending Yana and Atalig, we also modify the conditions imposed by the trial court. Those conditions were set as antecedents to rescinding the suspension, conditions Yana and Atalig were free to ignore unless they wanted to end their suspensions. We impose the following requirements not as optional conditions on the way to re-admission, but rather as mandatory obligations Yana and Atalig must timely comply with under the threat of contempt.

¶ 48 Appellants are hereby ordered to:

1. Pay to the Court, to be held pending further order of the probate court, at least ten (10) percent of the funds they each received as attorney fees that have been ordered disgorged. In addition, each Appellant must present a proposed realistic payment plan, acceptable to the Court, of their respective balance of the funds that each Respondent must pay back.
2. Pay any costs for the prosecution of this matter. This amount shall also be paid to the Court.
3. Pay to any and all clients the sum of any unearned retainer fees.

4. Comply with all provisions of Rule 15 of the NMI Rules of Discipline, which includes, among other things, notifying clients of the disbarment and filing an affidavit with the Superior Court showing compliance with Rule 15.

¶ 49 Finally, Disciplinary Counsel in this matter shall submit his attorney fees and costs of prosecution within fifteen (15) days of this Opinion.

V. Conclusion

¶ 50 For the foregoing reasons, we MODIFY the trial court's decisions: We find that Yana and Atalig violated Rules 1.15(e), 3.3(a), 8.4(a), 8.4(c), and 8.4(d), and DISBAR both, effective immediately. We further ORDER Appellants to satisfy the terms provided in ¶ 48.

SO ORDERED this 28th day of January, 2014.