

2003

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

Utah Supreme Court

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ARGUMENT

I. Reciprocal Discipline Is Not Limited to Sanctions of Identical or Lesser Severity

Welker's Brief offers a definition of "equivalent" in support of his argument that the Rules of Lawyer Discipline and Disability ("RLDD") limit a District Court to imposing equivalent or less severe discipline in cases of reciprocal discipline. Instead, the focus of the analysis should be on the word "reciprocal."

The word "reciprocal" denotes something owed mutually—in this instance, discipline owed by one jurisdiction predicated upon that imposed by another. The policy reasons for permitting reciprocal discipline are obvious and sound. The purpose of lawyer discipline proceedings "is to ensure and maintain the high standard of professional conduct required of those who undertake the discharge of professional responsibilities as lawyers and to protect the public and the administration of justice from those who have demonstrated by their conduct that they are unable or unlikely to properly discharge their professional responsibilities." Rule 1(a), RLDD. Reciprocal discipline is necessary to discharge these goals, and does so without the burden and expense of independent proceedings. The rule also prevents an attorney who has committed professional misconduct resulting in sanction by one jurisdiction from avoiding its effects simply by moving to another state.

By the same token, jurisdictions must be free to impose the discipline that would be warranted there. If it were otherwise, the jurisdiction's disciplinary powers would be limited by what is deemed appropriate elsewhere. It would mean that the consequences for an attorney's serious misconduct elsewhere

would not necessarily result in the sanction that likely would be imposed were the misconduct committed here. Such a result is inconsistent with the RLDD's directive that "These rules shall be construed so as to achieve substantial justice and fairness in disciplinary matters" Rule 1(c), RLDD. Indeed, the Standards for Imposing Lawyer Sanctions ("Standards") are designed to promote "consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions." Rule 1.3, Standards.

These goals are not furthered by Welker's restrictive interpretation of the reciprocal discipline rule. Instead, as Welker would have it, if a respondent commits an offense warranting disbarment in Utah, she can nevertheless avoid that sanction so long as she is prosecuted first in another jurisdiction and receives a lesser discipline there. This approach inadequately protects the public, and produces an unfair result for attorneys found to have committed the same or similar offenses in Utah.

II. Utah's Reciprocal Discipline Rule Comports With Due Process Requirements

Utah's reciprocal discipline rule affords respondents an opportunity to demonstrate that the procedure in the other jurisdiction "was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process." Rule 22(d)(1), RLDD. This is important because a final adjudication elsewhere conclusively establishes the misconduct. Welker did not allege that California's procedures deprived him of notice or opportunity to be heard such that it amounted to a deprivation of due process.

Utah's reciprocal discipline rule provides for notice of the Utah proceedings, and gives respondents an opportunity to be heard. Notice that the OPC would seek reciprocal discipline was afforded Welker when the OPC filed and served upon him its Petition for Reciprocal Discipline. (R. 1-36) The language of the rule itself, a copy of which was sent to Welker by the OPC, conveys notice that there may be a departure from the discipline imposed elsewhere if "the misconduct established warrants substantially different discipline in this state or is not misconduct in this jurisdiction." Rule 22(d)(3), RLDD.

In any event, Welker had actual notice that the OPC would seek a more severe sanction than what was imposed in California when it stated in its Petition served upon Welker that: "The OPC believes and therefore alleges that Welker's misconduct warrants substantially different and greater discipline in this State, under Utah[]'s Standards for Imposing Lawyer Sanctions." (R. 1-36 ¶ 10) The OPC also filed and served a memorandum demonstrating that disbarment is the appropriate sanction in Utah for misconduct of the type committed by Welker. (R. 56-65) Welker thus had ample actual notice.

The rule also provides for an opportunity to be heard: respondents are given the right to inform OPC counsel of any claim that the imposition of equivalent discipline would be unwarranted, and state the reasons therefor. See Rule 22(b), RLDD. The District Court permitted the parties to brief their respective positions,¹ and Welker was also "heard" in the District Court hearing

¹ Welker also filed two affidavits of fact (R. 50-53, 74-78) that the District Court read and considered in making its decision. (R. 95)

the court conducted before deciding this matter. Welker thus had ample opportunity to, and did, present his argument that identical discipline was appropriate. He presented the argument in a Memorandum (R. 43-46) and in a Reply Memorandum (R. 70-73), and through oral argument. Significantly, Welker never contended until this matter was on appeal that Utah's reciprocal discipline rule is constitutionally flawed for failure to provide him notice that he might receive a more severe discipline than that which he received in California.

III. Welker's Assertion That No Other Respondent In a Reciprocal Discipline Proceeding Has Received Increased Discipline Is Unsupported and Not Germain to the Disposition of This Case

Welker's Brief asserts in three places words to the effect that "No lawyer in the State of Utah has ever received a more severe penalty in Utah than he or she received in another jurisdiction." Brief of Appellee at 5, 4, 1. He offers no factual basis for making this assertion.

The OPC can neither affirm nor dispute Welker's contention, but observes that the RLDD were adopted in 1993, and prior to that, disciplinary proceedings were conducted by the Ethics and Discipline Committee with review and approval by the Bar Commission, and recommendations made to this Court concerning sanctions. See Summary, RLDD. The disciplinary proceedings model has changed significantly in the last decade, and to date, very few reciprocal discipline cases have been brought in District Court and the OPC is not aware of any that have been appealed to this Court. Welker's contention therefore could not have much foundation in a procedurally similar context.

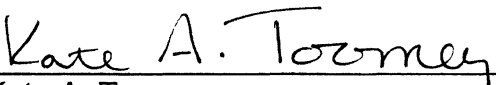
Additionally, Welker offers no case-by-case comparison of reciprocal discipline cases that would demonstrate that increased sanctions either were warranted but not sought by the OPC, or imposed by the District Court. Welker's unsupported assertions therefore lend no support to his argument that he should not receive a sanction more harsh than what was imposed in California.

CONCLUSION

The District Court erred in concluding that Rule 22, RLDD, restricts it to imposing identical discipline in a reciprocal discipline case. For purposes of reciprocal disciplinary proceedings in this state, "a final adjudication of the other court . . . that a respondent has been guilty of misconduct shall establish conclusively the misconduct." Welker's many serious instances of professional misconduct warrant disbarment under Utah law, and that is the sanction that should be imposed.

DATED: December 18, 2003.

OFFICE OF PROFESSIONAL CONDUCT


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CERTIFICATE OF MAILING

I hereby certify that on this 18th day of December, 2003, I caused to be mailed via United States mail, first-class postage pre-paid, two copies of the foregoing Reply Brief to the Respondent/Appellee, H. Delbert Welker, 8661 South Highland Drive, #179, Sandy, UT 84093.

Kate A. Toomey