1978

In Re: Robert B. Hansen Disciplinary Proceeding : Reply Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

In Re: ROBERT B. HANSEN	)	
	)	No. 15605
Disciplinary Proceedings	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM FINDINGS, DECISION AND RECOMMENDATION OF THE UTAH STATE BAR COMMISSION

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TABLE OF CONTENTS

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APPELLANT'S REPLY BRIEF

Most of the arguments made in the answering Brief can be met by oral argument. There are several points, however, where we deem it desirable to reply.

POINT I. THE UTAH STATE BAR COMMISSION COULD NOT HAVE CONSIDERED THE MITIGATING CIRCUMSTANCES

The Bar Commission asserts at various places in its brief (see, for example, P.2) that the Bar Commission did consider the mitigating circumstances in arriving at its recommendation for a one-year suspension. Otherwise, it argues, the recommended penalty would have been more severe. We pointed out in our initial brief that the findings are conclusionary in nature, and do not even purport to address the evidentiary matters relating to mitigation. We further noted that the evidence was not transcribed until after the Bar Commission had entered its order. The order is dated January 6, 1978. The evidence was transcribed January 18, 1978. The hearing examiners, of course, heard the evidence, but the Bar Commission did not. We respectfully submit that the Court should not give substantial weight to the Bar

Commission's recommendation, because the circumstances regarding mitigation were never heard by or apparent from the record before the Bar Commission. The answering Brief does not make any attempt to answer these assertions. It merely reasons that the Bar Commission must somehow have known the circumstances, because otherwise it would have recommended a more severe penalty.

POINT II. APPELLANT'S COMPLAINTS ABOUT THE FINDINGS ON THE DICK MATTER ARE FULLY JUSTIFIED, EVEN THOUGH HE PREVAILED ON THAT ISSUE.

Appellant has been tried and convicted in the press. The charges made against him in the complaint in the Dick matter were serious, but the evidence did not sustain the allegations of wrongdoing. The hearing examiners' negative findings in the Dick matter simply are not supported by the evidence. We have argued this in detail in our initial brief, and we won't reargue it here, but, for example, par. 7(b) is a finding that "Respondent [Appellant] apparently did not ascertain the identity of the fee title holder," when he prepared the contract of sale. This simply is not true. Appellant testified (R. 434) that he had a title report and he knew that Soelberg was the owner of the property. This is nowhere contradicted. The contract itself, wherein the Dicks were the named purchasers, and American National Mortgage Co. was the seller, was introduced in evidence as Ex. 49. Par. 6

of that contract expressly states that it is understood, "there there presently exists an obligation against said property in favor of LeRoy Soelberg, Sr. and Jean E. Soelberg, with an unpaid balance of $3,600 as of May 18, 1965," (Ex. 49). Further, John R. Dick testified that Appellant told them that Soelbergs had an interest (Depos. p.10). He was asked if he knew Soelberg was the seller, and he testified, "I think it so stipulated here. We knew that he had some interest," and he explained that Appellant had so advised them (Depos. p.10).

Thus, the charges in the complaint and Finding 7(b) not only are not sustained by the evidence, but they are contrary to the only evidence. Finding 7(b) is a negative finding. The hearing examiners and the Bar Commission, in approving the hearing examiners' report, conclude by 7(b) that he was guilty of misconduct, but it was not bad enough to violate the Code of Professional Conduct. As a matter of fact, the finding is not true. It is not supported by any evidence, and the Appellant was fully justified in challenging, in his initial brief, this and other similar negative findings on the Dick matter. They stand as an undeserved blemish on his record.

The rest of our argument in the Dick matter is adequately made in the opening brief, and we won't repeat it, but the Bar Commission is not entitled to enter findings which

cast the Appellant in an unfavorable light, and then assert in its brief here that Appellant should not be heard to complain.

POINT III. THE BAR COMMISSION'S ORDER IS NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS.

On p.8 of the answering Brief, the Bar Commission asserts that the Appellant "may not simply urge his version of the facts upon this court when the Commission has rejected that version..." Appellant's complaint here is that the hearing examiners did not address the evidentiary disputes in their findings. They simply entered conclusionary findings and no one can tell what particular facts were accepted to arrive at the conclusion. For example, on the Lowry matter, there really isn't any doubt that the assertion being made by the Bar Commission was that as the money was being received from Boothe and Gardner, it was being commingled and not maintained in a trust account. As we indicated in our initial brief, there is no evidence of such commingling on the Lowry account. This assertion is not challenged by the Bar Commission in its answering Brief, but it says that after a number of years, Appellant closed out his trust account and took the remaining money, and this, they say in their answering Brief, is the commingling complained of. It is not the commingling they charged. It is not the

commingling they tried to prove. It would not appear to be the commingling which the hearing examiners refer to in par. 4(g) of their findings. The hearing examiners concluded that Appellant "failed to maintain the funds collected in a separate trust account, and commingled the same with his own funds." In Count I, par. 2 of the complaint, the charge is made in substantially identical language.

As we pointed out in our initial brief, there is no showing that he did not "maintain" the Lowry funds in his trust account. There is no showing that he "commingled" the Lowry funds with his other funds. He had a separate trust account, and as far as this record shows, all of the Lowry funds went into it. Several years after he had closed his private practice and his trust account had become inactive he closed out his trust account, but that does not fit either the charge in the complaint nor the language of the finding, and the failure of the hearing examiners to address the specific evidentiary disputes makes it impossible for us to know what they in fact intended to find. Failure to maintain a trust account, and the commingling of client's funds is one thing. Closing out a dormant trust account long after he had gone out of the private practice is another.

One other example will demonstrate this fully. It is argued by the Bar Commission on page 9 that in the Piepenburg matter, the statement by the Appellant as to how he expected the jury to vote was made as a part of the

interview which took place at the counsel table, with the reporter taking notes. Appellant testified that he did not make that statement as a part of that interview (R.374). He had an interview with Mr. Horton at counsel table, which Appellant expected to be published. (R.370). He was asked some further questions on an informal basis as he left the courthouse to go out onto the street. (R.374). Horton said these statements on how the jury might vote may have occured at counsel table in the courtroom, (R.133), or may have occured as they left the building. (R.149). The hearing examiners did not address this conflict in the testimony at all, and yet the Bar Commission argues on p.9 of its brief that all of the statements concerning how the jury would vote took place as a part of the interview at counsel table. The hearing examiners did not so find. In arguing the case to this court, the Bar Commission is not entitled to represent that the hearing examiners considered that dispute in the evidence, and resolved it in favor of the Bar. We cannot tell, and neither can anyone else, whether the hearing examiners believed Appellant that this conversation about how the jury would vote took place as they left the courthouse building, and still concluded that this violated the canons. If it took place at counsel table with the reporter taking notes, in a formal interview which the Appellant admitted he intended to be published, the conclusion that he should have expected it to be published is fully supported. If it took place in an informal atmosphere,

as they walked out of the building to go to lunch, it presents the matter in an entirely different light. The hearing examiners ignored this conflict, and made no finding at all regarding it. The Bar Commission argues (p.10) that it wouldn't make any difference if the interview took place on the way out of the building, and it wouldn't make any difference if the reporter knew of the judge's concern about the jury. We think it does make a difference, and that the hearing examiner should have addressed these evidentiary conflicts. Since they did not do so, we think we are fully warranted in asking the court to examine the evidence. We emphasize that the Bar Commission could not have done so, because the findings made did not address the problem, and the transcript of the evidence was not available.

POINT IV. THERE WAS A FAILURE TO ACCOUNT TO LOWRY AND EMARINE, BUT THE CIRCUMSTANCES ARE CRITICALLY IMPORTANT.

The findings on the failure to account are simply "bare-bones" conclusions, that there was such a failure. This is all that the Bar Commission could have known, because the findings contain nothing else, and the evidence was not transcribed. Further, the oral arguments were not even taken down by the reporter. So the Bar Commission had nothing to guide it but the conclusion that there had been a failure to account - but none of the circumstances or particulars before it.

The uncontraverted evidence shows that for a long period of time Mr. Hansen had made collections, deposited the money to his trust account, advised the client that the money had been received, and after the check had cleared, promptly made the disbursement. Then he closed down his private practice, discharged his regular help, and moved his records, books, etc., into his home. His family assisted him in keeping the records and making the deposits, and his longtime secretary came in for a period of time, for about one day a week. (See p.26 of our initial brief.) During this period of time, there were a half dozen instances where the Emarine money was deposited in his law account, rather than in his trust account, but disbursement was immediately made, and this inadvertent commingling caused no harm (see our initial brief p.29).

Admittedly, some collections were made after he closed his office, and his system for accounting and disbursement did not function properly. There is absolutely no evidence of an intention on his part to keep the funds or conceal from his client that he had made the collection. In fact, the failure to disburse came to light when the Appellant, on his own volition, sent an affidavit to Mrs. Emarine showing the monies collected and the monies still due from her ex-husband. She realized that some of the money collected had not been remitted to her and she so advised the Appellant. Appellant could not find his file, and asked her for help to straighten

out the account. In this context, the Appellant admits that he had not accounted, and that he could not account, because he could not find his files.

This is a circumstance that the Bar Commission could not have known from the findings, because the findings don't reflect it. It is a circumstance that the Bar Commission could not have considered, because the evidence had not been transcribed and was not before it. This is spotlighted on pages 16 and 17 of the Bar Commission's brief. On page 16 the conclusionary findings are noted. On page 17 it is stated that "it is apparent that the Bar Commission took into account matters of "so-called mitigation." The brief then reasons, otherwise the penalty would have been more severe. Surely, the findings do not reflect the circumstances, and surely the Bar Commission did not have the transcript. These were mitigating circumstances. The Appellant did have a system which had functioned well. The commingling of several payments was inadvertent and caused no harm. He otherwise held the Emarine and Lowry monies separate from his own funds until he closed his dormant trust account. In the early years he notified them of the collections. He paid them promptly until he closed his office and it was thereafter that the system failed to function properly. He then brought Mrs. Emarine's attention to monies which had been collected, when he sent to her an affidavit for her signature--the affidavit reflected the monies collected. She knew she had not received all of

them, and asked for an accounting, but he could not thereafter find his files. The fact that he closed his office and separated himself from his longtime help, did not relieve him of the legal duty to account for and pay over the money to his clients, but it is crystal clear that he was not intentionally failing to account or failing to pay. When the problem surfaced, he was in the middle of an election campaign. The complaints concerning his professional conduct were coming to him through the press. His files were in numerous cardboard boxes, and the Emarine file could not be located. As soon as he was able to identify the money that he owed, he paid it, and on the initial demand, he deposited the full amount then demanded with the court.

We simply are asking the court to consider these circumstances and are pointing out to the court that the Bar Commission didn't and couldn't have done so, because the findings do not reflect them at all, and the transcript and arguments were not available.

POINT V. THE STATUTE OF LIMITATIONS IS MORE THAN A TECHNICAL DEFENSE.

The argument at page 18 that the duty to account continued up to the filing of the complaint with the Bar is without merit. The statute of limitations commences to run when the duty matures. On a common debt, the duty to pay continues up until the time the debt is paid or discharged, but the statute starts to run when the duty to pay matures and becomes in default. The duty to account and to pay

Franklin Life and/or Mr. Lowry's death matured more than three years before the filing of the complaint with the Bar. As noted on page 20 of the Bar Commission's brief, Mrs. Lowry made a request for an accounting on May 6, 1968. The duty to account matured at least by that time. Part of the problem in the Lowry case was the inability of the Appellant to find his files and records, and part of that problem is the result of the lapse of time--the very reason for the imposition of a statute of limitations.

The technical defense as to Mrs. Lowry being a client is again a matter of substance. The client in the lawsuit was Franklin Life Insurance Co., (See Exs. 8 and 9). Mr. Lowry was the agent, and Appellant dealt directly with Mr. Lowry and remitted the money to him. When Mr. Lowry died, his wife became his executor, and in that capacity the Appellant dealt with her. However, he has never represented her in her individual capacity as a client. Mrs. Lowry recognized Franklin Life as the client and wrote she would have to ask the company to change attorneys. (Ex.3). She admits that she never met Mr. Hansen, never talked to him in person or by phone and never received a letter from him (R.20), and we do not believe that the Bar established an attorney-client relationship with her as an individual. She did not file a complaint on behalf of Franklin Life nor as executor of the estate of Mr. Lowry, and the complaint filed was long after the statute of limitations had run. As noted on p.22 of the Bar's brief, the "eleven year old file" showed no action. The law should not punish Appellant because he could not

find all of his records nor reconstruct an eleven year old file.

Dated this 30th day of June, 1978.

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