

2003

In the Matter of the Discipline of H. Delbert Welker, #3418, Respondent : Brief of Appellee

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

H. Delbert Welker; pro se.

Kate A. Toomey; counsel for appellant.

Recommended Citation

Brief of Appellee, *Welker v.*, No. 20030428.00 (Utah Supreme Court, 2003).
https://digitalcommons.law.byu.edu/byu_sc2/2385

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

H. DELBERT WELKER (#3418)
8661 South Highland Drive, #179
Sandy, Utah 84093
Telephone (801) 942-7177

Attorney Pro se

IN THE UTAH SUPREME COURT

| | | |
|--|---|--------------------------------------|
| In the Matter of the Discipline of: |) | BRIEF OF APPELLEE |
| |) | |
| |) | |
| H. DELBERT WELKER, #3418 |) | Supreme Court No. 20030428-CV |
| |) | District Court No. 020909349 |
| Respondent |) | |
| |) | Priority No. 5 |

Appeal From the Third District Court, Salt Lake County
Judge Robin W. Reese

H. Delbert Welker
8661 South Highland Drive, #179
Sandy, Utah 84093
Respondent/Appellee

Kate A. Toomey
Deputy Counsel
Office of Professional Conduct
645 South 200 East
Salt Lake City, Utah 84111
Counsel for Appellant

FILED
UTAH SUPREME COURT

DEC - 1 2003

PAT BARTHOLOMEW
CLERK OF THE COURT

H. DELBERT WELKER (#3418)
8661 South Highland Drive, #179
Sandy, Utah 84093
Telephone (801) 942-7177

Attorney Pro se

IN THE UTAH SUPREME COURT

| | | |
|--|---|--------------------------------------|
| In the Matter of the Discipline of: |) | BRIEF OF APPELLEE |
| |) | |
| H. DELBERT WELKER, #3418 |) | Supreme Court No. 20030428-CV |
| |) | District Court No. 020909349 |
| Respondent |) | |
| |) | Priority No. 5 |

Appeal From the Third District Court, Salt Lake County
Judge Robin W. Reese

H. Delbert Welker
8661 South Highland Drive, #179
Sandy, Utah 84093
Respondent/Appellee

Kate A. Toomey
Deputy Counsel
Office of Professional Conduct
645 South 200 East
Salt Lake City, Utah 84111
Counsel for Appellant

TABLE OF CONTENTS

STATEMENT SHOWING JURISDICTION OF THE UTAH SUPREME COURT ...1

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW1

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES
AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE OF
THE APPEAL OR OF CENTRAL IMPORTANCE TO THE APPEAL2

STATEMENT OF THE CASE3

 Nature of the Case.....3

 Course of the Proceedings.....3

 Disposition in the District Court3

 Statement of the Facts Relevant to the Issues Presented for Review.....3

 Summary of the Arguments4

ARGUMENT4

 I. The District Court Correctly Imposed Equivalent Discipline in Utah for
 Acts that Occurred in California4

 II. Imposition of More Severe Discipline From Equivalent Discipline
 In a Deprivation of Due Process5

CONCLUSION7

TABLE OF AUTHORITIES

CASES

In re Babilis, 951 P.2d 207 (Utah 1997)7
In re Ennega, 37 P.3d 1150 (Utah 2003)7

RULES

Rule 22, Rules of Lawyer Discipline and Disability1,2,4,5,7

STATUTES

Utah Code Section 78-2-2(3)(c)7

STATEMENT SHOWING JURISDICTION OF THE UTAH SUPREME COURT

Pursuant to the Utah Constitution article VIII, section 4, “The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law,” the Utah Supreme Court has jurisdiction to hear this appeal. Also Utah Code section 78-2-2(3)(c), states that the Court has appellate jurisdiction over discipline of lawyers.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Issue 1: Whether reciprocal proceedings for discipline pursuant to Rule 22, Rules of Lawyer Discipline and Disability (RLDD), permit any regulatory body to impose greater sanctions than equivalent discipline. The language of Rule 22 puts the burden on the lawyer to show the court that an exception to equivalent discipline can be considered. There is no express language in the rule allowing the OPC to seek greater than equivalent discipline. In Utah, no lawyer has ever been sanctioned more severely by a regulatory body in a reciprocal discipline matter than what was imposed in the original jurisdiction.

Issue 2: Whether a body that regulates lawyers can impose sanctions greater than what was imposed in an out-of-state proceeding when notice and due process provisions are absent. Some other jurisdictions have increased the penalty that lawyers received in an out-of-state jurisdiction when their rules had notice and due process provisions protecting the rights of the lawyer. Should a regulatory body in Utah be able to increase the lawyer’s penalty in a reciprocal proceeding when the rules of notice and due process provisions are absent.

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND
REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE OF THE
APPEAL OR OF CENTRAL IMPORTANCE TO THE APPEAL**

Rule 22. Reciprocal discipline. Rules of Lawyer Discipline and Disability.

(a) Duty to notify OPC counsel of discipline. Upon being publicly disciplined by another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction, a lawyer admitted to practice in this state shall within thirty (30) days inform the OPC of the discipline. Upon notification from any source that a lawyer within the jurisdiction of the Supreme Court has been having disciplinary jurisdiction, OPC counsel shall obtain a certified copy of the disciplinary order.

(b) Notice served upon lawyer. Upon receipt of a certified copy of an order demonstrating that a lawyer admitted to practice in this state has been publicly disciplined by another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction, OPC counsel shall forthwith issue a notice directed to the lawyer containing:

(b)(1) a copy of the order from the other court, jurisdiction or regulatory body: and

(b)(2) a notice giving the lawyer the right to inform OPC counsel, within thirty (30) days from service of the notice, of any claim by the lawyer predicated upon the grounds set forth in paragraph (d), that the imposition of the equivalent discipline in this state would be unwarranted, and stating the reasons for that claim.

(c) Effect of stay of discipline in other jurisdiction. In the event the discipline imposed in the other court, jurisdiction or regulatory body has been stayed, any reciprocal discipline imposed in this state shall be deferred until the stay expires.

(d) Discipline to be imposed. Upon the expiration of thirty (30) days from service of the notice pursuant to paragraph (b), the district court shall take such action as may be appropriate to cause the equivalent discipline to be imposed in this jurisdiction, unless it clearly appears upon the face of the record from which the discipline is predicated that:

(d)(1) the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(d)(2) the imposition of equivalent discipline would result in grave injustice; or

(d)(3) the misconduct warrants substantially different discipline in this state or is not misconduct in this jurisdiction.

If the district court determines that any of these elements exist, it shall enter such other order as it deems appropriate. The burden is on the respondent to demonstrate that the imposition of equivalent discipline is not appropriate.

(e) Conclusiveness of adjudication in other jurisdictions. Except as provided in paragraphs (c) and (d) above, a final adjudication of the other court, jurisdiction or regulatory body that a respondent has been guilty of misconduct shall establish conclusively the misconduct for purposes of disciplinary proceeding in this state.

STATEMENT OF THE CASE

Nature of the Case: This is an attorney discipline matter.

Course of the Proceedings: On January 4, 2002, the Supreme Court of California entered an order suspending the appellee from the practice of law for a period of three years. Suspension was stayed on the grounds of a probation period of four years with an actual suspension of eighteen months. The Court ordered conditions of probation to include the taking and passing of the Multistate Professional Responsibility Examination during the suspension period. The OPC filed a petition for reciprocal discipline in the Third District Court on September 16, 2002.

Disposition in the District Court: On April 22, 2003, the Third District Court entered an order of equivalent discipline stating the same penalties as stated in the California court (Transcript, R. 104). Actual suspension began on March 28, 2003 (the date of the hearing) to March 28, 2004. The Court allowed a six month credit for the time appellee's membership in both states was either inactive or suspended. Total actual suspension was eighteen months. The Multistate Professional Responsibility Examination also has to be taken and passed along with the other provisions of the California order.

Statement of the Facts Relevant to the Issues Presented for Review: The facts as set forth in the District Court's Findings and Conclusions (R. 89) and the facts stated in respondent's affidavits (R. 50-53 and R. 74-78) were available to the Court to make its ruling.

SUMMARY OF THE ARGUMENTS

The only authority of the OPC to sanction wrongful conduct of a lawyer that takes place in another jurisdiction is found in Rule 22 (d) Rules of Lawyer Discipline and Disability (“RLDD”). Said rule warrants equivalent discipline in Utah unless the lawyer can show an exception to equivalent discipline. The burden is on the lawyer to show one of the stated exceptions. The district court has followed the rule and ordered equivalent discipline in Utah. The OPC is seeking a more severe penalty (disbarment) in Utah notwithstanding the notice requirements and due process considerations clearly stated in Rule 22. There has never been a case in Utah wherein the OPC or any of the Utah courts have imposed a more severe penalty than equivalent discipline in a reciprocal discipline matter.

ARGUMENT

I. The District Court Correctly Imposed Equivalent Discipline in Utah for the Acts that Occurred in California

Rule 22(d) RLDD was interpreted by the district court to mean that the court could order equivalent discipline to that which was ordered by the California Supreme Court. However, the respondent has a burden show that if something other than equivalent discipline is appropriate, the penalty could be less harsh (R. 104, page 29 of the transcript). Rule 22(d) states:

“the district court shall take such action as may be appropriate to cause the equivalent discipline to be imposed in this jurisdiction, unless it clearly appears upon the face of the record from which the discipline is predicated that:

- (1) the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;
- (2) the imposition of equivalent discipline would result in grave injustice; or
- (3) the misconduct established warrants substantially different discipline in the state or is not misconduct in this jurisdiction. If the district court determines that any of these elements exist, it shall enter such other order as it deems appropriate.

The burden is on the respondent to demonstrate that the imposition of equivalent discipline is not appropriate.”

Since the respondent was unable to show the court any exception under the rule, the district court ruled that equivalent discipline should be ordered (Transcript, R.104, page 29). Since no Utah case law defines equivalent discipline, a definition is stated in The American Heritage Dictionary that the meaning of equivalent is “equal, as in value, force, or meaning. Having similar or identical effects. Being essentially equal, all things considered.” The clearest meaning of equivalent discipline in Utah would be the same eighteen months of actual suspension imposed in California with the other provisions of classes and testing. The district ordered an eighteen month suspension with six months of credit during the time respondent’s license was suspended or inactive in both states at the same time. Rule 22 was properly interpreted by the court.

II. Imposition of More Severe Discipline From Equivalent Discipline Results in a Deprivation of Due Process

The safe guards and fair play provisions of Rule 22(d)(1) “the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process,” protects the lawyer in other jurisdictions but not in Utah according to the OPC’s position. No lawyer in the State of Utah has ever received a more severe penalty in Utah than he or she received in another jurisdiction. This is because the rule does not provide for a more harsh penalty.

Appellant’s brief correctly points out that other jurisdictions (not all) allow more severe sanctions in a reciprocal process than the original jurisdiction. The District of Columbia imposes reciprocal discipline more frequently than any other jurisdiction. However, if a more severe penalty than identical discipline is recommended, a

hearing de novo must be allowed for the lawyer to defend himself or herself. Appellant's brief states that, ("As noted above, Utah's reciprocal discipline rule does not provide this option," appellant's brief, page 20 footnote 4).

Appellant's brief cites the Colorado procedure for reciprocal discipline. A six month suspension that was ordered in New Mexico was ruled to be a disbarment in Colorado. However, the lawyer was given notice pursuant to Colorado rules that the regulatory body give the respondent notice of any claim that substantially different discipline was warranted, and with notice, respondent could present additional evidence. Utah has no such provision.

It is not unusual and in fact quite common that a stipulation of the facts to resolve any legal matter to summarily resolve litigation will conform to the elements of a law, crime, or rule as much as to the actual facts. Appellee's stipulation of the facts in California conformed to the charges brought by the California Bar. However, another set of facts that are somewhat different are contained in the briefs filed by appellee at the district court hearing (Affidavit of Respondent in Support of Memorandum, R. 50-53 and Affidavit of Respondent in Support of Reply Memorandum, R. 74-78). If the Utah rule provided either notice of more severe discipline as does Colorado or a de novo action as does the District of Columbia there would be different set of facts in the record for this court to review.

The stipulated facts in the record from California does not contain some of the concerns the court had about the hardship of the client, hardship of the medical provider, the attorney's emotional or personal problems, whether the wrongful conduct was intentional or negligent or a showing of how the public could be affected, In re

Babilis, 951 P. 2d 207 (Utah 1997) and In re Ennega, 37P. 3d 1150 (Utah 2003).

CONCLUSION

Rule 22 RLDD is the reciprocal authority to discipline lawyers in Utah who have been disciplined in other states. The district court correctly ordered equivalent discipline to be carried out in Utah for conduct in California. It is not the intent of the rule to allow anything other equivalent discipline or less (the burden to be on the lawyer). If that were not the case, provisions such as Rule 22 (d)(1) requiring due process safeguards in other states would also be mandated in Utah to preserve due process proceedings for lawyers in reciprocal matters.

DATED: November 28, 2003.


H. DELBERT WELKER
Attorney pro se

CERTIFICATE OF MAILING

I hereby certify that on this 29 day of November, 2003, I mailed two copies of the foregoing Brief of Appellee to Kate Toomey Deputy Counsel, Office of Professional Conduct, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111.


