

1980

## In Re: Don Leroy Bybee : Brief of Utah State Bar

Utah Supreme Court

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BEFORE THE SUPREME COURT  
OF THE STATE OF UTAH

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In re:

DON LeROY BYBEE

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Case No. 17253  
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BRIEF OF UTAH STATE BAR

APPEAL FROM THE  
FINDINGS AND RECOMMENDATIONS  
OF THE BOARD OF COMMISSIONERS OF THE UTAH STATE BAR

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APPELLEE'S STATEMENT OF THE CASE

In compliance with the Revised Rules of Discipline of the Utah State Bar, as approved by the Utah State Supreme Court, formal disciplinary proceedings were commenced by the Ethics and Discipline Committee of the Utah State Bar before the Bar Commission.

Following a hearing before a hearing panel designated by the Board of Commissioners, the Findings of Fact entered by the hearing panel were adopted and approved by the Commission and an Order was entered recommending the appellant be suspended from the practice of law in the State of Utah for a period of two months and ordered to reimburse the Utah State Bar for costs incurred in the disciplinary proceedings.

STATEMENT OF FACTS

The facts are essentially as stated in the appellant's brief with a few additions. The appellant undertook to obtain clearance for a bail bond operation under the name of Triple A Bail Bond. In preparing for the same, the appellant read the Utah statutes dealing with bail bonds and did not research any other relevant statutes.

After the application of the bonding company was approved and Lester Romero was denied the right to write bonds for the business, the appellant was on notice that the approval was a nullity as neither Sirren Bybee nor James Romero were authorized for Argonaut or licensed by the Department of Insurance to write bail bonds. Even though the appellant knew that Sirren Bybee was not sophisticated in business or legal matters, appellant did not advise his brother of the necessity of acquiring authorization as an Argonaut agent or for the need to become licensed in the state to write bail bonds. Nor did he advise Sirren Bybee or any other person associated with Triple A of the statutory obligations of bond agents; including their duties to maintain records, pay premiums, and work through authorized agents of the surety.

The appellant relied upon the advice of Lester Romero that Sirren Bybee and James Romero were authorized to execute bonds on behalf of Argonaut without making further inquiry as to whether or not this was the case. Though from past dealings and representations, he was aware that Lester Romero was not always truthful.

The appellant was also aware that Lester Romero and Sirren Bybee had entered into an agreement whereby Sirren Bybee had authorized Mr. Romero to use his name in the bonding business. The appellant did not advise Lester Romero or Sirren Bybee of potential civil and/or criminal liability for signing others names to the performance bonds or allowing others to sign one's own name.

Thereafter, the appellant commenced the representation of Golden Circle Investment Company and in that representation, prepared a performance bond to be submitted to the court. In that performance bond, the appellant included a statement that a power of attorney was attached and a line for inserting the number of the power of attorney. However, the appellant took no steps to attach said power of attorney nor to insert the number in the preparation of said performance bond.

The appellant did no research on statutory requirements and spent approximately ten minutes in preparing said bond. He did not retain a copy for his office file nor did he provide one for his clients or Argonaut.

In addition, when preparing said performance bond, the appellant made no inquiry as to whether or not Argonaut could issue performance bonds in the State of Utah, if Sirren Bybee was an authorized agent of Argonaut, or if Sirren Bybee or Lester Romero were licensed by the State of Utah to issue performance bonds.

Even though the appellant knew from prior representations of Triple A that Sirren Bybee was not an authorized agent for Argonaut and was not licensed by the State Department of Insurance, he represented to Judge Harding and opposing counsel that Sirren Bybee was an authorized agent for Argonaut; that the performance bond was valid and enforceable; that the signature of "S. Bybee" was that of his brother, Sirren Bybee, and that he had notarized the signature when, in fact, it was Lester Romero that put said signature on performance bond.

The appellant had not advised Lester Romero, Sirren Bybee, nor any other person involved with Triple A of the requirement that the signer of the performance bond be an authorized agent of Argonaut and be licensed by the state to write performance bonds.

The appellant now seeks relief from the Findings and Recommendation of the Board of Bar Commissioners that his acts were in violation of the Code of Professional Responsibility and that he should, therefore, be suspended from the practice of law for two months and be required to reimburse the Utah State Bar for costs incurred in the disciplinary proceedings.

#### ARGUMENT

##### Point I

THE CONDUCT OF THE APPELLANT CONSTITUTES VIOLATIONS OF RULE IV, CANON 1, DR 1-102 (A) (4), (5) and (6) OF THE REVISED RULES OF CONDUCT OF THE UTAH STATE BAR.



The appellant contends that his conduct did not violate the provisions of Canon 1, DR 1-102(A)(4), (5) and (6) because he did not engage in any conduct involving dishonesty, fraud, deceit or misrepresentation that was prejudicial to the administration of justice or that adversely reflected upon his fitness to practice law.

The record of the evidence presented to the hearing panel indicates otherwise.

The appellant, from his previous representation of Triple A, knew or should have known that Sirren Bybee was not an authorized agent to write performance bonds in the State of Utah. Yet, he represented to the court and opposing counsel that this was, in fact, the case. The appellant also represented to the court and opposing counsel that the performance bond which he had prepared was valid and enforceable and, in fact, it was not. The appellant knew or should have known these facts.

This conduct represents dishonesty, fraud, deceit and misrepresentation. It is also prejudicial to the administration of justice. This conduct, together with the fact that the appellant wrongfully notarized the forged signature of "S. Bybee" and failed to properly and fully advise his clients, adversely reflects on his fitness to practice law.

#### Point II

APPELLANT'S CONDUCT CONSTITUTES VIOLATIONS  
OF RULE IV, CANON 6, DR 6-101(A)(1), (2),  
AND (3) OF THE REVISED RULES OF CONDUCT  
OF THE UTAH STATE BAR.

The appellant contends that he cannot be held to have violated the provisions of Canon 6, DR 6-101(A) because there is no evidence to indicate that he handled a legal matter beyond which he was competent. However, the appellant admitted that when he undertook to process the application for the approval of Triple A as a bonding company the only experience he had was previously working with bail bonds. Also, the appellant admittedly failed to advise any of his clients or any persons affiliated with Argonaut of the necessity for authorization of an Argonaut agent, other than Lester Romero.

The appellant also failed to advise either of his clients of the requirement that the signer of the performance bond be an authorized agent of Argonaut and be licensed by the state to write performance bonds.

In addition, when appellant was preparing performance bond, he spent approximately 10 minutes in do so and did not inquire as to whether or not Argonaut could issue performance bonds in the State of Utah; nor did he inquire if Sirren Bybee was an authorized Argonaut agent; nor did he inquire if Sirren Bybee or Lester Romero were licensed by the State of Utah to issue performance bonds.

These facts indicate a lack of awareness on the part of the appellant of possible steps he might have taken to protect the interest of his clients. It was reasonable and proper for the hearing panel to deduce and the Bar Commission to confirm that the appellant was incompetent to handle the legal questions presented by these matters.

Subsection 2 of the same disciplinary rule states that "A lawyer shall not handle a legal matter without adequate preparation in the circumstances." Subsection 3 is similar and states that "A lawyer shall not neglect a legal matter entrusted to him."

The appellant, by his own admission, stated that the only preparation he did in applying for the performance bond was read the Utah statutes on bail bonds. The hearing panel felt that an attorney of similar skill and experience would have read all applicable statutes and ordinances relating to surety companies and statutes relating to agents, brokers, and adjusters.

The appellant also admitted that in preparing the performance bond, he merely altered a blank bail bond form and instructed his secretary to type the same.

Again, the hearing panel felt that an attorney of similar skills and experience would have ascertained the requirements or application through form books and/or similar applications submitted by others.

The appellant failed to advise Lester Romer and Sirren Bybee that they could not operate the bail bond business as it had been approved because there was not a properly authorized agent for Argonaut nor an agent licensed to write bail bonds.

Appellant neglected to advise Argonaut that Lester Romero was not approved by the court to write bonds; neglected to determine if Argonaut had such powers to issue bonds in the District Courts or to determine if Argonaut

could write and issue performance bonds.

Appellant also neglected to advise Lester Romero and Sirren Bybee of the penalties of false signature. Appellant further neglected to retain a copy of the performance bond for his own files.

The above stated facts demonstrate the appellant's apparent lack of preparation and neglect of his professional responsibilities.

In the case of William J. Codiga v. State Bar of California, 575 P.2d, 1186 (1978), the attorney's clients had no knowledge of errors which existed in their wills, yet the attorney was aware of said errors. The court held that under these facts, the attorney ". . . under a heavier obligation to initiate corrective action. Inattention to the needs of a client, standing alone, may constitute proper grounds for discipline." The court held that this conduct was incompetent representation and called for discipline.

The appellant herein is guilty of similar violations in the representation of his clients.

The evidence is clear and unmistakable that the appellant handled a legal matter which he was not competent to handle and did not adequately prepare. Also, he not only failed to take the proper actions to make sure that the bond that he presented to the court was proper, but also failed to advise his clients of the actions which they must

to make them eligible to write bonds in the State of Utah.

This conduct clearly constitutes violations of Canon 6 of the Rules of Conduct.

Point III

THE CONDUCT OF APPELLANT CONSTITUTES VIOLATIONS OF RULE IV, CANON 7, DR 7-102(A)(3), (5) and (8) OF THE REVISED RULES OF CONDUCT OF THE UTAH STATE BAR.

The hearing panel found, at paragraph number 38, of the Findings and Recommendation and Order of the Bar Commissioners that "Sirren Bybee was not an authorized agent for Argonaut and was not licensed by the State Department of Insurance in any manner and said information was publicly available upon inquiry and was apparent from respondent's prior representation of Triple A."

The appellant then represented to Judge Maurice Harding and opposing counsel that Sirren Bybee was an authorized agent for Argonaut together with the fact that the signature on the bond of "S. Bybee" was that of appellant's brother, Sireen Bybee. The appellant also represented to Judge Harding and opposing counsel that the signature on the bond of "S. Bybee" was that of his brother, Sirren Bybee, and that the appellant had notarized the signature, when it was actually Lester Romero who had signed "S. Bybee" on the bond.

In a New York case, the court held ". . . it is therefore a serious offense when a subscribing witness signs a statement equivalent to an affidavit when he knows full well that the signer did not sign in his presence or before

him and is similar to a situation where a notary signs a statement when the signer has acknowledged his signature before him. That notary's act, when untrue, constitute fraud and deceit and is punishable as a misdemeanor, Section 1820 A of the penal law. If the notary is a lawyer, it can lead to disbarment." Bloom v. Power, 193 N.Y. Supp. 2d, 697 (1959).

From the evidence presented at the hearing, the panel reached the conclusion that the appellant had knowingly made a false statement of fact or law to the court.

In the case of The Attorney Grievance Commission of Maryland vs. Jeffrey Alan Levitt, 406, Atl.2d, 1296 (1979), the court stated: "This court has observed that no moral character or qualification for bar membership is more important than truthfulness and candor and lack of candor as demonstrated here is unbecoming a lawyer and it also undermines the system of justice." The court held that knowingly making a false statement to the court warranted suspension from the practice of law for one year.

The hearing panel determined from all the evidence presented that the appellant was on notice that the bond which he presented to the court was not valid. He was under a legal obligation to disclose this information to the court and yet failed to do so and knowingly concealed this information to the court when he was questioned concerning the validity of the bond.

This evidence justifies the hearing panel in their determination that the appellant violated Canon 7 of the

Revised Rules of Professional Conduct of the Utah State Bar.

Point IV

THE RECOMMENDATION OF THE BOARD OF COMMISSIONERS OF A TWO MONTH SUSPENSION IS APPROPRIATE HEREIN.

The appellant argues that a formal reprimand be sufficient in this matter and that a two month suspension would serve no purpose other than work a hardship on him. He also points out that this court is free to impose any disciplinary action it may wish regardless of the recommendations of the Bar Commission. (Appellant's Brief, at 13). That would also mean that this court is free to impose a stricter penalty than that recommended by the Bar Commission.

It should be noted that the hearing panel who heard all evidence in this matter saw the demeanor of all witnesses and made its findings on same, recommended a suspension from the practice of law for a period of six months. (Findings and Recommendations of the hearing committee).

The Board of Commissioners of the Utah State Bar determined that the recommendation of the hearing panel should be modified to state that the appellant receive a formal reprimand and be suspended from the practice of law in the State of Utah for two months and that he be ordered to reimburse the Utah State Bar for the costs incurred in the proceedings. This recommendation is justified by the evidence and is necessary to protect the integrity of the legal profession, the courts, and the entire state of Utah.

CONCLUSION

The Utah State Bar urges that this court adopt the recommendation of the Board of Commissioners and suspend the appellant from the practice of law for a period of two months and order that he reimburse the Utah State Bar for the costs incurred in the proceedings before it. This action is justified and necessary as stated above.

RESPECTFULLY submitted this 4 day of December, 1980.

UTAH STATE BAR

by

S. DEE LONG

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing brief was mailed, postage prepaid to Walter R. Ellett, Attorney for Appellant, 5085 South State Street, Murray, Utah 84107, this 4 day of December, 1980.

Glorianne Ritchie