In re Tarkong, 3 ROP Intrm. 12A (1991)
IN THE MATTER OF JOHN S. TARKONG, ESQ.,
Respondent.

DISCIPLINARY PROCEEDING NO. 2-88

Supreme Court, Disciplinary Tribunal
Republic of Palau

Decision of disciplinary tribunal
Decided: July 4, 1991

Disciplinary Counsel: Robert Hartsock

Counsel for Respondent: *Pro se*

BEfORE: MAMORU NAKAMURA, Chief Justice; ARTHUR NGIRAKLSONG, Associate Justice; FREDERICK J. O'BRIEN, Associate Justice.

PER CURIAM:

This matter was heard by the Disciplinary Tribunal on June 28, 1991.

In a complaint filed January 8, 1991, Respondent was charged with commingling client funds, failing to promptly remit client funds received by him to his client, failing to keep his client informed of the status of a collection matter wherein Respondent was receiving funds on behalf of his client and failing to cooperate with an investigation of his conduct. At the June 28 hearing, Respondent stipulated that he had violated the disciplinary rules by commingling client funds with his own and failing to cooperate with the disciplinary counsel's investigation of his actions.

Respondent defended his actions by asserting that at the time he commingled the funds, he was unaware of the ethical rule requiring the creation of a separate client trust account and that ⊥12B his deeds were therefore unintentional. With regard to the charge that he still owes money to his client, Richmond Wholesale Meat, ("Richmond"), a California corporation, Respondent asserted that Richmond itself had agreed in a letter that Respondent no longer owed it anything. In defense of his failure to respond to interrogatories propounded by the original Disciplinary Counsel in 1987, Respondent stated that he no longer had access to the file as he had turned it over to replacement counsel.

Although Respondent has stipulated to Counts I, II and III of the Complaint, we believe the gravity of the violations warrant a complete review of the underlying facts.

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BACKGROUND FACTS

Respondent was retained in 1983 by Richmond to collect a judgment of slightly over $16,000 owed to Richmond by John Sugiyama. According to the documents supplied by Respondent, he received somewhere between $2,500 and $4,500 from Sugiyama in the spring of 1984.[1] According to the documents supplied by Respondent, Richmond was not even aware that this payment had been made to Respondent until May of 1985 when Respondent forwarded an accounting of the funds he had received from Sugiyama. On October 15, 1985, Richmond asked Respondent by letter why it had not yet received the more than $4,500 that Respondent had collected from Sugiyama. In a November 6, 1985 letter, Respondent admitted that ⊥12C he owed Richmond $3,937.50.[2] Richmond responded by noting that Respondent had originally told Richmond that $2,000 was paid by Sugiyama to Respondent in July of 1984 but that in a statement prepared in November of 1985, Respondent listed the July 1984 payment as being $750.

In a February 12, 1986 letter, Respondent requested that Richmond give him until June of 1986 to pay the money that he owed them which had been received from Sugiyama on Richmond's behalf. Respondent wrote Richmond in April of 1986 to explain that he would keep the entire $1,250 he had been awarded as sanctions against Sugiyama on top of the 25% contingency fee Richmond was paying him. In a letter dated April 28, 1986, Respondent told Richmond that he intended to charge them an extra $750 for the costs of collecting payments from Sugiyama. Richmond refused to pay this amount and it was ultimately never collected.

On October 5, 1987, Richmond wrote to Associate Justice Sutton, who was then presiding over the case of *Richmond Wholesale Meat v. Sugiyama*, asking about an alleged overpayment by Sugiyama and informing Justice Sutton that it was having problems with Respondent. That correspondence initiated this action.

DISCIPLINARY VIOLATIONS

An attorney commingles funds when he intermingles his client funds with his own; the separate identity of the funds is thereby lost so that the funds can be used for the attorney's personal ⊥12D expenses. *Black v. State Bar*, 18 Cal.Rptr. 518, 368 P.2d 118 (1962). Respondent admitted at the hearing and in his answers to interrogatories in Civil Action 22-87 that he did not open his first client trust account until October of 1986 and that the Richmond funds had been commingled in violation of the ABA Model Rule of Professional Conduct 1.15(a). [3] Respondent

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[1] In memoranda prepared for Respondent, Respondent's then legal secretary, Leslie Tadao indicated that $4,000 had been received from Sugiyama during that period. Respondent prepared affidavits in 1986 in which he claimed that the amount received in the spring of 1984 was only $2,500.

[2] This was less than the $4,781.25 that Richmond claimed Respondent owed them.

[3] Attorneys practicing law in Palau are subject to the ABA Model Rules of Professional Conduct pursuant to Rule 2(h) of the Disciplinary Rules and Procedures for Attorneys Practicing in the Trust Territory (in effect in 1984) and the Disciplinary Rules and Procedures for Attorneys and Trial Counselors Practicing Law in the Republic of Palau (effective November, 1989).

violated ABA Model Rule 1.15(b) when he failed to promptly notify Richmond that he had received funds from Sugiyama in 1984. As Respondent is found to have violated Rule 1.15, he necessarily had to have been acting in violation of Rule 1.4 which requires that an attorney keep his client reasonably informed of the status of a matter. To add insult to injury, once a dispute arose regarding these funds, Respondent failed to establish a separate account while the resolution of the dispute was pending in violation of Model Rule 1.15(c).

It appears from a review of the record that Respondent may still owe Richmond as much as $2,250. In any case, after computing interest since the award of the judgment, it is clear that Respondent has deprived Richmond of a yet to be determined sum. Respondent pointed to a statement received from Richmond dated December 1, 1986 as evidence that his balance with Richmond had ⊥12E been reduced to zero. [4] However it should be noted that Richmond was calculating Respondent's debts based solely on what Respondent had told Richmond he had received from Sugiyama, not on an independent accounting. On September 9, 1988, Richmond informed David Shadel (former Disciplinary Counsel) that it was confused about the amount Respondent might still owe Richmond. In fact, Respondent gave at least two different accountings of the payments he had received from Sugiyama, both of which differ from the accounting of Sugiyama's payments prepared by a certified public accountant.

Respondent's attempt to charge Richmond an extra $750 for costs related to collection constituted a violation of Model Rule 1.5 which states that:

> When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing <u>before or within a reasonable time</u> after commencing the representation. (emphasis added)

An attorney cannot simply add on charges to an already established contingency fee agreement merely because the matter is costing him more than he anticipated. Similarly, any sanctions awarded Respondent for Sugiyama's procrastination should be forwarded to Richmond. Respondent's 25% fee reimbursed him for all the costs of collection; any monies awarded above that 25% belong to the client per the contingency agreement.

Respondent admitted, and we find that he failed to cooperate ⊥12F with the Disciplinary Counsel's investigation of his conduct in violation of ABA Model Rule 8.1. David Shadel, the original Disciplinary Counsel in this case, propounded a Request To Produce and Interrogatories to Respondent on June 24, 1988. Respondent never answered. Respondent's assertion that he could not respond because he had turned his Richmond files over to another attorney provides absolutely no excuse for his conduct. Respondent had a duty to look at the file, wherever it might have been, obtain the necessary documents and, at the very least, answer the interrogatories to the best of his ability. He provided no testimony and offered no evidence to show that he at least attempted to review the file but was refused. Moreover, Respondent's

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[4] At the hearing, Respondent referred to Document No. 41 as indicating that his balance with Richmond had been reduced to zero. Document No. 41 is actually the September 9 letter from Richmond to Shadel, but we will assume that Respondent was referring to the December, 1986 statement.

failure to cooperate so the problem could be resolved belied his repeated claims at the hearing that he was always been "willing and able to pay what [he] owes."

We find that Respondent committed a further violation of Rule 8.1 when he claimed in his affidavit filed June 25, 1991 that he need a continuance of the hearing on this action because he was "arranging for [his ex-secretary, Leslie Tadao] to come in August [from Portland] for the hearing" as a necessary witness. Respondent also stated in his Motion to Continue Hearing that "A former secretary who is in Portland, Oregon now will be available to appear for Respondent in August . . . ." According to Disciplinary Counsel's affidavit filed June 27, 1991, Ms. Tadao told Mr. Hartsock that she had no plans to come to Palau in August and had not had any communications with Mr. Tarkong. Respondent admitted ⊥12G at the hearing that he had never spoken with Ms. Tadao but that he had talked with her father in order to get her address and telephone number. Thus, Mr. Tarkong's sworn statement was at the least an attempt to mislead the court and more accurately, a blatant lie and a violation of ABA Model Rule 3.3 which prohibits attorneys from offering evidence known to be false.

SANCTIONS

It is usually grounds for disciplinary action when an attorney commingles funds. Bureau of National Affairs, Inc., ABA Lawyer's Manual On Professional Conduct 45:502 (1989). Respondent's claims of inexperience, ignorance of the disciplinary rules and absence of harm to the client have been considered by other courts to be inadequate defenses to the charge. *Id.*; *Wrighten v. U.S.* , 550 F.2d 990 (4th Cir. 1977) (commingling of personal and office funds as a result of lack of training and experience sufficient to warrant disbarment); *Jackson v. State Bar* , 25 Cal.3d 398, 600 P.2d 1326, 1329 (1979) (disciplinary rule violated by attorney's commingling even though no person injured). We agree and find that Respondent had a professional and ethical duty to make himself aware of all rules applicable to the practice of law.

In determining appropriate sanctions for the violations described above, we consider mitigating and aggravating factors, including the attitude and conduct of Respondent at the hearing as this goes to Respondent's general fitness to practice law. Although admitting to serious professional misconduct, Respondent showed no remorse and no meaningful comprehension of the magnitude ⊥12H of his actions. At one point, Respondent explicitly stated that he firmly believed he had done nothing wrong. In his attempts to explain why the procedure he used to forward payments from Sugiyama to Richmond was legitimate, Respondent finally admitted that the checks to Richmond were drawn on his own checking account, showing that he still did not understand the basic definition of commingling.

Respondent sought to blame the commingling on his legal secretary, on his law school's curriculum, on the alleged fact that none of the bar exams he had taken included questions on professional ethics and on his campaigning for Vice President. In his efforts to trivialize his conduct, make excuses and blame others, Respondent conveyed to this panel a shocking lack of regard for professional ethics and good business practice.

This panel is also troubled by the shoddy way in which Respondent conducted his own

defense in this matter. Despite having knowledge of the underlying dispute since late 1986, he did not offer one defense to his actions that was not first mentioned by Disciplinary Counsel in his opening statement, cite one case or other authority in support for his plea that only a reprimand be imposed, introduce any evidence on his own behalf, call any witnesses, or introduce any affidavits or deposition testimony of witnesses. Respondent did not obtain any bank documents and had prepared no legal argument in his own defense.

In his Motion to Continue, Respondent stated that he had hired an expert witness to review his records. It became clear at the ⊥12I hearing that Respondent had only very recently approached an accountant, James Landon, about reviewing his records. Since Landon was the C.P.A. who was hired to do an accounting in Civil Action 61-81, *Richmond Wholesale Meat v. Sugiyama*, he absolutely cannot serve as an expert in this matter without posing a serious conflict of interest. Although Respondent indicated to Richmond in September of 1987 that he would hire an accountant to resolve the dispute over the funds, he obviously had not done so. In fact, since September of 1987, Respondent has taken no action whatsoever to resolve the dispute.

Respondent has had serious problems on other cases before the Palau courts which constitute further aggravating circumstances. For example, in *Hardware of Guam v. Tarkong* , Civil Action 22-87, Mr. Tarkong's client prevailed in its claim that Respondent had not forwarded the judgment amount and did not keep a separate client trust account. In *Owens v. House of Delegates* , Civil Action 52-86, Respondent failed to file an appellate brief and waived his client's right to appear the day before oral argument without ever filing a motion to withdraw from the case in violation of Model Rule 1.4. Further, Respondent failed to keep his client appraised of the status of the matter and failed to send her copies of pleadings. In *Albert v. Asanuma Gumi Co.* , (App. 14-87), the Appellate Division sanctioned Respondent for bringing a frivolous appeal. In *KSPLA v. Lakobong* , Civil Action No. 159-88, the court determined that Respondent had brought frivolous claims and defenses and was sanctioned by the court.

⊥12J We realize that the severity of the punishment in this case should be mitigated by the fact that this is the first disciplinary action taken against an attorney for commingling funds in Palau and have tempered our ruling accordingly. However, we conclude that the aggravating factors far outweigh the mitigating ones. We further find that Respondent intentionally deprived Richmond of its use of its funds with intent to permanently deprive Richmond of those funds. We ORDER that Respondent:

1. Is suspended from the practice of law in Palau for a period of three (3) years.

2. Pass the Multi-State Professional Responsibility Exam as a condition to being readmitted to practice in Palau.

3. Provide to the Disciplinary Tribunal a report by August 30, 1991 outlining how his current caseload has been transferred to either the client or substitute counsel.

4. Pay all costs and attorneys fees incurred in this proceeding as further ordered by this Tribunal after an accounting.

5. Reimburse Richmond Wholesale Meats for any funds wrongfully withheld from Richmond as ordered by Justice Sutton in Civil Action No. 61-81, including pre-judgment interest of 9% per annum on such sum from the date they were paid to Respondent by Sugiyama and all attorneys fees and costs reasonably incurred by Richmond in their efforts to collect the money owed to them by Respondent.