

2001

IN RE: Serge B. Gudmundson, Disciplinary Proceeding, Petitioner v. Utah Supreme Court

Utah Supreme Court

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Pete N Vlahos; Attorney for Petitioner.

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

| | | |
|--------------------------|---|----------------|
| Re: |) | |
| |) | |
| GEORGE B. GUDMUNDSON, |) | CASE NO. 13620 |
| Disciplinary Proceeding, |) | |
| |) | |
| Petitioner. |) | |
| |) | |
| |) | |

BRIEF OF RESPONDENT

Appeal from the Board of
Bar Commissioners of the
Utah State Bar.

LAUREN N. BEASLEY, Esq.
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Salt Lake City, Utah 84111

Attorney for Bar Commission

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FILED
JUL 20 1975

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IN THE SUPREME COURT OF THE
STATE OF UTAH

| | | |
|--------------------------|---|----------------|
| Re: |) | |
| |) | |
| RGE B. GUDMUNDSON, |) | CASE NO. 13620 |
| disciplinary Proceeding, |) | |
| |) | |
| Petitioner. |) | |
| |) | |

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action wherein a Complaint was
filed by the Screening Committee of the Utah State
Bar with the Utah State Bar Board of Commissioners,
alleging that the Petitioner, who is an attorney
at law and member of the Bar of the Supreme Court
of the State of Utah, failed to carry out his con-
tract of employment with one VELMA JOY BECK and
failed to promptly refund moneys entrusted with
him for and on behalf of one GREGORY W. GREEN.

DISPOSITION BY THE BOARD OF COMMISSIONERS

The Board of Commissioners of the Utah State Bar determined that Petitioner had neglected the BECK divorce matter and had intentionally failed to carry out his contract of employment with MRS. BECK and further found that he did not promptly refund moneys entrusted to him for and on behalf of GREGORY H. GREEN.

The Board of Commissioners recommended that Petitioner be suspended from the practice of law for a period of one year and that as conditions to reinstatement he be ordered to pay to MRS. BECK the sum of \$250.00 and any unexpended balance of \$5.00 court costs paid to him; and that he pay to GREGORY W. GREEN the sum of \$250.00 as the balance of the \$500.00 received by the Petitioner; and further, that he reimburse the Utah State Bar for the actual expense incurred by it in connection with this disciplinary procedure.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have this Honorable Court affirm the action taken by the Board of Commissioners

nd adopt its recommendations.

STATEMENT OF THE FACTS

The Petitioner, SERGE B. GUDMUNDSON, is an attorney at law and a member of the Utah State Bar with offices in Ogden City, Weber County, State of Utah. He has for many years maintained an office at 217 Eccles Building, Ogden, Utah.

During August, 1972, one VELMA JOY BECK consulted with Petitioner relative to obtaining a divorce for her. Petitioner informed MRS. BECK that she had not resided in Utah for three months and therefore had no jurisdiction to commence a divorce action. Petitioner further informed MRS. BECK that she should return to his office after she had fulfilled the three-months' residency requirement. MRS. BECK returned to Petitioner's office on October 3, 1972, and gave to Petitioner a check in the amount of \$25.00 to cover court costs in the divorce action (Ex. 1). Thereafter, on November 7, 1972, MRS. BECK gave to Petitioner

check in the amount of \$50.00 as a portion of
s attorney's fees (Ex. 2). On November 8, 1972,
e Petitioner caused to be filed in the District
art of Weber County a one-page divorce complaint
an action entitled "VELMA JOY BECK v. ROGER
NALD BECK", being Civil No. 56297 (Ex. 6).

. GUDMUNDSON caused to be filed at the same
me a vital statistics form as prescribed by
e Utah State Division of Health. Except for
e Complaint and the vital statistics form no
her documents have been filed in that case
. 23).

On November 28, 1972, MRS. BECK gave to Pe-
tioner a check in the amount of \$75.00 (Ex. 3)
id on February 5, 1973, a check in the amount
\$175.00 (Ex. 4) as total payment for the
storney's fees in the divorce action.

During the period from November 8, 1972,
ntil some time in May, 1973, MRS. BECK contacted
R. GUDMUNDSON on a number of occasions, making
nquiry as to the status of the divorce action.

a Petitioner repeatedly told her that it would require an additional twenty-one days to obtain service of process and he eventually informed her that he would have to obtain service on MRS. BECK's estranged husband by Publication of Summons (T. 9 11).

On May 21, 1973, ROGER D. BECK, the estranged husband of VELMA JOY BECK, secured the entry of divorce decree in the State of California. MRS. BECK received notice of the entry of the decree on or about the 26th of May, 1973, and immediately terminated the employment of MR. GUDMUNDSON and demanded the refund of a portion of the fees paid (Ex. 7). The Petitioner has refused any refund of the moneys paid to him (T. 11-12).

The complaining witness, MRS. BECK, testified that initially she was desirous of obtaining property settlement from her former husband, ROGER D. BECK, but that she withdrew this demand because her husband had sold the jewelry business (T. 14).

She further testified that she expected the petitioner to obtain a divorce for her in the State of Utah at the earliest possible time (T-14).

The second cause of action against the Petitioner arose out of his alleged agreement with one GREGORY W. GREEN to represent MR. GREEN in a proposed lawsuit against Ogden City Corporation and an Ogden City police officer, for falsely arresting GREGORY W. GREEN.

MR. GREEN initially discussed the matter with MR. GUDMUNDSON and he agreed to take the case upon a contingency basis. There was no discussion as to the exact amount of this contingency (T. 41).

After this initial discussion the Petitioner contacted MR. GREEN and told him he would have to have \$500.00 to cover court costs and costs of depositions. MR. GREEN was unable to pay this sum to Petitioner. Thereafter Petitioner contacted MR. W. H. GREEN, the father of GREGORY W.

GREEN, and persuaded him to give to Petitioner the sum of \$500.00 for court costs and deposition costs (T. 42).

No action was ever commenced by Petitioner on behalf of MR. GREEN and after a period of approximately one and one-half months GREGORY W. GREEN contacted MR. GUDMUNDSON and requested that the suit not be filed and that the \$500.00 be refunded. Petitioner refused to refund the \$500.00 and informed GREGORY W. GREEN and his father, W. H. GREEN, that the \$500.00 was owed to him as attorney's fees in other matters (T. 43-47).

During subsequent discussions with GREGORY GREEN the Petitioner refunded to W. H. GREEN \$250.00. At the time of this refund MR. GUDMUNDSON requested GREGORY W. GREEN and W. H. GREEN to sign a document which was forwarded to the office of the Utah State Bar on or about October 26, 1973; which document indicated that the GREENS desired to vacate and dismiss their complaint against MR. GUDMUNDSON (Ex. 10).

The Board of Commissioners found that with regards to the BECK matter the Petitioner had violated Rule III, Canon 6 D.R. 6-101(A)(3) of the Revised Rules of Professional Conduct of the Utah State Bar, in that he neglected the divorce matter and that he violated Rule III, Canon 7 D.R. 7-101(A)(2) of the Revised Rules of Professional Conduct of the Utah State Bar in that he intentionally failed to carry out his contract of employment with MRS. BECK (R. 16).

The Board further found, with regards to the REEN matter, that the Petitioner had not neglected the legal matter entrusted to him or that he intentionally failed to carry out his contract of employment, but did determine that Petitioner violated Rule III, Canon 9 D.R. 9-102(B)(4), of the Revised Rules of Professional Conduct of the Utah State Bar, in that he did not promptly refund the \$500.00 cost moneys entrusted to him (R. 18).

The original Complaint was filed on or about the 14th day of September, 1973, and was served upon the Petitioner on the 18th day of September, 1973, together with a copy of the citation requesting the Petitioner to file an answer within twenty-one days (T. 4-5). The Petitioner never filed a written answer. Thereafter, the Board of Commissioners set the formal hearing for the 8th day of December, 1973.

In the original Complaint, Count II, the petitioner was charged with violating Canon 9 D.R. 9-101(B)(4) of the Rules of Professional Conduct of the Utah State Bar (T. 2-3). At the time of hearing it was pointed out by the prosecutor for the Bar that this was probably a typographical error and that the proper citation should have been Canon 9 D.R. 9-102(B)(4). The Board of Commissioners granted the prosecutor's motion to amend by interlineation.

Petitioner objected to this and stated that had not been informed until the morning of the hearing that the wrong citation was set forth in the Complaint. The Board of Commissioners determined that the Petitioner had had a copy of the Complaint from September 18, 1973, to the date of hearing, December 8, 1973, and had had an opportunity to make inquiry and had had an opportunity to obtain a copy of the Rules of Professional Conduct of the Utah State Bar and would not be prejudiced by allowing the amendment and proceeding on the Second Cause of the Complaint (T. 4-5).

POINT I

THE SUPREME COURT SHOULD ADOPT THE FINDINGS OF FACT, CONCLUSIONS AND DECISION OF THE BOARD OF COMMISSIONERS.

The Petitioner had a copy of the Complaint in his possession from the 18th day of September, 1973, until the date of the hearing, which was December 8, 1973. The notice of the hearing was

mailed to the Petitioner on the 16th day of November, 1973 (R.6). The Petitioner therefore had sufficient time in which to prepare for the hearing. At the time of the hearing the Petitioner stated that he was ready to proceed on the BECK charge but that he was not ready to proceed on the GREEN matter inasmuch as he felt that the GREEN matter should have been dismissed because of documents signed by both GREENS requesting the dismissal (T. 5).

The Commissioners determined that the hearing should go forward on this count and there is nothing in the record of the hearing which would show that the Board of Commissioners took any action which was detrimental to the rights of the Petitioner. The Board afforded MR. GUDMUNDSON a full opportunity to be heard and to present witnesses on his behalf. Inquiry was made of MR. GUDMUNDSON as to whether or not he desired

have an attorney represent him. He informed the Board that he would represent himself at the hearing.

At the conclusion of the hearing MR. GUDMUNDSON was given the opportunity of having ten days in which to file a memorandum of law for the Board to consider, and this he did.

It is submitted that at no time during the hearing or prior to filing its decision did the Board of Commissioners act arbitrarily or capriciously. In fact, the opposite appears to be the case. The Board of Commissioners extended every courtesy to the Petitioner and afforded him every opportunity to present evidence, witnesses and legal memorandum.

This Court said, on a prior occasion:

" . . . the review of that proceeding in this Court is not like an ordinary appeal or administrative review because the order to be made is the responsibility of this Court. Nevertheless, this Court is disposed to follow the same pattern generally and to look upon the findings and recommendation of the Bar Commission

with indulgence; and not to disregard its action lightly nor at all unless there is something to persuade this Court that the Commission has acted capriciously or arbitrarily or beyond the scope of its powers or is plainly in error." In re Boyd M. Fullmer (1965) 17 U. 2d 121, 405 P. 2d 343, at p. 344.

e also In re Norman Wade (1972) 27 U. 2d 410, 7 P. 2d 22; In re George Badger (1972) 27 U. 2d 4, 493 P. 2d 1273; and In re Grant MacFarlane, (1960) 10 U. 2d 217, 350 P. 2d 631.

POINT II

PETITIONER HAD NOTICE OF CHARGES PENDING AGAINST HIM.

GREGORY GREEN filed a Complaint with the Utah State Bar, a copy of which was given to Petitioner, and thereafter the matter was brought before the Screening Committee of the Utah State Bar. Petitioner alluded to his discussions with the Screening Committee which were prior to the filing of the formal Complaint in this matter (T. 38). The filing of the formal Complaint was in September, 1973, and a copy of the Complaint was served

pon Petitioner on the 18th day of September, 1973. In the formal complaint all of the facts relevant to the charges against Petitioner were set forth. There was a probable typographical error in the citation to the Rules of Professional Conduct of the Utah State Bar, Canon 9, D.R. 9-102 B)(4), which read, "Canon 9, D.R. 9-101(B)(4)". The latter does not exist.

The Petitioner admitted he had not seen a copy of the Rules of Professional Conduct until the morning of the hearing, which was held on the 8th day of December, 1973 (T. 38). This was through no fault of the Bar Association nor any of its members as there are many copies of the rules available and a single trip to the Bar Association office prior to the hearing would have enabled the Petitioner to read the canons.

Further, it is submitted that an attorney at law and member of the Bar of the Supreme Court of the State of Utah has an affirmative duty to be

miliar with the canons which should govern
s practice.

Petitioner further contends that he was pre-
diced by not having his personal file with him
the time of the hearing. He says it was be-
use he thought the GREEN complaint had been
smissed. Petitioner admitted that the state-
ent of the Screening Committee relative to
ttlement of the dispute was made prior to the
ormal complaint being filed (T. 38). There was
ever at any time a responsive pleading filed in
ie instant matter on behalf of the Petitioner
or was there at any time a motion presented to
ie committee which would have raised the ques-
ion of dismissal prior to the hearing.

At the hearing the Board heard Petitioner
r this matter and ruled that a purported settle-
ent with a client after a formal complaint was
iled was not binding upon the Board and that
ney should proceed to hear the matter. Sections

nd 6, Rule III, Revised Rules of Discipline
the Utah State Bar.

POINT III

NO SHOWING OF INTENT IS NECESSARY TO PROVE
VIOLATION OF EACH AND EVERY CANON.

Rule III, Canon 6, D.R. 6-101(A) (3), reads
follows:

"(A) A lawyer shall not:

. . .

(3) Neglect a legal matter
entrusted to him."

From a reading of the foregoing canon it is
clear that no finding of intent by the committee
is necessary. Neglect can be found by the mere
failure to do what is required, whether such fail-
ure is intentional, as a result of laziness,
pressure of other business, or mere forgetfulness.

Rule III, Canon 9, D.R. 9-102(B) (4), reads
follows:

"(B) A lawyer shall:

. . .

(4) Promptly pay or deliver to the client as requested by a client, the funds, securities, or other property in the possession of the lawyer which the client is entitled to receive."

It is submitted that here again no finding of intent is necessary. A lawyer has a sworn duty to uphold the integrity and honor of his profession and to conduct himself so as to reflect credit on the Bar and to inspire the confidence, respect and trust of his clients and of the public. To withhold money from a client which a lawyer clearly knows has been entrusted to him for court and deposition costs is contrary to all the foregoing and justifies the action of the committee.

Rule III, Canon 7, D.R. 7-101(A)(2), reads follows:

"(A) A lawyer shall not intentionally:

. . .

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under D.R. 2-110, D.R. 5-102 and D.R. 5-105."

This canon requires intent and it is clear from a reading of the transcript of the hearing at the committee concluded from the facts that petitioner had intentionally failed to carry out his contract with MRS. BECK (Conclusions on Count R. 16).

This conclusion is supported by the following facts:

A. No pleadings were ever filed in the divorce action except the one-page Complaint.

B. No attempt at service of process upon MR. BECK in California was ever taken while Petitioner led MRS. BECK to believe he was making such service.

C. The passage of time from November 8, 1972, until May 26, 1973.

D. The number of attempts by MRS. BECK to communicate with Petitioner.

Petitioner, in his Brief, at page 15, refers the fact that at the time of the hearing the

ard allowed him ten days in which to file a
lef and that his Brief was filed on the 17th
of December, 1973. Through some inadvertence
ich cannot be explained by this writer, the
ief was not included in the record transmitted
this Court by the Executive Secretary of the
r. It is submitted that all members of the
mmittee had in their possession copies of this
ief; and it is further submitted that there is
thing in this Brief which varies from the evi-
nce adduced at the time of the hearing nor
es the Brief contain any citation or authori-
es which would aid the Petitioner in this
tter (See Appendix A).

POINT IV

DISCIPLINE OF A MEMBER OF THE BAR IS FOR
E GOOD OF THE PUBLIC AND OF THE PROFESSION.

The Bar Association, by and through its elec-
ed representatives and the members of the Dis-
iplinary Committee, have a duty to supervise and

a power to discipline its members in order to protect the public and the Bar itself. This statement is so universally accepted that it most requires no citation.

This Honorable Court has adhered to this principle whenever the question has been raised and in the matter of In re Grant MacFarlane, Sr., *pra*, the Court said, at p. 633:

"It is basic that the responsibility is upon the Bar and the courts to supervise those licensed to practice and to disbar, suspend or discipline those guilty of infractions of proper standards because the practice of law is not a right accorded all citizens, but is a privilege extended only upon showing good character, meeting required qualifications and maintaining proper professional standards. In the prudent exercise of the power to discipline in order to maintain such standards lies the protection of the public and of the Bar itself."

There is nothing in the record of this matter to show or even suggest that the suspension recommended by the Board was punitive or given for any other purpose than for the protection of the public and the Bar.

In the BECK matter the Board determined that the Petitioner had neglected the case entrusted to him and thus had violated Rule III, Canon 6, D.R. 6-101(A)(3), and Rule III, Canon 7, D.R. 6-101(A)(2).

The Annual Report of the Committee on Grievances of the Association of the Bar of the City of New York, 1967-1968, N.Y.L.J. September 12, 1968, at page 4, column 5, shows that of the 828 offenses against clients, 452, or more than one-half of the complaints, involved neglect. If we are to preserve the integrity of the Bar the committee should take the necessary action to protect the public from dilatory members.

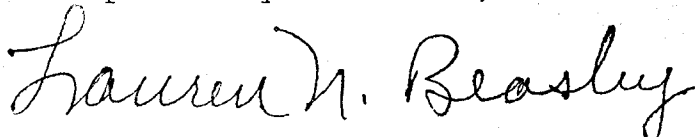
A suspension from practice has been held by the Supreme Court of this state to be proper where an attorney appropriated a client's funds but made full restitution. In re Barclay (1933) 82 U. 288, 24 P. 2d 302. See also, In re Boyd Fullmer, supra.

The Supreme Courts of our sister states have likewise adhered to this principle. See: In the Matter of the State Bar of Arizona v. James H. McQuinn, (1961) 89 Ariz. 155, 359 P. 2d 499; Land v. The State Bar of California, (1972) 105 Cal. Rep. 152; and In the Matter of the Disciplinary Proceeding against M. W. Vandercook, (1970) 474 P. 2d 106.

CONCLUSION

The Petitioner had the opportunity for a complete hearing on the complaint against him. His lack of preparedness was occasioned by his own neglect. The Board acted neither arbitrarily nor capriciously and their findings should be upheld and their recommendations adopted.

Respectfully Submitted,



LAUREN N. BEASLEY of
Cotro-Manes, Warr, Fankhauser &
Beasley
Suite 430 Judge Building
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the above and foregoing Brief in Response, postage prepaid, to PETE N. VLAHOS, Attorney for Petitioner, Suite 312 Eccles Building, Ogden, Utah 84401, this 25th day of July, 1974.

Lauren N. Beasley

LAUREN N. BEASLEY, ESQUIRE

BEFORE THE BOARD OF COMMISSIONERS OF THE UTAH STATE BAR

In re SERGE B. GUDMUNDSON

)
)
) BRIEF
) F-87

Canons of judicial ethics provides:

Canon 6, DR 6-101 (A) (1) A lawyer shall not neglect a legal matter entrusted to him.

Canon 7, DR 7-101 (A) (2) Fail to carry out a contract of employment entered into with a client for professional services----

Canon 9, DR 9-102 (B) (4) A lawyer shall promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

The charge: Beck complaint----DR-101 (A) (3) & DR 7-101 (A) (2)

Green complaint---DR-101 (A) (3), DR 7-101 (A) (2) &
DR 9-102 (B) (4)

Summary of facts: Beck' matter;

Roger D. Beck's request to enter default divorce in Superior Court of California dated March 21, 1972, stating no property involved etc.

Letter from Mrs. Beck's attorney (Gudmundson) to Mr. Beck stating intent to file divorce in Utah Court and request to enter into a stipulation concerning property rights etc. Negotiations with Mr. Beck ending with threat by Mr. Beck to file attempted murder charge in California against Mrs. Beck if she did anything further on the divorce in Utah or California. Mrs. Beck's divorce filed in Utah, Nov. 8, 1972.

May 24, 1973, Mrs. Beck's request to serve the surmons by publication and for the first time to proceed without property settlement.

May 26, 1973, notice by mail to Mrs. Beck of California default divorce dated May 23, 1973, with no property settlement etc.

May 26, 1973, Mrs. Beck termination of Gudmundson's services and requested total amount of \$325.00 be refunded to her. Dec. 3, 1973, Gudmundson's offer to settle attorney fee dispute for refund to Mrs. Beck in the sum of \$200.00 rejected.

Summary of facts: Green matter;

On Feb. 5, 1973, advanced costs in the sum of \$500.00 was given to Gudmundson by Mr. Green for a suit of false arrest or any other action he may bring on account of Gregory W. Green's arrest. Gudmundson services on this action started on Feb. 5, 1973.

On or before Mar. 21, 1973, Mr. Green informed Gudmundson to "drop the case" and refund the costs advanced.

Mr. Green was indebted to Gudmundson from Sept. 5, 1972 for attorneys fee on two cases.

Oct. 26, 1973, dispute as to attorneys fee settled and Mr. Green did direct Utah State Bar to vacate and dismiss his complaint against Gudmundson.

Argument on DR-101 (A) (3) canon 6, & DR 101 (A) (2) canon 7.

All an attorney owes to his client is reasonable skill and diligence in the prosecution of the case which lawyers usually exercise when confronted with the same or a similar situation. Error of judgment or success in the undertaking is not within this rule.

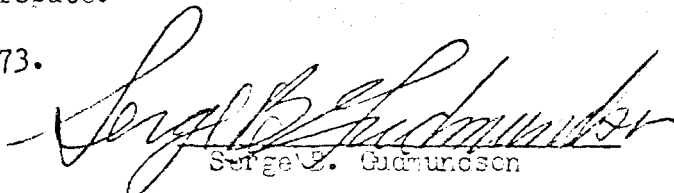
In this matter, no testimony was given, expert or otherwise, by which this committee can determine the conduct of Gudmundson was not within this standard.

Argument on DR 102 (B) (4) canon 9. (Preserving Identity of funds & property-client)

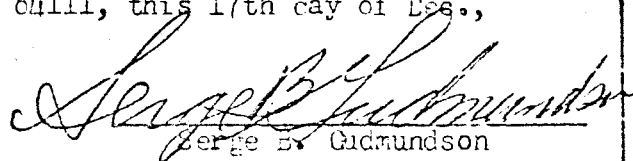
It is stated in DR-102 (A) canon 9, "All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited ----". Mr. Green had a credit with his attorney.

There is not a failure of the attorney to promptly pay funds to the client which the client is entitled to receive by the mere retention of a client's credit with him where the client is indebted to the attorney that is the subject of a bona fide dispute.

Dated this 17th day of Dec., 1973.


Serge E. Gudmundson

Mailed a copy of the above and within Brief to Lauren N. Beasley, 430 Judge Building, Salt Lake City, Utah 84111, this 17th day of Dec., 1973.


Serge E. Gudmundson