

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

In re: Robert Barnwell Clarkson.)	
Gary Chapman, (1))	Docket No. 07-ALJ-17-0257-CC
)	
Petitioner,)	
)	ORDER OF CONTEMPT
vs.)	
)	
South Carolina Department of Revenue,)	
)	
Respondent.)	

This proceeding of contempt came before the Administrative Law Court ("ALC") pursuant to a report by counsel for the Respondent that Robert Barnwell Clarkson ("Clarkson") was engaging in the unauthorized practice of law during the course of the above-captioned case.² In the underlying matter, Petitioner Gary Chapman challenges income tax assessed by the Respondent, the South Carolina Department of Revenue. Clarkson, a disbarred attorney, admitted to providing the Petitioner with legal advice prior to the hearing and admitted to preparing pleadings in this matter on the Petitioner's behalf, although the documents are signed by the Petitioner himself.

BACKGROUND

Clarkson was disbarred from the practice of law in the state of South Carolina in 1978. In an order dated May 25, 2004, the South Carolina Supreme Court held Clarkson in criminal

I Pursuant to a newly enacted statute to be codified at S.C. Code Ann. § 12-60-3312, ALC proceedings and records involving challenges to proposed tax assessments are no longer confidential. Accordingly, the caption in the underlying contested case is hereby amended to include the Petitioner's name rather than designating him as "Anonymous Taxpayer." See 2007 Act No. 110, § 6 (eff. June 21, 2007) and 2007 Act No. 116, § 12 (eff. June 28, 2007) (amending Article 13, Chapter 60, Title 12 of the 1976 Code to add § 12-60-3312) ("Except as otherwise provided by law or proper judicial order, all proceedings and records of a contested case hearing of the Administrative Law Court of a matter covered by the South Carolina Revenue Procedures Act are open to the public."). Section 12-60-3312 "applies to all tax decisions and associated information filed of record, whether or not the decision in the contested case hearing was issued before, on, or after [the effective date of the Act]."

2 While the court was in the process of preparing a written contempt order, it received a letter from Mr. Clarkson specifically requesting a written order and further requesting "a delay in this court's verbal order on the fine." This delay was granted via e-mail on October 2, 2007, which stated that Clarkson's ten-day deadline to pay the fine would run from the date of the instant written order. The parties were provided copies of this correspondence.

contempt of court for repeatedly engaging in the unauthorized practice of law. That order reiterated the prohibition against Clarkson's providing legal advice or in any way engaging in the unauthorized practice of law and imposed a six-month sentence of incarceration, which was suspended upon three conditions, one of which was that Clarkson not engage in the unauthorized practice of law.

Upon receiving the report of the Respondent's counsel, this court held a hearing regarding Clarkson's alleged conduct. Multiple witnesses confirmed that Clarkson appeared at the hearing with the Petitioner in this case and sat with the Petitioner at the counsel table. These witnesses, who were present in the courtroom awaiting the hearing, testified that they overheard Clarkson providing Petitioner with legal advice prior to the start of the hearing. The testimony showed that Clarkson reviewed the Respondent's trial notebook, containing the Respondent's exhibits and trial brief, with the Petitioner and advised him as to the arguments he should make. One witness testified that she overheard Clarkson advising the Petitioner to move for a continuance.

Clarkson disputed none of the witnesses' testimony and admitted that he provided legal advice to the Petitioner, as well as drafting pleadings used by the Petitioner in this case. Clarkson asserted that he was aware of his disbarment. Clarkson also stated that the Petitioner's case was not the only case in which he was providing legal assistance, and that he had been held in contempt by other courts on numerous occasions since his disbarment. Following the contempt hearing, Clarkson sent a letter to the court in which he characterized his conduct as "paralegal assistance to pro se litigants." He further directed the court's attention to his website, www.patriotnetwork.info. While admitting the facts described by the witnesses at the contempt hearing, he denied that he has ever "managed a case, controlled a case, or made the final decisions," stating that "[m]y Patriot friends are hard headed Conservatives, with ideological beliefs and are heavily armed. I am afraid to make decisions for others or managed [sic] a case that I might lose." Finally, Clarkson provided an attachment to his letter entitled "Statistics on Self representation with Paralegal Assistance in SC Courts."

DISCUSSION

Contempt is defined as "[c]onduct that defies the authority or dignity of a court. . . ." Black's Law Dictionary 313 (7th ed. 1999). Contempt can be either civil or criminal.

The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised, including the nature of the relief and the purpose for which the sentence is imposed. The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant. The primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.

Floyd v. Floyd, 365 S.C. 56, 75, 615 S.E.2d 465, 475 (Ct. App. 2005) (citing Poston v. Poston, 331 S.C. 106, 502 S.E.2d 86 (1998)).

Contemptuous conduct may be either direct or indirect. One example of direct contempt is conduct that "interferes with judicial proceedings, exhibits disrespect for the court, or hampers parties or witnesses." State v. Havelka, 285, S.C. 388, 389, 330 S.E.2d 288, 288 (1985); see also Rhoad v. State, 372 S.C. 100, 106, 641 S.E.2d 35, 37-38 (Ct. App. 2007). Another example is "contemptuous conduct that occurs in the presence of the court." Brandt v. Gooding, 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006). By contrast, indirect or "constructive" contempt occurs outside the presence of the court. The "presence of the court" has been held to include "all elements of the judicial system," not just the courtroom or "the mere physical presence of the judge." State v. Kennerly, 337 S.C. 617, 620, 524 S.E.2d 837, 838 (1999); see also State v. Kennerly, 331 S.C. 442, 450, 503 S.E.2d 214, 219 (Ct. App. 1998), affd, 337 S.C. 617, 524 S.E.2d 837 (1999) ("The court 'consists not of the judge, the courtroom, the jury, or the jury room individually, but of all of these combined. The court is present wherever any of its constituent parts is engaged in the prosecution of the business of the court according to law.'). When contempt occurs in the presence of the court, such conduct "may be immediately adjudged and sanctioned summarily." Brandt, 368 S.C. at 628, 630 S.E.2d at 264 (citing Int'l Union- United Mine Workers of Am. v. Bagwell, 512 U.S. 821 (1994)).

Engaging in the practice of law after being disbarred is punishable by contempt of court. In re Duncan, 83 S.C. 186, 65 S.E. 210, 212 (1909); cf. Drake v. Ham, 2007 WL 2302575, *2 (D.S.C. 2007) (Perry, 1.) ("One may be found to have committed contempt of court by practicing law without being properly authorized to do so." (quoting 17 Am. Jur. 2d Contempt § 64)). The "practice of law" is not defined by statute, but rather determined by the South Carolina Supreme Court. See S.C. Code Ann. § 40-5-20 ("The Supreme Court may from time to time prescribe, adopt, promulgate and amend such rules and regulations as it may deem proper (a) defining and

regulating the practice of law. . . ."). It is well-settled in this state that the preparation of pleadings constitutes the unauthorized practice of law. See S.C. Med. Malpractice Joint Underwriting Ass'n v. Froelich, 297 S.C. 400, 402, 377 S.E.2d 306, 307 (1989) (the practice of law includes "preparation of pleadings and. . . legal instruments of all kinds") (citing Duncan); In re Duncan, 65 S.E. at 211 (stating that the practice of law is "generally understood" to include "preparation of pleadings, and other papers incident to actions and special proceedings").

In addition, "the giving of advice, consultation, explanation or recommendations on matters of law" regarding the preparation of legal documents and "instructing other individuals in the manner in which to prepare and execute [those] documents" also constitute the practice of law. State v. Despain, 319 S.C. 317, 320, 460 S.E.2d 576, 578 (1995); see also In re Duncan, 65 S.E. at 211 (the practice of law includes "all advice to clients, and all action taken for them in matters connected with the law"). Management of court proceedings has also been found to be the practice of law. Housing Authority of Chy of Charleston v. Key, 352 S.C. 26,28, 572 S.E.2d 284, 284 (2002); see also Roberts v. LaConev, Op. No. 26376 (S.C. Sup. Ct. filed Sept. 4, 2007) (Shearouse Adv. Sh. No. 33 at 21),2007 WL 2479501; Despain, 319 S.C. at 319,460 S.E.2d at 577; In re Duncan, 65 S.E. at 211. Our Supreme Court has also noted that the development of a strategy in connection with a legal proceeding can constitute the use of "specialized legal knowledge and ability" that only a licensed attorney is permitted to utilize. Roberts, Op. No. 26376 (S.C. Sup. Ct. filed Sept. 4, 2007) (Shearouse Adv. Sh. No. 33 at 21).

South Carolina law is clear that a disbarred attorney is not permitted to be employed as a paralegal or in any other capacity connected with the practice of law. Rule 413, SCACR, Rule 34 (Employment of Disbarred or Suspended Lawyers) ("A lawyer who is disbarred. . . shall not be employed directly or indirectly. . . as a paralegal, investigator, or in any capacity connected with the practice of law. . . ."); In re Chastain, 356 S.C. 19, 587 S.E.2d 115 (2003) (disbarring an attorney for a pattern of misconduct that included violation of Rule 34 by serving as the office manager in a county attorney's office while suspended from the practice of law). Moreover, "to legitimately provide services as a paralegal, one must work in conjunction with a licensed attorney." State v. Robinson, 321 S.C. 286,289,468 S.E.2d 290,291 (1996).

Although this issue was not raised at the contempt hearing, Clarkson asserts in his post hearing letter to the court that he does not charge any money for his assistance. However, the

unauthorized practice of law is not excused on the ground that no fee is charged. (3) See Franklin v. Chavis, 371 S.C. 527, 532 n.5, 640 S.E.2d 873, 876 n.5 (2007). Rather, the Supreme Court has unequivocally stated in a case with facts remarkably similar to those currently before this court that "[t]he fact that respondent accepted no remuneration for his services is irrelevant." Housing Authority v. Key, 352 S.C. 26, 28, 572 S.E.2d 284, 285 (2002) (enjoining an unemployed paralegal from the practice of law where the paralegal appeared at a status conference, prepared pleadings that were signed by plaintiffs as pro se litigants, and assisted a litigant at a hearing). Further, the Supreme Court has recently noted that

a lack of compensation in fact makes the situation worse. Indeed, the public may well be in greater need of protection from the unauthorized practice of law where it seems to be done without charge than where a charge is openly made for services. In the former situation, the public, through natural cupidity, are the more readily attracted to something which appears to be a "giveaway" project or a chance to obtain "something for nothing."

Franklin, 371 S.C. at 532 n.5, 640 S.E.2d at 532 n.5 (quoting Grievance Comm. of the Bar of Fairfield Cty. v. Dacey, 154 Conn. 129, 153, 222 A.2d 339, 351 (Conn. 1966)).

Nor does decision-making authority appear to be the litmus test for determining whether a person is practicing law. See, In re Chastain, 356 S.C. at 23, 587 S.E.2d at 117 (serving as office manager in a law office constitutes practice of law); Roberts, Gp. No. 26376 (S.C. Sup. Ct. filed Sept. 4, 2007) (Shearouse Adv. Sh. No. 33 at 21) (development of a strategy is practice of law); Despain, 319 S.C. at 320, 460 S.E.2d at 578 (advice, consultation, or recommendations as to the preparation of legal documents is the practice of law); In re Duncan, 65 S.E. at 211 (practice of law includes: preparation of pleadings and legal instruments, management of proceedings, advice to clients). The court observes that even clients with legitimate legal representation retain final decision-making authority regarding the objectives of that representation and may disregard counsel's advice regarding the means to achieve those objectives, even to the point of discharging their attorney. See Rule 407, SCACR, Rule 1.2(a) & Comments. Therefore, the Rules of Professional Conduct clearly contemplate that an attorney can practice law even without making final decisions. Accordingly, Clarkson's argument that he

³To the contrary, in 2002, the General Assembly amended S.C. Code Ann. § 40-5-80 to delete a provision that permitted a non-lawyer to prosecute or defend the cause of another without charging a fee, provided that the non-lawyer received advance permission from the court. See Housing Authority v. Key, 352 S.C. 26, 28 n.3, 572 S.E.2d 284, 285 n.3 (2002) (discussing the 2002 amendment).

did not manage the conduct of the case because he did not make the Petitioner's decisions for him is without merit.

The practice of law "must be decided on the facts and in the context of each individual case." Roberts, Op. No. 26376 (S.C. Sup. Ct. filed Sept. 4, 2007) (Shearouse Adv. Sh. No. 33 at 20). The policy behind prohibiting the unauthorized practice of law is not to protect the legal profession; rather, it is "for the protection of the public from the potentially severe economic and emotional consequences which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law." Despain, 319 S.C. at 320, 460 S.E.2d at 578 (citing Buyers Servs. Co., 292 S.C. 426, 357 S.E.2d 15).

Based on the undisputed testimony and Clarkson's admissions, the court finds beyond a reasonable doubt that Clarkson, a disbarred attorney, has engaged in the unauthorized practice of law in connection with this matter. Furthermore, the court finds that Clarkson's conduct was willful. "A willful act is defined as one 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.'" Spartanburg County Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988) (quoting Black's Law Dictionary 1434 (5th ed. 1979)). ALC Rule 8 states that "No one shall be permitted to represent a party where such representation would constitute the unauthorized practice of law." Despite this, Clarkson gave legal advice to the Petitioner and drafted pleadings for him to file with the court. Even after being held in contempt by the Supreme Court for similar conduct, Clarkson prepared pleadings and provided legal advice to the Petitioner. Clarkson was on notice that the Supreme Court had specifically prohibited him from "managing the conduct of a case." Clarkson nonetheless willfully did so in the proceeding before this court, advising the Petitioner as to legal arguments, procedural matters, and strategy.

"[C]ontempt is an extreme measure and the power to adjudge a person in contempt is not to be lightly asserted." State v. Bevilacqua, 316 S.C. 122, 128, 447 S.E.2d 213, 216 (Ct. App. 1994) (citing State v. Harper, 297 S.C. 257, 258, 376 S.E.2d 272 (1989)). Notwithstanding, a "determination of contempt is within the sound discretion of the trial judge." State v. Sowell, 370 S.C. 330, 336, 635 S.E.2d 81, 84 (2006) (citation omitted). An administrative law judge has the same authority in a hearing as a circuit court judge, S.C. Code Ann. § 1-23-630 (2006), which includes the power of contempt, S.C. Code Ann. § 14-5-320 ("The circuit court may

punish by fine or imprisonment, at the discretion of the court, all contempts of authority in any cause or hearing before the same."); see also In re Terry, 128 U.S. 289, 303 (1888) ("The power to punish for contempt. . . is a power. . . arising from necessity; . . . because it is necessary to the exercise of all other powers. Without such power, . . . the administration of the law would be in continual danger of being thwarted by the lawless."); Kennerly, 331 S.C. at 449-50, 503 S.E.2d at 218 ("The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." (quoting In re Terry, 128 U.S. at 303)).

Mindful of the caution with which the contempt power should be exercised, the court finds such a punishment is necessary in the instant situation for the dual purpose of vindicating the court's authority and protecting the public. An attorney owes a fiduciary duty to his client. Hendricks v. Clemson Univ., 353 S.C. 449, 459-60, 578 S.E.2d 711, 715 (2003). "Accordingly, the practice of [law] is not a right, but a privilege to be granted only to those who meet certain qualifications specified by the State." S.C. Dep't of Labor. Licensing & Regulation. Real Estate Comm'n v. MacDonald, 98-ALJ-11-0360-IJ, 1998 W.L. 540225, *2 (S.C. Admin. Law Judge Div., July 28, 1998). Clarkson's privilege to practice law in this state has been revoked, and his continued practice of law in flagrant disregard of ALC Rule 8 and other legal authority demonstrates a general disregard for the laws of this state and an ongoing risk of harm to the public.

CONCLUSION

Clarkson has engaged in the unauthorized practice of law in the instant proceeding. In light of his disbarment and previous contempt citation by the Supreme Court, the court finds that his conduct was willful. 4 It is therefore

ORDERED that, as a result of Clarkson's unauthorized practice of law in the conduct of the proceeding before this court, Clarkson is held in direct, criminal contempt of court. It is further

⁴ While the court has considered the Supreme Court's May 24, 2004 Order in determining the willfulness of Clarkson's conduct, it emphasizes that it holds Clarkson in contempt of court for his conduct in the *instant proceeding only*. Whether Clarkson should be penalized for violating the Supreme Court's May 24 Order, incarcerated for violating a condition of his suspended sentence, or disciplined for other instances of the unauthorized practice of law is a matter for the Supreme Court's consideration.

ORDERED that Clarkson shall pay within ten days of the date of this order a fine of five hundred dollars (\$500) to the Clerk of Court for the Administrative Law Court. It is further

ORDERED that Clarkson is hereby enjoined from providing legal assistance in this matter, including but not limited to preparing any documents to be filed with the court by or on behalf of Mr. Chapman; giving advice, opinions, or information or consulting, explaining, or making recommendations on matters connected with the law, whether substantive or procedural; managing this proceeding; developing or using a strategy in connection with this legal proceeding; or otherwise engaging in the unauthorized practice of law, as defined by the law of South Carolina, in this matter. It is further

ORDERED that failure to comply with any provision of this order may result in further sanctions, including but not limited to incarceration.

IT IS SO ORDERED.

s/ Paige Gossett
Administrative Law Judge

October 5, 2007
Columbia, South
Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

Judicial Law Clerk