

RECEIVED
GUAM BAR ASSOCIATION
Office of the Ethics Prosecutor
Guam Judicial Center, Second Floor
120 W. O'Brien Drive
Hagatna, Guam 96910-5174

FILED

2013 AUG 22 AM 8:37

1
2 Date: 8/22/13 Time: 3:10
By: J. Mendile

3 **IN THE SUPREME COURT OF GUAM**

SUPREME COURT
OF GUAM

4
5 **IN RE:**

) Case No.: ADC13-006

6 **ORDER OF RECIPROCAL**
7 **DISCIPLINE**

8 **DOUGLAS F. CUSHNIE,**

9 **Respondent.**

10 This matter comes before the court upon the Stipulated Entry of Order of Reciprocal
11 Discipline entered into between Respondent Douglas F. Cushnie, appearing *pro se*, and the
12 Guam Bar Association Ethics Committee (GBEC) in GBEC Ethics Case No. EC13-030. This
13 court has the authority to review and modify such orders of the GBEC pursuant to Rule 16(d) of
14 the Supreme Court of Guam Rules for the Discipline of Attorneys ("Rules of Discipline").
15 Therefore, in accordance with Rule 16(d) and pursuant to Rule 2 of the Rules of Discipline, the
16 court hereby enters the instant order.

17 Respondent is currently an active member of the Guam Bar Association (GBA) who
18 resides and practices law in the Commonwealth of the Northern Mariana Islands (CNMI).
19 Respondent was disciplined for attorney misconduct in the CNMI on July 27, 2011, and was
20 administered a public reprimand. Respondent's discipline came to the attention of the GBA
21 Ethics Prosecutor and the GBEC. Rule 16(a) of the Rules of Discipline provides the procedures
22 by which the GBEC may pursue reciprocal discipline in Guam regarding discipline a Guam Bar
23 member has been subject to in another jurisdiction. The GBEC and Respondent executed a
24 Stipulated Entry of Order of Reciprocal Discipline, attached hereto as "Attachment 1," wherein
25 Respondent expressly waived the order to show cause hearing before the GBEC that he would
26 generally be entitled to pursuant to Rule 16(a).

Respondent and the GBEC stipulated that an order of reciprocal discipline issue from the
GBEC disciplining Respondent based upon the discipline he received in the CNMI. The parties

1 further stipulated that such order be submitted to the Supreme Court of Guam for its action. In
2 addition, Respondent expressly waived notice from the Supreme Court upon its receipt of the
3 GBEC's Stipulated Entry of Order of Reciprocal Discipline, and waived any right he may have
4 to file a statement with the Supreme Court objecting to or challenging such order. Attached as
5 Exhibit "A" to the GBEC's Stipulated Entry of Reciprocal Discipline is a copy of the July 27,
6 2011 Order Re: Disciplinary Action issued by the CNMI Superior Court, wherein that court
7 found that the appropriate sanction was a reprimand or public censure, and further ordered that
8 publication of its Order Re: Disciplinary Action shall constitute Respondent's sanction or
9 reprimand.


10 The GBEC issued an order of discipline in Guam pursuant to Rule 16(d) of the Rules of
11 Discipline publicly reprimanding Respondent. Respondent and the GBEC jointly request that
12 the Supreme Court enter the GBEC's order as a final judgment of the court pursuant to Rule 2 of
13 the Rules of Discipline. Rule 3(f)(2) of the Rules of Discipline states that, in the event of a
14 judgment by the Supreme Court to publicly reprimand an attorney, the Supreme Court shall
15 order the respondent attorney to appear before the court, and the Chief Justice shall deliver the
16 reprimand orally. The Supreme Court has inherent authority to govern matters of attorney
17 discipline in Guam. *See* 48 U.S.C.A. § 1421-1(a)(7) (the Supreme Court has authority to
18 "govern attorney and judicial ethics and the practice of law in Guam, including admission to
19 practice law and the conduct and discipline of persons admitted to practice law").

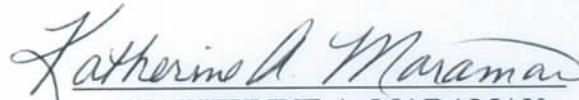
20 Therefore, pursuant to the Supreme Court's inherent authority, and in consideration of the
21 particular circumstances of this case, the court will suspend the requirement of Rule 3(f)(2) that
22 Respondent be brought into court to receive the public reprimand by the Chief Justice. Rather,
23 the publication of the notice, as addressed below, shall constitute the public reprimand. The
24 court hereby adopts this discipline entered by the GBEC, and enters it as a final judgment of this
25 court.


26 The court orders that a Notice of Public Reprimand be published twice in a local
newspaper of general circulation in Guam within thirty (30) days of the filing of the judgment, to
be coordinated by the Ethics Prosecutor, with the expense for such publications to be reimbursed
by Respondent within thirty (30) days of being notified by the Ethics Prosecutor of the total
expense. The published notice shall state as follows:

1 Douglas F. Cushnie, an attorney licensed to practice law in Guam,
2 has been publicly reprimanded by the Supreme Court of Guam for
3 a violation of the Guam Rules of Professional Conduct based on
4 reciprocal discipline following his discipline by order of the
5 Superior Court of the Northern Mariana Islands for misconduct
6 there as he failed to provide a client with a timely accounting in
7 violation of Rule 1.4(a) of the Rules of Professional Conduct.

8
9
10 **SO ORDERED** this 22nd day of August, 2013.

11 
12 **ROBERT J. TORRES**
13 **Associate Justice**

14 
15 **KATHERINE A. MARAMAN**
16 **Associate Justice**

17 
18 **F. PHILIP CARBULLIDO**
19 **Chief Justice**

20 I do hereby certify that the foregoing is a
21 full true and correct copy of the original on
22 file in the office of the clerk of the
23 Supreme Court of Guam

24 **AUG 22 2013**
25 **By: IMELDA R. DUENAS**
26 **Assistant Clerk of Court**
Supreme Court of Guam

Office of the GBA Ethics Prosecutor
Judicial Center Building, Second Floor
Hagatna, Guam 96910

BEFORE THE GUAM BAR ASSOCIATION'S COMMITTEE ON
PROFESSIONAL ETHICS AND THE UNAUTHORIZED
PRACTICE OF LAW

IN RE:)	GBEC Ethics Case No. EC13-030
)	
DOUGLAS F. CUSHNIE,)	
)	STIPULATED ENTRY OF
)	ORDER OF RECIPROCAL
Respondent.)	DISCIPLINE
)	
)	
)	

Respondent herein, appearing *pro se*, is currently an active member of the Guam Bar Association who resides and practices law in the CNMI. Respondent was disciplined for attorney misconduct in the CNMI on July 27, 2011 and was administered a public reprimand. Attached hereto as Exhibit "A" is a true and correct copy of the July 27, 2011 Order RE: Disciplinary Action issued by the Superior Court of the Commonwealth of the Northern Mariana Islands in its Civil Case Number 10-0340. Respondent's discipline came to the attention of the Guam Bar Association's ("GBA") undersigned ethics prosecutor and the Guam Bar Association's Ethics Committee ("GBEC").

Rule 16(a) of the Supreme Court of Guam's Rules for the Discipline of Attorneys ("Rules of Discipline") provides the procedures by which the GBEC may pursue reciprocal discipline in Guam regarding discipline a Guam Bar member has been subject to in another jurisdiction. By this stipulation, Respondent herein expressly waives the order to show cause hearing before the GBEC he would generally be entitled to pursuant to Rule 16(a).

" Attachment 1 "

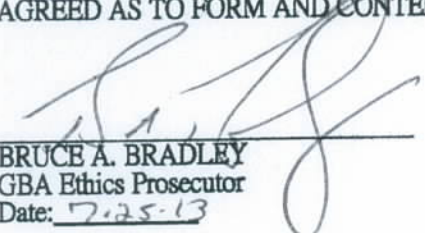
The parties hereto stipulate that this Order of Reciprocal Discipline of a PUBLIC REPRIMAND issue from the GBEC IP disciplining Respondent based upon the discipline he received in the CNMI. The parties further stipulate that such order be submitted to the Supreme Court of Guam for its action. Further, Respondent expressly waives notice from the Supreme Court upon its receipt of the present order he would otherwise be entitled to pursuant to Rule 2 of the Rules of Discipline and waives any right Rule 2 otherwise provides him to file a statement with the Supreme Court objecting to or challenging this order.

Based on the finding of misconduct in the CNMI, the GBEC hereby enters an order of discipline on Guam pursuant to Rule 16(d) of the Rules of Discipline publicly reprimanding Respondent. The parties hereto jointly request that the Clerk of the Supreme Court enter this order as a final judgment of the Court pursuant to Rule 2 of the Rules of Discipline, and that Respondent be allowed to appear before the Court as required by Rule 3(f)(2) telephonically. It is further stipulated, agreed and recommended that the Court order that a Notice of Public Reprimand be published twice in a local newspaper of general circulation on Guam within thirty (30) days of the filing of the judgment, to be coordinated by the Ethics Prosecutor, with the expense for such publications to be reimbursed by Respondent within thirty (30) days of being notified by the Ethics Prosecutor of the total expense. It is recommended that such published notice state as follows:

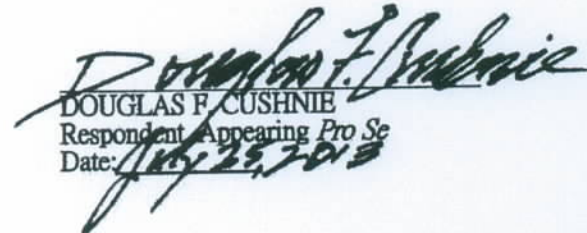
Douglas F. Cushnie, an attorney licensed to practice law on Guam, has been publicly reprimanded by the Supreme Court of Guam for a violation of the Guam Rules of Professional Conduct based on reciprocal discipline following his discipline by order of the Superior Court of the Northern Mariana Islands for misconduct there as he failed to provide a client with a timely accounting in violation of Rule 1.4(a) of the Rules of Professional Conduct.

It is further stipulated, agreed and understood by the parties hereto that this order of discipline is subject to review and modification by the Supreme Court of Guam, pursuant to Rule 16(d) of the Rules of Discipline.

AGREED AS TO FORM AND CONTENT:

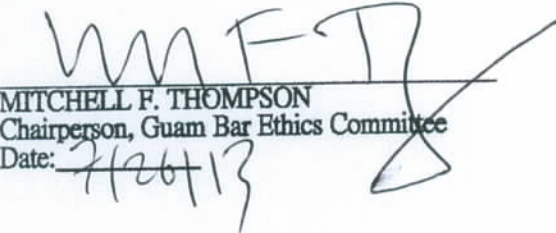


BRUCE A. BRADLEY
GBA Ethics Prosecutor
Date: 7.25.13



DOUGLAS F. CUSHNIE
Respondent Appearing Pro Se
Date: July 25, 2013

AGREED, CONCURRED, & RECOMMENDED:



MITCHELL F. THOMPSON
Chairperson, Guam Bar Ethics Committee
Date: 7/26/13



By the order of the court, Judge David A. Wiseman

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FOR PUBLICATION

RECEIVED
JUL 27 PM 4:57
[Handwritten signature]

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
)
)
)
_____)

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).

Exhibit A

1
2
3
4
5
6
7
8
9

II. FACTS

- 10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
1. On or about February 5, 1999, Respondent was named as a Defendant in a Complaint filed by Ms. Matsunaga which alleged that Respondent had violated his fiduciary and ethical duties to Ms. Matsunaga.
 2. On or about December 15, 2006, the CNMI Supreme Court found that Respondent failed in his duty to account to his client in a reasonable and timely manner and further found that Respondent had taken money from his client's trust account to which he was not entitled.

III. DISCUSSION

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

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

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

Here, it is undisputed that Respondent's client was Ms. Matsunaga. Therefore, Respondent had a 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 addressing
17 whether Respondent's fees were unreasonable, the Court would first like to point out the uncharged possible
18 violation of Model Rule 1.15 (c) and (d), in that Respondent failed to safeguard Ms. Matsunaga's property.

19
20
21
22
23
24
25

¹ Model Rule 1.5(a) lists the following factors a court should consider when determining the reasonableness of a fee:
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other 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 Model Rule 1.15 discusses an attorney's obligation to safeguard a client's property. Subsection (c)
2 of said section provides "[a] lawyer shall deposit into a client trust account legal fees and expenses that have
3 been paid in advance, *to be withdrawn by the lawyer only as fees are earned* or expenses
4 incurred."(Emphasis Added). Subsection (d) further provides:

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

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

19 Regardless, this Court could not sanction Respondent for what it deems to be a possible violation
20 of Model Rule 1.15 since disciplinary proceedings are "adversary proceedings of a quasi-criminal nature"
21 where charges must be made known to Respondent before the proceedings begin and may not be amended
22 on the basis of the testimony of the accused. *In Re Ruffalo*, 390 U.S. 544, 551 (1968). Here, Respondent
23 was not charged with violating Model Rule 1.15 so the Court cannot sanction Respondent for violating said
24 Rule. Put a different way, the Court can only consider whether Respondent violated Model Rules 1.4 and/or
25 1.5(a) as alleged in the Complaint.

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

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

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

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

25 The Court cannot sanction Respondent for failing to safeguard Ms. Matsunaga's property, failing

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

9 10 IV. CONCLUSION

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

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

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

SO ORDERED this 27th day of July, 2011.

[Handwritten Signature]

/s/

David A. Wiseman, Associate Judge

I hereby certify that the foregoing is a full true and correct copy of the original on file in the Office of the Clerk of Courts, Saipan, Mariana Islands.

Date: *[Handwritten Signature]* Oct. 13, 2011

CLERK OF COURT
NORTHERN MARIANA ISLANDS
SAIPAN, MP 96950