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Serge B. Gudmundson, Disciplinary Proceeding : Brief of Petitioner

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

In Re:

SERGE B. GUDMUNDSON,
Disciplinary Proceeding,

Petitioner.

Case No.
13620

BRIEF OF PETITIONER

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

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STATEMENT OF THE KIND OF CASE

This is an action wherein a Complaint was filed with the Board of Commissioners of the Utah State Bar by a Screening Committee of the Utah State Bar, alleging that the Petitioner, who is an attorney and counselor at law of the State of Utah and a member of the Utah State Bar, allegedly conducted himself in an unprofessional manner as charged in the Complaint of the Screening Committee of the Utah State Bar.

The Board of Commissioners of the Utah State Bar made a finding of fact, alleging the violation of certain Canons of ethics by the Petitioner and made a recommendation that the Petitioner be suspended from the practice of law for a period of one (1) year.

RELIEF SOUGHT BY PETITIONER

The Petitioner seeks reversal of the Findings of Fact, Conclusions of Law and decision rendered by the Bar Commission, and seeks to establish before the Supreme Court of the State of Utah, that the conclusions of the Bar Commission are in error and that the decision and recommendation for disciplining the Petitioner is not proper under the existing facts and law and is a harsh and unwarranted recommendation.

STATEMENT OF FACTS

The Petitioner is an attorney and counselor

of the State of Utah and a member of the Utah State Bar, having graduated from the University of Utah School of Law in 1950; having been admitted to the practice of law in the State of Utah in 1951; and having offices at 217 Eccles Building, in Ogden, Utah. (R-14)

The Complaint of the Bar set forth as a first count an allegation concerning one, Velma Joy Beck, an alleged violation of Rule III, Canon 6, DR 6-101(A)(3); Canon 7, DR 7-101(A)(2) of the Rules of Professional Conduct of the Utah State Bar, alleging that the said Velma Beck employed the Petitioner in August of 1972 to obtain a Decree of Divorce for her and paid a sum of money to the Petitioner, alleging the failure of the Petitioner in expeditiously handling the matter for said client and by the failing in repayment to the client of a portion of the fee in connection therewith. (R-2)

The original Complaint of the Bar alleged as

a second count, that the Petitioner was employed by Gregory W. Green to represent Green in an action, and with the failure of the Petitioner after termination of his services to refund to the client the fees paid, and in doing so alleged in the original Complair violation of Rule III, Canon 6, DR 6-101(A)(3); Canon 7, DR 7-101(A)(2); and Canon 9, DR 9-101 (B)(4) of the Rules of Professional Conduct of the Utah State Bar. (R-3)

ARGUMENT

POINT I

DUE PROCESS REQUIRES TIMELY NOTICE.

In the allegations set forth in the Complaint of the Bar regarding the conduct of the Petitioner in his relationship to Gregory W. Green, it is interesting to note that not until the time of the hearing itself was the Petitione actually advised of the charges against him. (TR-4) The Board of Bar Commissioners found

that the conduct of the Petitioner was not in violation of Rule III, Canon 6, DR 6-101(A)(3), nor of Canon 7, DR 7-101(A)(2), but found that the Petitioner was in violation of Canon 9, DR 9-101(B)(4) (sic.) of the Rules of Professional Conduct of the Utah State Bar. (R-18)

The Petitioner was unable to find such a Canon as Canon 9, DR 9-101(B)(4), in that there is no such Canon numbered among the Bar numbers of the A.B.A. Code of Professional Responsibility, and that only at the time of the hearing was the Petitioner advised that there had been a misrepresentation and error as to such Canon, and that the Canon should have read Canon 9, DR 9-102(B)(4). (TR-4)

The Petitioner was never timely advised by means of the Complaint of the actual Canon with which he was charged to have violated and found to have been in violation of, in the ultimate Findings of the Bar, in regards to

the Green matter. The Board of the Bar Commission having amended the Complaint on the day of the hearing (TR-4) and proceeding to a hearing on the amended Complaint in spite of the objection by the Petitioner to a continuation of the hearing on the amended Complaint. (TR-37)

The Petitioner was denied an opportunity to prepare an adequate defense and to have a meaningful Due Process hearing by reason of the failure of the Complaint to set forth the actual Canon which the Bar alleged was violated by the Petitioner. The Bar having found no violation by the Petitioner as to the other two Canons allegedly violated by the Petitioner in the Green matter. (R-18)

The record before the Bar will reveal that the Petitioner was greatly disturbed by the fact that there was to be a full hearing in the matter as to Gregory Green, in that the

Petitioner alleges that in his appearance before the Disciplinary Committee of the Bar, Petitioner alleged (TR-3) that he was at a disadvantage, in that it was his belief that there was no charge as to Green, in that he had been advised by the Screening Committee that if the matter was settled to the satisfaction of the client, that there would be a dismissal of the action, and that as a result thereof, the Petitioner did not even bring his file and records in the matter to the Bar Commission hearing. (TR-3)

The record before this Court shows that the father of Gregory Green, who had paid the fee to the Petitioner on behalf of his son, Gregory Green, had been a friend and client of the Petitioner for many years. (TR-53) The record further reveals that the Petitioner had rendered many services without charge to both the Complainant, Gregory Green, and to his father,

who had paid the money on behalf of his son, Gregory. That there had been a lack of mutuality of payment by the Greens to the Petitioner and that in retaining part of the monies, the Petitioner felt in his own mind, that he was justified in being paid for the services of representing both the son in the hearings previous to the Petitioner being retained for the purpose of filing a suit on behalf of the son, Gregory Green, and the many previous services rendered by the Petitioner on behalf of the father of Gregory Green, and it is evident from a reading of the Transcript of the trauma of the Petitioner in finding his being charged with the alleged retention of unearned funds, in that in the Petitioner's own mind in his testimony before the Commission of the Bar, was evidenced that his feelings were that he had rendered many services and was merely retaining some of the funds for

which he had an offset of fees from previous services rendered. (TR-47,-48,-49,-51,-52)

It is submitted to this Honorable Court, that the Petitioner was unable to be prepared to answer any charges as alleged in the second count in relationship to Gregory Green, in that:

1. Petitioner had been led to believe that there would be no hearing as to that matter, in that there had been an Accord and Satisfaction between the parties in settlement of any monies owed by the Petitioner to the client, and (TR-3, Pl.Exh.10)

2. That the notice in the Complaint served upon the Petitioner set forth a Canon, namely Canon 9, DR 9-101(B)(4), which is a non-existent Canon and could not in any way inform and advise the Petitioner as to the charge against him prior to the time of the hearing, and (R-2)

3. The Petitioner did not bring his file

and the records and evidence which would have been in mitigation of the charge against him as to the Canon with which the Bar Commission found a violation, namely Canon 9, DR 9-102(b)(4), based upon Petitioner's belief that there was to be no hearing as to that matter and that the Complaint was faulty in setting forth the charge. (TR-3)

POINT II

VIOLATION OF CANON REQUIRES INTENT.

In regards to the allegations set forth as to the Complaint of Velma Joy Beck James, hereinafter referred to as Beck, it was evidenced that in the first instance the Complainant had been a previous client of the Petitioner in a prior divorce action. The Complainant moved back to Utah from California and again retained the Petitioner in August, 1972, in an attempt to attain a property settlement and divorce from her successive spouse who resided in

California. (TR-7)

The Complainant, Beck, was advised that she would not be eligible for an action in divorce until after she had established residence in Utah for a period of three months, paying to the Petitioner the sum of $25.00 as a retainer for the filing fees of the divorce. (TR-7,-8)

The Complainant further advised the Petitioner, that she was a 40-percent owner in a business that she was engaged in with her husband in California (TR-13), and that she wanted one-half of the business as part of the divorce settlement.

The Petitioner advised Beck that there was no jurisdiction in a Utah divorce action for obtaining a personal property settlement from her husband and that Petitioner would make an attempt to see if the husband was willing to make a property settlement for a divorce. (TR-13,-14)

The Petitioner, after a couple of telephone calls with the spouse of Beck, determined that the husband was threatening to file an attempted murder charge against Beck if she should attempt to obtain a California divorce, and the Petitioner made telephone calls and communicated with the husband in an attempt to arrive at a settlement without the necessity of going through a Utah divorce action wherein the Complainant would not be compensated. (TR-13,-14

Beck admitted that she received a telephone call from her husband after communications from the Petitioner and that her husband had told her to "drop dead". (TR-7)

Beck paid the Petitioner an additional $50.00 on November 7, 1972; $75.00 on November and $175.00 on February 5, 1973. (Ex.1,2,3,4)

The Petitioner was attempting during this period of time to engage in a telephone conversation and letter writing ploy with the spouse

of the Complainant in an attempt to better the position of his client, Beck. Two days prior to the Complainant receiving the notice of her husband having obtained a divorce from her in the California Courts, the Petitioner recommended that they file a publication to get jurisdiction over the husband, and obviously was unable to file same prior to the time of obtaining the notice from the husband of his attaining of a divorce. (TR-14,-15)

It is also interesting to note that the Complainant did not ask for the discharge of her attorney until after she had written a letter to the Grievance Committee of the Bar, being sure to make a copy of same demanding a refund of fees paid as a self-serving record to bolster her claim to the Bar. (TR-15,-19)

The record further shows that the Complainant was more interested in getting a divorce with or without a property settlement, in that she

became married immediately after the obtaining of a divorce by her husband, and as the record shows, she has added the last name of "James" to her previous names. (TR-19)

The Complainant testified and admitted, that her first plan in discussing the divorce with the Petitioner was in forcing her husband into getting a divorce and settling the action by a California divorce. (TR-21) In accordance with the belief of the Petitioner, the fee paid to him was for the negotiations, letter writing, and telephone conversations, in addition to the filing of a Complaint, all in line with the coercive attempt by Counsel to compel the husband to obtain the divorce in California. (TR-21,-22)

The record further reveals that the Petitione had previously performed legal services for Beck and that they had a good relationship, and further, that the Petitioner did not always

bill the Complainant for services which he rendered for her. (TR-22)

The Petitioner believed that the fee of $300.00, plus the filing fee, was for services to be rendered to the Complainant in compelling the obtaining of a California Decree and not necessarily in obtaining a Utah Decree with the hope of attempting to coerce a property settlement of some kind as to the spouse of the Complainant. (TR-22)

It is further submitted to this Honorable Court, that on TR-30 of Record the Petitioner was given an opportunity to file a Brief in supplementation of the record as to the law in regards to the subject matter before the Bar Commission, which the Petitioner did submit to the Bar on December 17, 1973, but that nowhere in the record has there been an inclusion of the Brief and certified statement for the record made by the Petitioner.

POINT III

DISCIPLINE OF ATTORNEY SHOULD NOT BE PUNITIVE.

It is submitted to this Honorable Court, that the suspension, revocation, or disbarment of an attorney at law is not a matter to be taken lightly, for as Chief Justice John Marshal stated in Ex Parte Burr 6 Law Edition 153:

> "On the one hand, the profession of an attorney is of great importance to an individual, the prosperity of his whole life may depend upon its exercise. The right to exercise it is not to be lightly or capriciously taken from him."

This Court has previously held in Carter Oil Company vs. State, 240 P.2d 787, that Boards of quasi judicial powers must base their findings and orders on substantial evidence.

While the Petitioner would not impugn the motives and work performed by members of the Bar Commission in the performance of this function, it should always be borne in mind

as was stated in Geer vs. Stathopulos, 390 P.2d 606, Supreme Court of Colorado:

> "That capricious or arbitrary exercise of discretion by an administrative board can arise, by exercise of its discretion in such manner after a consideration of evidence before it, has clearly indicated that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions."

The Colorado Supreme Court further stated, the abiding and well based principle, that when a Court is called upon to review action of an administrative agency, it should be placed in the same position as such agency, and therefore, if the agency has some knowledge of some fact, and acts upon such knowledge, it should see to it that what it knows becomes part of the record in order to permit the reviewing Court to evaluate the matter so known. It is submitted to this Honorable Court, that in the instant matter before the Court, the record is so incomplete and so inconclusive as to

make difficult the task of this Honorable Court to make a fair ascertainment of what would be a just action in the matter it is now considering.

It is submitted to this Court, that the principle of law set forth in Marks vs. France, 325 P.2d 368, may be applicable in the instant situation where the Court stated that an administrative body, such as the Board of Examiners in Optometry, cannot be the final judge of reasonableness of its orders, and while Courts will not be permitted to substitut their Judgment for that of administrative bodies, nevertheless Courts are definitely charged with the solemn duty of determining whether the procedure employed in reaching Judgment, or whether Judgment itself as rendere is unreasonable, arbitrary, or oppresive under circumstances of each particular case.

The Supreme Court of Oklahoma in the State

of Oklahoma Bar Association vs. Booth, 441 P.2d 405, (1966), used as a goal for the purposes of the action of a Bar Commission, that it did not have as the ultimate purpose the disciplining of an attorney in order to inflict punishment, but that the purpose was purely purification of the Bar and protection of the Courts and public generally.

The Court stated in the Bar Association of San Francisco vs. Sullivan, 198 P. 7, that in making a determination of unprofessional conduct as to an attorney, that all reasonable doubts must be resolved in favor of the accused and where there are two or more reasonable inferences may be drawn from a proved fact, that, that inference leading to a conclusion of innocence rather than one leading to a conclusion of guilt will be accepted.

It is further submitted to this Honorable Court, that the attorney before the Bar should

be disciplined only for a wilful breach of the rules of professional conduct, and that to establish a wilful breach, it should be demonstrated that the person charged, acted or omitted to act purposely, that he knew what he was doing or not doing, and that he intended either to commit the act or to abstain from committing it, and this principle of law has been well established in the cases of Palmquist vs. State Bar, 43 Cal.2d 428; In Re Trombley, 193 P.2d 734; Towle vs. Matheus, 62 P. 1064.

The Supreme Court of Arizona in Talbot vs. Schroeder, 475 P.2d 520, held that an attorney is bound to discharge his duties to his client with strictest fidelity and to observe the highest and the utmost good faith, but that at the same time, an attorney is not liable to a client when acting in good faith, when he makes mere errors of judgment, or for a

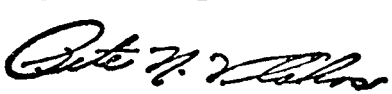
mistake as to an unsettled issue of law. It was further held in Eadun vs. Reuler, 146 Col. 347, 361 P.2d 445, (1961), that an attorney is not liable simply because his client becomes unhappy with the result.

CONCLUSION

It is, therefore, submitted to this Honorable Court that in the matter of the single count, Re Gregory Green, for which the Petitioner was held to be in violation of a specific Canon, that he was not advised of that specific Canon nor could he defend himself against it until at the time of the actual hearing, in that the Canon cited in the Complaint was unknown to the Petitioner until the time of the hearing and was a non-existent Canon and one for which he could find no rule in any book setting forth the Canons of ethics of the Bar of the State of Utah; and that in the case of the matter of Beck, that there is some indication

of the vindictiveness of a client, who perhaps through her own penuriousness, sought to gain an advantage by a refund of funds which had been well earned by the attorney, or at least, in his opinion, believed he had so earned it. Further, that the recommendation of the Commission of the Bar is far in excess of any punishment warranted to a man of long standing and good character who has been a faithful member of the Bar of this State for more than 23 years in which he has held forth as a practicing attorney.

Respectfully submitted,



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CERTIFICATE OF MAILING

A copy of the above and foregoing Brief of Petitioner was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Bar Commission, Lauren N. Beasley, Esq., at 430 Judge Building, Salt Lake City, Utah 84111, on this 31st day of May, 1974.

Pete N. Vlahos

PETE N. VLAHOS, ESQ.