

In re Kalscheur, 12 ROP 164 (2005)
**In the Matter of
CLARA KALSCHEUR, ESQ.,
Respondent.**

Disciplinary Proceeding No. 05-004

Supreme Court, Disciplinary Tribunal
Republic of Palau

Heard: August 16, 2005
Decided: September 2, 2005

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BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; J. UDUCH SENIOR, Associate Justice Pro Tem

PER CURIAM:

In this disciplinary proceeding, attorney Clara Kalscheur (“Kalscheur”) admits to the allegations contained in the complaint filed against her by the Disciplinary Counsel on July 5, 2005. Accordingly, the only matter to decide is the appropriate sanction. After considering the seriousness of her transgressions, her testimony at the hearing, and the factors outlined in the ABA Standards for Imposing Lawyer Discipline, the panel finds, for reasons discussed in detail below, that Kalscheur shall be suspended from the practice of law in the Republic of Palau for a period of six months.

VIOLATIONS OF THE DISCIPLINARY RULES

The complaint filed against Kalscheur centers around her representation of three different clients, and charges her with violations of Palau Disciplinary Rule 2(h) and ABA Model Rules of Professional Conduct 1.1 (“competent representation”) and 1.3 (“reasonable diligence”).¹ The violations can be summarized as follows:

1. Kalscheur represented Defendant Jackson Ngiraingas **L166** in Civil Action 171-97 and Civil Appeal No. 04-012. After a judgment was rendered against Ngiraingas for \$1,526,587.60, Kalscheur failed to file a notice of appeal. On April 26, 2004, Associate Justice Michelsen warned Kalscheur that she was “playing with procedural fire by repeatedly delaying the filing of notice of appeal” and that the failure to do so was “grounds for sanctioning counsel.” Although Kalscheur eventually filed a notice of appeal, she never filed an appellate brief despite receiving numerous extensions. Kalscheur also failed to

¹Palau Disciplinary Rule 2(h) states that an attorney may be subject to disciplinary action for “[a]ny act or omission which violates the American Bar Association Model Rules of Professional Conduct and the amendments thereto.”

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respond to an Order to Show Cause issued April 19, 2005. On May 3, 2005, the appeal was dismissed.

2. Kalscheur represented Defendant Terry Eledui in Civil Action No. 01-94 and Civil Appeal No. 04-013. After a judgment was rendered against Eledui for \$15,896.16, Kalscheur failed to file an appellate brief “even after seven extensions of time to do so, an Order to Show Cause, and an admonition from the Court.” On April 29, 2005, the appeal was dismissed.

3. In her representation of both Ngiraingas and Eledui at the trial level, Kalscheur failed to file written closing arguments.

4. Kalscheur represented Plaintiff Donald Hazelwood in Civil Action No. 01-116.² In response to a Motion for Summary Judgment, Kalscheur asked that summary judgment proceedings be postponed until after the completion of discovery. Her motion was granted by the trial court. Kalscheur, however, did not file any response after the discovery deadline passed, but instead requested, two months later, a status conference to set a new schedule for discovery and motions. Eventually, after a series of various other delays, Defendants filed a motion to judgment and to dismiss, arguing that their motion for summary judgment should be granted as unopposed, or alternatively, that the case should be dismissed for failure to prosecute. In response, Kalscheur submitted an affidavit offering various reasons for her delay. After six months with no further action, Defendants renewed their motion for judgment and to dismiss, and Kalscheur failed to file any substantive response even after being granted seven extensions of time. On November 12, 2004, the case was dismissed with prejudice by the trial court judge for failure to prosecute.

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DISCUSSION

Palau Disciplinary Rule 3 lists the various forms of discipline which may be imposed on lawyers found to be in violation of the rules: disbarment, suspension for not more than five years, public censure, private censure, a fine, or community service. “In considering the appropriate sanction, we consider it our duty to impose the discipline necessary to protect the public, the legal profession, and the courts.” *In re Tarkong*, 4 ROP Intrm. 121, 132 (1994). In making this determination, we look to the ABA Standards for Imposing Lawyer Discipline (“ABA Standards”) for guidance. *See In re Perrin* 10 ROP 111 (2003). The ABA Standards requires the weighing of the duty violated, the attorney’s mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors. *In re Warren*, 704 A.2d 798, 791 (Vt. 1997).

During these proceedings, Kalscheur has been both cooperative and forthcoming. Furthermore, there are no records of any other prior disciplinary action being brought against her. *See* ABA Standards 9.32 (Mitigating Factors). Nevertheless, it is undeniable that despite receiving countless extensions, admonitions, and Orders to Show Cause from the court -- *each*

²Hazelwood initiated the suit pro se in May 2001, but later secured Kalscheur’s representation in February 2002.

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one of which should have served as a reminder of her own malfeasance -- Kalscheur failed to take obvious and necessary steps to protect her clients' interests. More importantly, her failures as an attorney caused serious harm to her clients. In addition to not filing written closing arguments for Ngiraingas and Eledui, she also failed to perfect their appeals, which resulted in final judgments against them totaling over \$1.5 million. Because of her failure to prosecute his case, Donald Hazelwood lost the chance to "have his day in court." Thus, Kalscheur, by her own inaction, "effectively deprived [her clients] of the very access to justice that lawyers are hired or appointed to secure." *In re Obert*, 89 P.3d 1173 (Or. 2004).

At the hearing held on August 16, 2005, Kalscheur attempted to offer reasons for her misconduct by describing to the panel a long history of numerous medical issues that had allegedly overpowered her life since at least the year 2000. Her testimony was candid and heartfelt. She admitted that, upon recognizing her health problems, she sought the treatment of medical professionals on the island. Eventually, however, she gave up on traditional measures and resorted to self-diagnosis and self-medication. She explained that each time she genuinely thought she was getting better, her health problems would invariably return.

While we are sensitive to her medical issues, and have no doubt they played a significant role in her derelictions, they do not excuse her conduct, nor do they absolve her from punishment.³ Even after it should have become painfully obvious that her attempts to cure herself had been unsuccessful, and that her representation of her clients was suffering severely as a result, Kalscheur still failed to advise her clients of her poor health so they might consider retaining new, more capable counsel. But what is most troubling, she presented no tangible evidence at the hearing that her medical problems are currently being treated, or for that matter, even been definitively diagnosed. Indeed, Kalscheur, through her testimony, has exhibited a pattern ¶168 of failing to take serious and committed steps to treat her medical problems. Therefore, there is no way for this panel to know whether these problems, which are allegedly the root cause of her misconduct, will arise again in the future.

DISCIPLINE

The public is entitled to a reasonable guarantee that an attorney remains competent to represent clients. As noted by Disciplinary Counsel, the business of practicing law is a professional monopoly, available only to those who meet specific requirements. Attorneys licensed to practice in Palau, as with attorneys in most other jurisdictions, swear an oath and are the designated gatekeepers to the justice system. As such, it is the responsibility of the Disciplinary Tribunal, as the supervisors of the Palau Bar, to ensure that its members remain competent to practice law before the courts.

With these principles in mind, we find that Kalscheur's repeated and serious acts of misconduct, in addition to the unanswered questions surrounding her medical problems, require that she be suspended from the practice of law for a period of *six months*. See ABA Standard 4.42(a) ("Suspension is generally appropriate when: a lawyer knowingly fails to perform services

³While the ABA Standards suggests "personal or emotional problems" are a *mitigating* factor, we find that, in this case, they are actually an aggravating factor because they have not been effectively treated.

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for a client and causes injury or potential injury to a client . . .”). In administering this admittedly lengthy punishment, we are mindful that, pursuant to Palau Disciplinary Rule 13(b), she may apply for reinstatement after three months from the effective date of her suspension. When, and if, Kalscheur applies for reinstatement, she will, at that time, have to prove to the panel’s satisfaction that she is both emotionally and physically fit to practice law in the Republic of Palau. *See* ABA Standard 2.3 (“a lawyer who has been suspended should not be permitted to return to practice until [s]he has completed a reinstatement process demonstrating rehabilitation and fitness to practice law.”).⁴

⁴The court also reminds Kalscheur of her duties upon suspension under Palau Disciplinary Rule 12.