

In re Attorney Disciplinary Proceeding
19 FSM R. 576 (Pon. 2014)

FSM SUPREME COURT TRIAL DIVISION

IN THE MATTER OF ATTORNEY)
DISCIPLINARY PROCEEDING.)
_____)

DPA NO. 001-2002

ORDER CLOSING CASE

Ready E. Johnny
Acting Chief Justice

Hearing: October 3, 2014
Decided: October 13, 2014

APPEARANCES:

Disciplinary Counsel: Aaron L. Warren, Esq.
P.O. Box PS-111
Palikir, Pohnpei FM 96941

For the Respondent Attorney: Nora E. Sigrah, Esq.
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HEADNOTES

Attorney and Client – Admission to Practice

Admitted attorneys are required to annually provide certain contact information and those attorneys who fail to comply are removed from the list of active members and are no longer authorized to practice before the FSM Supreme Court. In re Attorney Disciplinary Proceeding, 19 FSM R. 576, 578 (Pon. 2014).

Attorney and Client – Admission to Practice

An attorney who has not complied with FSM GCO 2012-01, §X, and who is thus "removed from the list of active members" remains a member of the FSM bar otherwise in good standing and licensed to practice law before the FSM Supreme Court and who, upon submission of the required contact information, will be included in or restored to the list of active members authorized to appear before the court. Until then the attorney is an inactive member of the bar in good standing. In re Attorney Disciplinary Proceeding, 19 FSM R. 576, 578 (Pon. 2014).

Attorney and Client – Attorney Discipline and Sanctions

When the then disciplinary counsel failed to serve a formal complaint on the respondent attorney at the end of 2007 or in 2008 even though the respondent attorney's address and workplace were known, this weighs in the favor of dismissal of a disciplinary action still pending in 2014 when a complaint was finally served. In re Attorney Disciplinary Proceeding, 19 FSM R. 576, 578 (Pon. 2014).

Attorney and Client – Attorney Discipline and Sanctions

To dismiss a disciplinary complaint for the long delay in prosecuting it, needs a showing that the prejudice created by the delay is actual or specific prejudice; that is, the respondent attorney must show

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that because of the passage of time certain specific favorable witnesses are now unavailable or that certain evidence is no longer available. Prejudice is not shown when the defendant does not state that any one particular witness now has an impaired memory or is no longer available, or what that witness would testify to if his or her memory were not impaired. In re Attorney Disciplinary Proceeding, 19 FSM R. 576, 578 (Pon. 2014).

Attorney and Client – Attorney Discipline and Sanctions; Civil Procedure – Discovery

Even when the monetary discovery sanctions imposed on the respondent attorney's client and the client's eventual compliance with all discovery orders in that case serve as the full and final resolution of the discovery dispute from which a disciplinary referral case arose, this does not mean that an attorney cannot be disciplined if there is a pattern of discovery abuse by that attorney in a number of cases even if the clients in all of those cases were sanctioned and complied. In re Attorney Disciplinary Proceeding, 19 FSM R. 576, 578-79 (Pon. 2014).

Attorney and Client – Attorney Discipline and Sanctions

A disciplinary complaint may be dismissed when the disciplinary complaint arose from a single case in which the respondent attorney abused the discovery process; since the attorney's duty is to zealously represent clients; since comprehensive discovery sanctions were imposed on the respondent attorney's client; and since there was long delay in contacting and serving the respondent attorney once the respondent attorney had been located in the United States. In re Attorney Disciplinary Proceeding, 19 FSM R. 576, 579 (Pon. 2014).

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COURT'S OPINION

READY E. JOHNNY, Acting Chief Justice:

This disciplinary case was filed in 2002 on referral from an FSM Supreme Court justice sitting on a case in which the respondent attorney represented a party. The referral concerned that party's discovery abuse which had occurred in 2001. The order containing the referral also included various monetary and other discovery sanctions under Civil Procedure Rule 37. The attorney left the FSM in 2004.

For some reason not apparent in the record, the chief justice did not appoint a disciplinary counsel until May 2006. By November 2007, disciplinary counsel had located an address for the respondent attorney in the United States, the attorney's workplace there, and a photograph from which it could be ascertained that the attorney was correctly identified. Although there might have been some contact with the respondent attorney, the disciplinary counsel never served a formal complaint on the respondent attorney. That disciplinary counsel later left the FSM. Other disciplinary counsel were appointed from time to time.

The current disciplinary counsel was appointed in 2011 and was recently able to file and serve a Disciplinary Rule 5(c) formal complaint. The respondent attorney filed an answer and a motion to dismiss. At the October 3, 2014 Rule 5(d) formal hearing, the court heard presentations from counsel representing the respondent attorney and from the disciplinary counsel who had voluntarily agreed to the dismissal. The court granted the dismissal from the bench. This order memorializes that dismissal.

The respondent attorney sought dismissal for three reasons – 1) lack of jurisdiction; 2) laches; and 3) the prior imposition of sanctions on the respondent attorney's client.

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The first reason lacks any merit. The respondent attorney contends that the promulgation of FSM General Court Order No. 2012-01 in combination with Disciplinary Rule 1 leaves the court without jurisdiction to impose discipline on the respondent attorney. This argument is based on Disciplinary Rule 1's use of the present tense – "[a]ny . . . person who practices law before the Supreme Court of the Federated States of Micronesia" to refer to the persons subject to sanction under the FSM Disciplinary Rules. The respondent attorney further notes that General Court Order No. 2012-01, section X, requires admitted attorneys to annually provide certain contact information and that those attorneys who fail to comply with that section are "removed from the list of active members and shall no longer be authorized to practice before this [sic] FSM Supreme Court." The respondent attorney never provided the required contact information and was generally unaware of FSM GCO 2012-01.

The court must reject this argument outright. If it were taken to its logical conclusion, any attorney could avoid discipline for past misconduct merely by resigning or by purposely neglecting to update the attorney's contact information. That cannot be allowed.

Furthermore, an attorney who has not complied with FSM GCO 2012-01, § X, although "removed from the list of active members" remains a member of the FSM bar otherwise in good standing and licensed to practice law before the FSM Supreme Court and who, upon submission of the required contact information, will be included in or restored to the list of active members authorized to appear before the court. The respondent attorney is currently an inactive member of the bar in good standing.

The second reason – the long delay in prosecuting the disciplinary complaint – rests on somewhat firmer ground. The argument is that the very long delay – eleven years – causes prejudice to the respondent attorney because of the respondent attorney's inability to attend and to participate in any disciplinary hearing here that could affect the respondent attorney's ability to earn a livelihood by practicing law elsewhere and thus to provide for the respondent attorney's minor children. However, the disciplinary counsel notes that the respondent attorney can appear by telephone and cites attorney discipline cases in other jurisdictions that hold that the prejudice created by the delay must be actual or specific prejudice. That is, the respondent attorney must show that because of the passage of time certain specific favorable witnesses are now unavailable or that certain evidence is no longer available. The respondent attorney in this case has not made such a showing.

This requirement for actual or specific prejudice parallels a similar requirement for the showing of prejudice from delay in criminal cases where a dismissal is sought for unnecessary delay. FSM v. Kansou, 15 FSM R. 481, 482 (Chk. 2008); FSM v. Kansou, 15 FSM R. 373, 378-79 (Chk. 2007); FSM v. Kansou, 15 FSM R. 180, 188 (Chk. 2007) (general statement that witnesses' memories may be impaired from the delay does not show prejudice; speedy trial claim will fail absent a demonstration of actual prejudice); *see also* Chuuk v. William, 15 FSM R. 381, 389 (Chk. S. Ct. Tr. 2007). Prejudice is not shown when the defendant does not state that his, or any particular one of his, witnesses has an impaired memory or is no longer available, or what that witness would testify to if his or her memory were not impaired. Kansou, 15 FSM R. at 188.

Nevertheless the then disciplinary counsel failed to serve a formal complaint on the respondent attorney at the end of 2007 or in 2008 even though the respondent attorney's address and workplace were known. This weighs in the favor of dismissal.

The third point rests on the firmest ground. The respondent attorney contends that the monetary discovery sanctions imposed on the respondent attorney's client and the client's eventual compliance with all discovery orders in that case (and the appellate division's affirmance of the trial court's discovery sanctions) should serve as the full and final resolution of the discovery dispute from which

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this disciplinary referral case arose. The disciplinary counsel views this as a mitigating factor and therefore decided not to oppose the dismissal motion.

While the court concurs, this does not mean that an attorney cannot be disciplined if there is a pattern of discovery abuse by that attorney in a number of cases even if the clients in all of those cases were sanctioned and complied. See *In re Boone*, 7 P.3d 270 (Kan. 2000) (multiple discovery and other misconduct in seven cases over a five-year period). However, this disciplinary complaint arose from a single case in which the respondent attorney abused the discovery process.

In light of an attorney's duty to zealously represent clients, FSM MRPC R. pmb1. ("[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system"); in light of the comprehensive discovery sanctions imposed on the respondent attorney's client; and in light of the long delay in contacting and serving the respondent attorney once the respondent attorney had been located in the United States, the motion to dismiss was granted. This case is closed. This order shall be published.

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FSM SUPREME COURT TRIAL DIVISION

FSM DEVELOPMENT BANK,)	CIVIL ACTION NO. 2007-035
)	
Plaintiff,)	
)	
vs.)	
)	
PERDUS I. EHSA and TIMAKYO I.)	
EHSA a/k/a TIMAKIO I. EHSA,)	
)	
Defendants.)	
_____)	

ORDER DENYING RULE 11 SANCTIONS

Ready E. Johnny
Associate Justice

Hearing: October 3, 2014
Decided: October 13, 2014

APPEARANCES:

For the Plaintiff: Nora E. Sigrah, Esq.
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