In Re Tarkong, 4 ROP Intrm. 121 (1994)
IN THE MATTER OF JOHN S. TARKONG,
Respondent.

DISCIPLINARY PROCEEDING NO. 1-92

Supreme Court, Disciplinary Tribunal
Republic of Palau

Decision and order
Decided: January 28, 1994

Disciplinary Cousnel: William L. Ridpath

Attorney for Respondent: David G. Banes

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; and PETER T. HOFFMAN, Associate Justice.

PER CURIAM:

The complaint in this proceeding alleges six counts against Respondent John S. Tarkong, each a separate violation of the Disciplinary Rules and Procedures for Attorneys and Trial Counselors Practicing in the Courts of the Republic of Palau (hereafter "Disciplinary Rules"). All six counts pertain to conduct by Tarkong while under a previous suspension by this Tribunal. Tarkong has essentially admitted all of the allegations in the complaint, and we find that they have been proven by clear and convincing evidence. Our opinion today will serve to underscore the duties and responsibilities incumbent upon all attorneys and trial counselors practicing law in Palau.

BACKGROUND

In the previous disciplinary proceeding, *In the Matter of John S. Tarkong, Esq.*, Disciplinary Proceeding No. 2-88, slip op. ⊥122 (July 4, 1991), Tarkong was suspended from the practice of law for "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 this client and failing to cooperate with an investigation of his conduct." Id. at 1. Of particular significance to the present proceeding are the first four components of the Tribunal's order:

> 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.

Id. at 10.

During oral argument in the case of *Techemding Clan v. Mariur*, Civil Appeal No. 24-90, slip op. (February 20, 1992), a member of the Techemding Clan informed the Court that Tarkong had prepared appellant's opening brief filed on September 4, 1991; appellant's reply brief filed on December 23, 1991; and perhaps also a request for continuance filed on February 12, 1992. These documents were all prepared subsequent to the Disciplinary Tribunal's July 4, 1991 order suspending Tarkong from practicing law for three years.

The Chief Justice was then notified that Tarkong may have continued to practice law while under suspension, and the law firm ⊥123 of Ngiraikelau, Dengokl, and Ridpath was appointed to investigate the complaint. Disciplinary Counsel William Ridpath submitted a report finding various violations by Tarkong and filed a formal complaint on April 20, 1992.

The complaint contains six counts: three instances of unauthorized practice of law by preparing the opening and reply briefs and the request for continuance in the *Techemding* case, failure to notify a client (the Techemding Clan) of his suspension, failure to file leave to withdraw as attorney of record in the case, and failure to file a truthful report as required by the order of the Disciplinary Tribunal.

DISCIPLINARY VIOLATIONS

COUNTS I-III

The first three counts charge Tarkong with unlawfully practicing law while under suspension by filing an opening brief, a reply brief, and a request for continuance, in violation of Disciplinary Rules 2(a), 13(a), and 15. Rule 2(a) subjects attorneys to disciplinary action for "[w]illful disobedience or violation of a court order." Rule 13(a) prohibits suspended attorneys from resuming practice until reinstated by order of the Disciplinary Tribunal. Rule 15 provides that any suspended attorney who "practices law" shall be held in contempt of court and subject to discipline.

Tarkong admits that he prepared the three documents while under suspension, and he does not dispute that such services constitute the practice of law. See Annotation, Nature of Legal ⊥124 Services or Law-Related Services Which May Be Performed for Others by Disbarred or Suspended Attorney, 87 A.L.R.3d 279, 289-93 (1973).

Tarkong has raised several defenses to the charges against him. He first argues that a

"disbarred or suspended attorney may continue in a limited way to continue [to] perform legal services including preparing written legal documents, briefs and pleadings." All of the cases he cites, however, indicate that a suspended or disbarred attorney may only perform such services in the capacity of law clerk for another attorney, not as a direct service to a client. See id.

He next argues that he never signed the documents and that upon delivering them to his client, the Techemding Clan, he stated that they could either be handed over to the clan's new attorney, once one was retained, or signed by the chief and filed as is. We do not see how this defense helps his case. The preparation of the documents, not the presence or absence of Tarkong's signature, is the activity constituting unauthorized practice of law. Moreover, his advice to his client--either to hand over the documents to another attorney or to sign and file them--was in itself an instance of unauthorized practice of law. As one court noted, "While petitioner did not sign any legal documents or make a court appearances on [client's] behalf, in a larger sense, the practice of law includes legal advice and counsel and the mere preparation of legal instruments." *Farnham v. State Bar*, 552 P.2d 445, 449 (Cal. 1976).

By the same token we reject Tarkong's argument that he had ⊥125 already prepared the opening brief before the suspension was to take effect. Even accepting this claim as proven, we do not see how it exonerates him of the charge. As we have just seen, handing the document to his client and providing advice as to how it could be used was in itself an act of practicing law.

Also unpersuasive is Tarkong's argument that he did not charge the clan for preparing the documents. The practice of law includes services that are performed both remuneratively and gratuitously. "It is well-known that many licensed attorneys often perform professional services gratuitously. This constitutes the practice of law when performed by a licensed attorney. We see no reason why a different rule should apply when the service is performed by a disbarred attorney." *Houts v. State Ex Rel. Oklahoma Bar Association*, 486 P.2d 722, 725 (Okl. 1971).

Another defense is that Tarkong performed these services at the request of the clan, which was well-aware of his suspension, and that he acted at all times in the clan's best interest. Even if his motivation for preparing the documents originated in a request from his client, such motivation in no way vitiates the fact that he prepared the legal documents while under suspension. Nothing in Disciplinary Rule 15 requires that conduct must be in bad faith in order to constitute the unlawful practice of law. Furthermore, his actions were not in the clan's best interest: the clan was harmed by not having the opportunity to be represented by competent counsel, which at minimum means one currently authorized ⊥126 to practice law.[1]

Finally, we will address a defense that Tarkong offers to the first count. He argues that the July 4, 1991 order suspending him was silent as to the effective date; that the court's August 30, 1991 deadline for filing his report (later extended to September 15) led him to believe that he

[1] We also take judicial notice of the fact that the appeal which Tarkong briefed was ultimately deemed frivolous, and the clan was consequently ordered to pay attorneys fees and costs. *Techemding Clan v. Mariur*, Civil Appeal No. 24-90, slip op. at 6-7. We therefore reject a fortiori his argument that he acted in his client's best interest, and we will consider this prejudice infra in our discussion of sanctions.

could continue practicing law until such time; and that he believed that he was not yet under suspension when he handed his opening brief to his client on August 21. Tarkong also contends that he was misled by the Court because the Clerk of Courts telephoned him on one or more occasions with a message that the Chief Justice was wondering why he was not appearing in court to represent his client.

We find no merit to these arguments. Neither Tarkong nor the Clerk of Courts was able to provide the dates of such telephone calls, and we therefore have no way of knowing whether they occurred before or after the effective date of the suspension. More importantly, even assuming that such calls were made after the effective date, they do not absolve him of the charge. It was Tarkong's duty to ascertain from the Disciplinary Tribunal what his rights were. *State v. Schumacher*, 519 P.2d 1116, 1126 (Kan. 1974).

Tarkong's argument regarding the effective date of the order is belied by the clear language of Disciplinary Rule 12(c), which ⊥127 provides that "[o]rders imposing suspension or disbarment shall be effective thirty (30) days after entry." Tarkong's attempt to avoid the effect of this rule is particularly damning. He testified that he had not "checked" the Disciplinary Rules until September, 1991. Not only do we fail to find this testimony credible, but it does not serve to exculpate him. The previous Disciplinary Tribunal chided him for attempting to shift the blame to his law school curriculum and his bar exams. *In the Matter of John S. Tarkong*, Disciplinary Proceeding 1-92, slip op. at 8. It also noted that "Respondent had a professional and ethical duty to make himself aware of all rules applicable to the practice of law." Id. at 7. Given his extensive history of ethical violations [2] and the Tribunal's clear articulation of his duty, it is hard to imagine how Tarkong could have failed to review the Disciplinary Rules prior to September, 1991. Moreover, such a failure would provide weak testament to his professional competence.

Our opinion today should make clear to all attorneys and trial counselors practicing law in Palau that they have a professional and ethical duty to make themselves aware of all rules applicable to the practice of law. Whether or not they are aware of a particular rule, such knowledge will be imputed to them. Any plea of ignorance of the law in this regard will not only fail to ⊥128 furnish a defense, but may also demonstrate unfitness to practice law.

COUNT IV

The fourth count alleges that Tarkong did not notify the Techemding Clan of his suspension by registered or certified mail as required by Rule 12(a). He admits that he failed to provide such notification, but argues that he should not be punished for this omission because he informed a clan representative, Senator Sam Masang, in person and therefore complied with the "spirit" or "fundamental requirement" of the provision.

We reject this contention. The notice requirement in Rule 12 is more than a mere

[2] See, e.g., *In the Matter of John S. Tarkong*, Disciplinary Proceeding 2-88, slip op. at 9 (citing four cases involving misconduct); *ROP v. Liberio Chisato*, 1 ROP Intrm. 585, 586 (1989) (referring to "the number of past occasions" when the court had imposed sanctions).

formality. Had Tarkong provided timely notice of his suspension and withdrawn from the case, the clan would have had time to retain the services of another attorney and would not have been forced to rely on Tarkong to prepare the opening brief. We also note that it was Senator Masang who initiated the contact, after learning about the suspension from another senator. We have no way of knowing whether Tarkong would have informed the clan of his own accord.

In any event, we see no reason for such a cavalier attitude to our Disciplinary Rules. They are to be interpreted strictly, according to the "letter" of the law, not stretched to the point of vacuity. As one court stated, "Just as every lawyer should avoid even the appearance of professional impropriety, a suspended attorney should avoid the appearance of failure to comply with the court's order." *Schumacher*, 519 P.2d at 1122. The provision in ⊥129 Rule 12(a) that a suspended attorney shall promptly notify his clients of his suspension by registered or certified mail means just that, not notification by such means as the suspended attorney deems fit. To hold otherwise would make a mockery of our rules and seriously hamper the Supreme Court's ability to regulate the Bar and protect clients and the public from unethical conduct of lawyers.

COUNT V

The penultimate count charges Tarkong with failure to file for leave to withdraw as attorney for the clan subsequent to his suspension. The applicable rule is 12(b), which creates an affirmative duty on suspended attorneys to make such a motion when a client has not obtained subsequent counsel by the effective date of the suspension. Again Tarkong admits that no such motion was filed, but argues that he was attempting to find substitute counsel for his client and did not wish to leave the clan's interests unprotected during the interim. Again we emphasize the unambiguous requirement set out in the rule.

COUNT VI

The final count alleges that Tarkong failed to file a truthful report as required by the order of the Disciplinary Tribunal. Rule 2(a) subjects attorneys to discipline for dishonesty, and Rule 12(d) requires a suspended attorney to file an affidavit which shows that he has complied with the court's order and with the Rules.

The report submitted by Tarkong stated, "In addition to ⊥130 contacting clients personally, letters of confirmation have been prepared and sent, via registered mail, to them." This statement made to the Court was patently false as to the Techemding Clan, as was demonstrated in the above discussion of Count IV. Here, Tarkong appears to have consulted the Disciplinary Rules, and Rule 12(a) in particular, but only towards the improper end of falsely stating his compliance with the Rule. Moreover, the report was not in the form of an affidavit; in other words, it was not a sworn statement. Tarkong's argument that the Disciplinary Tribunal's order requesting a "report" fails to convince us that the Tribunal thereby meant to require or permit an unsworn statement, in direct contravention of Rule 12(d).

SANCTIONS

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. Rule 14 makes clear, however, that suspension is the minimum sanction for an attorney who has been suspended and then commits another violation. Rule 15 goes on to provide that an attorney who practices law while suspended shall be in contempt of court and subject to the sanctions pertaining thereto. We also note our authority under Disciplinary Rule 5(g) to consider prior disciplinary actions.

We therefore find Tarkong in contempt of the Disciplinary Tribunal and now turn our attention to the appropriate sanction. ⊥131 Given the complex tapestry of the charges against Tarkong and his extensive record of previous violations, we refer to the list of aggravating and mitigating circumstances set forth in the ABA Standards for Imposing Lawyer Discipline (1986).[3] We refer to these standards as guidelines, but in no way do we mean to abdicate our ultimate prerogative and responsibility to select the appropriate discipline in light of all of the circumstances of this case. See *Gary v. State Bar of California* , 749 P.2d 1336, 1340-41 (Cal. 1988).

The aggravating factors listed by the ABA Standards are as follows:

(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge wrongful nature of conduct;
(h) vulnerability of victim;
(i) substantial experience in the practice of law;
(j) indifference to making restitution.

The mitigating factors are the following:

(a) absence of a prior disciplinary record;
(b) absence of a dishonest or selfish motive;
(c) personal or emotional problems;
(d) timely good faith effort to make restitution or to rectify consequences of misconduct;
(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
(f) inexperience in the practice of law;
(g) character or reputation;

[3] These factors are also set forth in *In Re Howard*, 743 P.2d 719, 731-33 (Or. 1987), and therefore may be readily consulted by all attorneys and trial counselors here in Palau.

⊥132 (h) physical or mental disability or impairment;
(i) delay in disciplinary proceedings;
(j) interim rehabilitation;
(k) imposition of other penalties or sanctions;
(l) remorse;
(m) remoteness of prior offenses.

It is plain from our discussion above that there are numerous aggravating factors and few, if any, mitigating factors. In considering the appropriate sanction, we consider it our duty to impose the discipline that is necessary to protect the public, the legal profession, and the courts. *Levin v. State Bar of California* , 767 P.2d 689, 693 (Cal. 1989). As a result, we have elected to impose another substantial suspension upon Tarkong and set stringent conditions for his reinstatement.

We therefore ORDER that Respondent:

1. Be suspended from the practice of law in Palau for a period of three (3) years, with such suspension to take effect upon the termination of his previous suspension on August 4, 1994.

2. Pay all costs and the fees of the Disciplinary Counsel incurred in this proceeding within sixty days of the date of this decision.

3. Take and pass the Palau Bar Examination as a condition of being readmitted to practice law in Palau.

4. Reimburse the Techemding Clan for all of the sanctions imposed on it for filing a frivolous appeal in *Techemding Clan v. Mariur* .[4] Respondent shall be required to provide evidence of such reimbursement as a condition of readmission.

⊥133 5. Offer timely and complete compliance with all court orders pertaining to any matter.

Finally, we thank the Disciplinary Counsel for his prosecution of this matter.

[4] See supra note 1.