



Gregory G. Skordas (#3865)
SKORDAS, CASTON & HYDE, LLC
560 South 300 East, Suite 225
Salt Lake City, UT 84111
Telephone: (801) 531-7444
Facsimile: (801) 531-8885
Attorney for Respondent
gskordas@schhlaw.com

**IN THE THIRD JUDICIAL DISTRICT COURT – SALT LAKE
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

In the Matter of the Discipline of:

AARON TARIN #12258,

Respondent.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Case No. 140907841

Judge Ryan Harris

This matter is before the Court on a disciplinary action initiated by the Office of Professional Conduct (OPC) against Aaron Tarin, Utah State Bar #12258. Trial on this matter was held on March 22-23, 2017. Counsel for OPC was present through Barbara L. Townsend. Mr. Tarin was also personally present and represented by counsel, Gregory G. Skordas. The Court heard testimony and received evidence into the record.

Now having considered arguments of counsel and having reviewed the evidence and witnesses and applicable law, the Court hereby makes the following Findings of Facts and Conclusions of Law:

FINDINGS OF FACT:

Respondent, Aaron Tarin, is an attorney licensed to practice law in the State of Utah.

Mr. Tarin has been licensed as an attorney in the State of Utah since 2008.

Mr. Tarin is engaged in the practice of criminal law as well as immigration law.

The instant Complaint arose from Mr. Tarin's representation of Hector Sustaita-Alonso in the case *State of Utah v. Sustaita*, #111902670.

Mr. Sustaita was charged in the Second District Court, Weber County with Possession with Intent to Distribute Methamphetamine, a second degree felony.

At the time this matter arose, Mr. Tarin was in his third year of legal practice.

On December 1, 2011, Mr. Tarin appeared in Court on the Weber County matter and met with the assigned prosecutor, Dee Smith.

At the time, Dee Smith was the elected official in charge of the Weber County Attorney's Office and he had substantial experience in the practice of criminal law.

During this December 1st meeting, Mr. Smith indicated that any amenable plea agreement must include a possession with intent to distribute a controlled substance, the charge must be at least a third degree felony, and the charge must be enhanceable.

During this December 1st meeting there was only a brief conversation between Mr. Tarin and Mr. Smith and there was no discussion of the particular drug involved.

During this December 1st meeting, Mr. Smith did not share with Mr. Tarin that the Weber County Attorney's Office had a policy of not changing the controlled substance involved in the plea and Mr. Tarin had no way of knowing that such a policy existed at the time of this meeting.

Mr. Tarin and Mr. Smith agreed to continue the matter in order for Mr. Tarin to review

the immigration implications and consequences of the potential plea agreement.

Mr. Tarin left the December 1st meeting with the intent to find a plea which included Mr. Smith's requirements; meaning, a third degree felony possession with intent to distribute a controlled substance that was also enhanceable.

At the time, Mr. Tarin knew of only two ways to amend a criminal charge from a second degree felony to a third degree felony:

make the charge an attempt crime, which Mr. Smith was not interested in as attempts are not enhanceable; or

change the controlled substance involved to a controlled substance not listed on Schedule I or II.

Mr. Smith testified that the Weber County Attorney's Office in fact had a third way of changing the degree of offense by simply verbally stating on the record that a charge was to be amended from a second degree felony to a third degree felony even if there was no statutory legitimacy for such a practice.

Mr. Tarin was not aware of or in the practice of amending such charges in the manner described by Mr. Smith.

After reviewing the potential immigration complications, Mr. Tarin settled on the controlled substance HU-211, at the time listed under 58-37-4.2(4)

Mr. Tarin drafted a plea agreement prior to the next court appearance, which contained the following relevant portions:

On page 1 Mr. Tarin changed the charged offense to include the statutory citation for the HU-211 chemical compound as well as the statutory citation for third degree drug

offenses involving controlled substances found on schedule III and IV, as opposed to any citation to the schedules containing methamphetamine.

On pages 2-3 Mr. Tarin inserted the chemical compound for HU-211 into the factual basis for the Plea Agreement, which was copied/pasted directly from the statute. Here, Mr. Tarin failed to put “HU-211” in front of the lengthy chemical compound. Mr. Tarin could have and probably should have put “HU-211” in front of the lengthy chemical compound name, as that was how the statute read.

On page 2 Mr. Tarin inserted the phrase, “the following facts describe the conduct for which I am criminally liable and are the only undisputed facts which I assent to.”

On pages 6-7 Mr. Tarin inserted the phrase, “The Plea entered into today will not function as a grounds for inadmissibility as per federal law.”

With regard to the language added on page 6-7 of the Plea Agreement, when questioned about it at trial Mr. Smith indicated he now understands that language to mean the offense would not be a deportable offense.

With regard to the language added on pages 6-7 of the Plea Agreement, both Mr. Smith and the secondary prosecutor, Mr. Willoughby testified that they understood that if Mr. Sustaita had pled to a felony offense involving methamphetamine it would have been a deportable offense with a lifetime ban, which is inconsistent with this added language.

Any of the noted sections to the Plea Agreement ought to have put the Weber County prosecutors on notice of the changes made to the substance being pled to and gave them an opportunity to ask any follow-up questions if they had any concerns.

On December 15, 2011, Mr. Tarin appeared in court and provided Mr. Smith with the drafted Plea Agreement to see if Mr. Smith would be willing to sign it.

With the exception of signatures, the Plea Agreement was never altered or amended after it was presented to Mr. Smith.

Mr. Smith had the opportunity to read, review, and ask follow-up questions of Mr. Tarin regarding the parameters of the Plea Agreement.

No evidence was presented that Mr. Smith asked any follow-up questions of Mr. Tarin regarding the drafted Plea Agreement.

Mr. Smith acknowledged that he read and reviewed at least certain portions of the Plea Agreement and then signed it.

Once Mr. Smith signed the Plea Agreement, Mr. Tarin was under the not unreasonable impression he had obtained a plea involving HU-211; not methamphetamine.

In the Courtroom a separate prosecutor, Benjamin Willoughby, was provided a copy of the signed Plea Agreement and had a brief discussion with Mr. Tarin regarding the terms of the plea.

Prior to this brief discussion Mr. Willoughby had not been involved in any plea discussions regarding the matter.

The case was called by Judge Lyon who asked for a factual basis supporting the Plea Agreement and the factual basis was offered by Mr. Willoughby as being methamphetamine

Judge Lyon then asked Mr. Sustaita if he agreed with those facts and at that point Mr. Tarin jumped in, stating that he wanted to clarify the precise name of the drug, and read the lengthy chemical compound name.

Mr. Willoughby responded to Mr. Tarin by saying that he did not know what that was.

Mr. Tarin replied that it did not matter for this purpose, but for immigration purposes it needed to be clarified.

Judge Lyon inquired as to whether or not that drug was a controlled substance and Mr. Tarin clarified that the chemical was in fact a controlled substance.

Mr. Tarin did not specifically clarify that the drug was not methamphetamine.

A fair inference can be made from the transcripts of the Plea Colloquy that Judge Lyon understood that the drug being pled was something other than methamphetamine.

Mr. Willoughby did not attempt to clarify the precise name of the substance being pled to.

Judge Lyon specifically stated that the charge was being amended from a second degree felony to a third degree felony Possession with Intent to Distribute a Controlled Substance, but did not say methamphetamine. Judge Lyon dismissed Count II of the Information.

No written amendment was made to the criminal information filed against Mr. Sustaita, there is only the oral record of the plea hearing. From the oral record of the hearing it is unclear how the charge was amended. Neither Mr. Tarin nor Mr. Willoughby took steps to clarify the issue at that point.

During trial, it became clear that this was simply an issue of miscommunication and there never was entirely a meeting of the minds, between Mr. Tarin and the Weber County Prosecutor's Office, as to what the Plea Agreement was to fully entail.

This failure of the meeting of the minds between the parties does not fall squarely on the shoulders of Mr. Tarin as the Weber County officials had ample opportunity to read, review, and

question the Plea Agreement which clearly outlined what Mr. Tarin believed the plea involved.

Mr. Tarin, at this point, believed his client had successfully entered a plea that comported with the concerns of the Weber County Attorney's Office, which was a third degree felony enhanceable offense of possession with intent to distribute, and Mr. Tarin believed he had done so with regard to a drug that was not presumptively deportable for Mr. Sustaita.

Prior to the initial immigration proceeding in March 2012, Federal Prosecutor Adam Greenway expressed some confusion about what Mr. Sustaita actually pled guilty to in his criminal case. Mr. Greenway could not tell from looking at the file if Mr. Sustaita had pled guilty to a methamphetamine charge or to an HU-211 charge.

Mr. Greenway contacted the Weber County Attorney's Office to clarify the inconsistencies in the criminal information and the plea agreement.

Mr. Smith and Mr. Willoughby expressed to Mr. Greenway that they believed the plea involved methamphetamine.

At the initial immigration proceedings, Mr. Greenway informed Immigration Judge William Nixon that the Weber County Attorney's Office contested the terms of the Plea Agreement.

Judge Nixon was, from the outset, aware that there was a dispute between Mr. Tarin's interpretation of the deal and the Weber County Attorney's Office interpretation of the deal.

Even though the Weber County Attorney's Office disputed that the Plea Agreement was for methamphetamine, Mr. Tarin was not required to relinquish his belief that the plea was for HU-211 when presenting his legal arguments before Judge Nixon in the immigration proceedings.

Mr. Sustaita was ultimately deported and received no discernable benefit from Mr. Tarin's arguments in support of non-deportation.

Judge Nixon believed there to be an ambiguity in the record of the criminal proceedings in Weber County because the criminal information had never actually been amended to change the drug and because the Weber County Attorney's Office was adamantly taking the position that the plea agreement was not consistent with Mr. Tarin's argument. Based on that ambiguity, Judge Nixon refused to afford the relief Mr. Tarin was pursuing for Mr. Sustaita.

The Court disagrees with the view of the Chair of the Ethics and Discipline Committee that Mr. Tarin's overall business model of defending non-citizens facing criminal charges in order to preserve their immigration status is somehow nefarious or improper.

The Court finds that the Chair of the Ethics and Discipline Committee, and to an extent the OPC, proceeded to prosecute this case based, in part, on the incorrect premise that Mr. Tarin's overall strategy was inherently unethical.

The Court finds that when all parties are in agreement, the overall strategy of obtaining immigration safe-haven plea agreements in a criminal proceeding is not in and of itself unethical.

The Court finds that these types of plea agreements can validly create a situation in which both the prosecution and defense can benefit. The aforementioned strategy being, seeking a plea agreement with cooperation from the prosecution which resulted in an enhanceable third degree felony possession with an intent to distribute a controlled substance by amending the substance to one listed on the Utah controlled substance schedules but not listed on the federal schedule in order to gain favorable standing in later immigration proceedings.

The Court finds that Mr. Tarin's listserve email exchange explaining the strategy to other lawyers in order to help their immigrant clients was not improper.

CONCLUSIONS OF LAW:

The Court finds that Mr. Tarin did not violate Rule 3.3(a)- Candor to the Tribunal. This finding is based on the following:

Rule 3.3 requires a showing that Mr. Tarin knowingly made a false statement to the tribunal.

OPC provided no evidence that Mr. Tarin made any false statements to the District Court; thus, OPC has not established that Mr. Tarin made such representations to Judge Lyon at the District Court.

Judge Nixon was aware of the dispute regarding the Plea Agreement from the outset of the immigration proceedings; thus, OPC has not established that Mr. Tarin made any false statements to Judge Nixon.

Mr. Tarin's continued reliance on what he understood the Plea Agreement to be does not amount to a violation of Rule 3.3.

The Court finds that Mr. Tarin did not violate Rule 3.4(a)- Fairness to Opposing Party. This finding is based on the following:

There is no persuasive argument that Mr. Tarin altered the Plea Agreement after it was provided to Mr. Smith.

Mr. Tarin drafted the Plea Agreement and gave the only copy to Mr. Smith, which he reviewed and signed.

This rule is more readily applicable to circumstances where a party alters an

already existing document or piece of evidence and offers such evidence as unaltered.

This rule is not applicable to the instant matter because the Plea Agreement was a proposed contract never altered by but instead was created by Mr. Tarin.

OPC's argument that Rule 3.4 allows for a "Fairness Analysis" is unpersuasive.

Mr. Tarin's presentation of the Plea Agreement to Mr. Smith does not amount to a violation of Rule 3.4(a).

The Court finds that Mr. Tarin did not violate Rule 4.1(a),(b)-Truthfulness to Opposing Parties. This finding is based on the following:

Rule 4.1(a) requires a showing that Mr. Tarin knowingly made a false statement to a third party.

The Plea Agreement provided to the Weber County officials did not contain any knowingly false statements.

The Plea Agreement contained what Mr. Tarin believed the terms of the plea were.

The Plea Agreement strongly implied that the drug being pled to was something other than methamphetamine.

Once Mr. Smith signed and assented to the terms of the Plea Agreement, Mr. Tarin was warranted in relying on what he believed the terms of that agreement were.

OPC initially cited the entirety of Rule 4.1; however, their Trial Brief focused on subsection 4.1(b), which states, "a lawyer shall not knowingly . . . [f]ail to disclose a material fact, when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."

This subsection is not at issue in this case.

No evidence was provided that Mr. Tarin's conduct benefitted his client, Mr. Sustaita in the commissions of a criminal or fraudulent act.

Mr. Tarin's continued reliance on his belief in the terms of the Plea Agreement before Judge Nixon in hopes of obtaining immigration relief for his client does not amount to a violation of Rule 4.1(b).

The Court finds Mr. Tarin did not violate Rule 8.4(c)- Misconduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation. This finding is based on the following:

Under this rule, dishonesty, fraud, and deceit all require intent.

While the law recognizes negligent misrepresentations without intent, those representations would have to be affirmative misrepresentations and not simply omissions or failures to disclose.

The law treats misrepresentations differently than omissions.

Mr. Tarin never knowingly or intentionally made any affirmative misstatements of law to the prosecution, the district court, or the immigration court.

Mr. Tarin's statements or omissions regarding the Plea Agreement do not amount to a violation of Rule 8.4(c).

CONCLUSION:

Based on the above findings and conclusions, the Court finds that OPC has not met its burden by a preponderance of the evidence to establish Mr. Tarin violated any of the Utah Rules of Professional Conduct, including Rules 3.3(a)- Candor to the Tribunal, 3.4(a)- Fairness to Opposing Party, 4.1- Truthfulness to Opposing Parties, or 8.4(c)- Misconduct Involving

Dishonesty, Fraud, Deceit, or Misrepresentation.

Tarin and his counsel are invited to prepare a form of Judgment, in accordance with Utah R. Civ. P. 58A(a), to bring this case to completion.

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**- -THE DATE AND THE COURT'S SIGNATURE APPEARS AT THE TOP OF THE
FIRST PAGE- -**