

1980

# In Re: Don Leroy Bybee, Disciplinary Proceeding : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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In re:

DON LeROY BYBEE

Disciplinary Proceeding

Case No. 17253

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BRIEF OF APPELLANT

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Clk. Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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In re:

DON LeROY BYBEE

}  
Case No. 17253

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant herein, Don LeRoy Bybee, appeals to the Utah Supreme Court from the findings and recommendations of a hearing panel in the disciplinary proceeding before the Board of Commissioners of the Utah State Bar, and from the recommendations of the Utah State Bar that the appellant be suspended from the practice of law in the State of Utah for a period of two months, and providing that appellant reimburse the Utah State Bar for costs

incurred in the disciplinary proceedings.

#### STATEMENT OF FACTS

In about February 1975, appellant was contacted by one Lester Romero, and two persons claiming to be representatives of the Argonaut Insurance Company. Appellant was requested to prepare and present an application to the Salt Lake City Court to obtain a clearance for a bail-bond operation under the name of Tom's Bail Bond, or Triple-A Bail Bond. Appellant was advised that Argonaut Insurance Company would underwrite the bonds, and that Lester Romero would be the person writing the bonds.

Appellant inquired concerning Argonaut Insurance Company, and determined that it was a company qualified to write bonds in the State of Utah.

Appellant advised Mr. Romero and the others of the requirement to submit the requested application to the court. Appellant was advised that others would be involved in the writing of bonds, among whom was appellant's brother, Sirren Bybee.

Appellant prepared the necessary documents and presented them to Judge Robert C. Gibson, the then presiding Salt Lake City Judge. Thereafter, appellant was informed that the application had been approved, but that Lester Romero could not write bonds for the business entity. As a result, Sirren Bybee and one James Romero were named as the agents to write such bonds.

At a time after the bond approval was received, appellant's brother, Sirren Bybee, rented an office from appellant and maintained a telephone for Triple-A Bonding in that office, as well as his own driving school business.

In connection with the application for approval by the City Court, appellant reviewed the bond forms and the Argonaut Insurance Company power of attorney forms to be used. Blank forms were in appellant's office. In addition, appellant was provided with a letter from Argonaut addressed to the Utah State Insurance Department, indicating that Lester Romero was an authorized agent for Argonaut for the writing of bail bonds.

Appellant was advised by Lester Romero that Sirren Bybee and James Romero were authorized to execute bonds on behalf of Argonaut Insurance Company, and was aware of the fact that the name "S. Bybee" appeared on Argonaut power of attorney forms furnished to him.

Thereafter, appellant represented Golden Circle Investment Company in a matter involving Murray City. During this litigation, appellant's client was required by the court to provide a bond in the sum of \$5,000, to assure performance of certain items prescribed by the court. This bond was to be filed on or before September 4, 1975.

Appellant was requested by Lester Romero to prepare the necessary bond with Argonaut Insurance Company as surety. Appellant adapted a blank bond form to meet the requirements of the court, and had the same prepared for the signature of "S. Bybee," as Argonaut Attorney-in-Fact. Thereafter, as appellant's brother, Sirren Bybee, walked past appellant's office, appellant inquired as



to whether he was authorized to notarize the signature of "S. Bybee" as it appeared on the bond, whereupon appellant's brother indicated that he was, and appellant then notarized the signature. This bond was submitted to the court; however, because the case was resolved, bond performance was never required, so that the form of the bond and its signature was not then challenged.

Some time later, Brent Cameron, then Deputy Salt Lake County Attorney, by letter, complained to the Utah State Bar Association, alleging that the bond filed with the court was invalid, known by the appellant to be invalid, and the preparation of the same and the presentation of it to the court violated the Code of Professional Responsibility.

The hearing panel found that the conduct of the appellant violated Rule IV, Canon I, DR 1-102 (A) (4), (5) and (6); Canon 6, DR 6-101 (A) (1), (2) and (3); and Canon 7, DR 7-102 (A) (3), (5) and (8) of the Revised Rules of Professional Conduct of the Utah State Bar. Based thereon, the Board of Commissioners of the

Utah State Bar recommended the issuance of a formal reprimand and suspension from practice for a period of two months.

## ARGUMENT

### POINT I

THAT THE CONDUCT OF THE APPELLANT DID NOT VIOLATE RULE IV, CANON I, DR 1-102 (A) (4), (5) AND (6) OF THE REVISED RULES OF PROFESSIONAL CONDUCT.

Rule DR 1-102 (A) (4), (5) and (6) provides:

"(A) A lawyer shall not:

- (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law."

The evidence presented to the hearing panel that the appellant, in preparing the performance bond for Triple-A Bonding

Company, at the request of its owner Lester Romero, did so based upon his knowledge of the qualification of the company to write bonds before the City Courts. There was nothing to indicate to him that the bond, as prepared, did not meet the requirements of the court. In fact, the bond obligation was never required, so that it is now only speculation that the bond was not valid and may not have been paid if presented for performance. There was no dishonesty, fraud, deceit or misrepresentation involved, nor was there any conduct that was prejudicial to the administration of justice. Appellant acted in a manner that was in compliance with the court requirements insofar as the bond was required. Based upon the information he had, he could reasonably believe that the preparation of the bond, the signature thereon, and the filing of the same were all proper. There is no evidence to the contrary.

The claim that there was fraud, deceit and misrepresentation by reason of the fact that appellant notarized the signature of "S. Bybee", when in fact the signature was not than of Sirren

Bybee, is without basis, because the evidence adduced established that appellant's brother, Sirren Bybee, when asked about the signature, authorized its notarization, knowing that he had not signed, but had authorized the signature to be placed by another. The family relationship, the circumstances that existed, and the fact that Sirren Bybee had been approved as an agent to sign bonds, all gave rise to notarization, which was done in good faith and upon what was apparently proper authorization. This is no way established a fraud or deceit or misrepresentation, as found by the panel.

POINT II

THAT THE CONDUCT OF THE APPELLANT DID NOT VIOLATE RULE IV, CANON 6, DR-6-101 (A) (1), (2) AND (3), REVISED RULED OF CONDUCT.

Canon 6, DR 6-101 (A) (1), (2) and (3) provides:

"(A) A lawyer shall not:

- (1) Handle a legal matter which he knows, or should know, he is not competent to handle, without associating with him a

- lawyer who is competent to handle it.
- (2) Handle a legal matter without preparation adequate in the circumstances.
  - (3) Neglect a legal matter entrusted to him.

Again, there is no evidence before the panel to indicate that appellant was called upon to handle a legal matter which was beyond his competence. In fact, the evidence was that appellant had prepared bonds for other clients, and was aware of the purpose and needs of such bonds. That in the case involved, appellant had, prior to preparing the bond, met with representatives of Argonaut Insurance Company, had made inquiries of the Insurance Commissioner of Utah concerning Argonaut Insurance Company, and was aware that the bonds of Triple-A Bonding Company were accepted by the Salt Lake courts. Everything done by appellant was in the furtherance of the interests of his client, was done without neglect, and accomplished those things required by the court, as well as the needs of appellant's clients.

Appellant was knowledgeable in the requirements of the bond requested, and the bond prepared met those requirements. Opposing counsel made personal inquiry concerning the authority of Argonaut Insurance Company, and determined that the company was authorized to write bonds in this State. Appellant had made this very representation to counsel, and had the same information.

POINT III

THAT CONDUCT OF APPELLANT DID NOT VIOLATE RULE IV, CANON 7, DR 7-102 (A) (3), (5) AND (8), REVISED RULES OF PROFESSIONAL CONDUCT.

These provisions of the Rules of Professional Conduct provide:

- "(A) A lawyer shall not intentionally:
  - (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
  - (5) Knowingly make a false statement of law or fact.

- (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

At all times here involved, appellant was completely open in his dealings with the court, the Salt Lake County Attorney, and his client. He did not conceal, or knowingly fail to disclose, any facts known by him that he was required to reveal, or even that he should, under any circumstances, have disclosed. At all times, he believed that he performed his obligation to the court and to his client.

Although the hearing panel found (Findings and Recommendations 37) that at a meeting with the court, appellant assured the court that the bond prepared and filed was valid and enforceable, which it is presumed is the basis for the finding that there was a violation of Canon 7, the facts are that the only question raised was an inquiry about Argonaut Insurance Company. To this inquiry, appellant informed both the court and counsel that Argonaut was a California company, authorized to write bonds; that he had qualified Triple-A Bonding Company before the courts of Salt Lake City, and that he was satisfied that they were a responsible

company. These were facts that appellant believed to be true, and had no reason under the circumstances to challenge. There is no evidence that any statement made by appellant was other than that which he believed to be true.

The findings of the panel contain many matters not founded upon facts presented to it. There are many conclusions listed as findings, none of which establish any violation of the rules of conduct.

It is interesting to note that it was not a complaint by appellant's clients that precipitated this matter, but was a complaint by the deputy county attorney, made two years after the claimed fact. Nothing in the initiating complaint would give rise for a basis for the findings of the panel, and particularly the findings of violations of Canon 1.

#### POINT IV

THE RECOMMENDATION THAT APPELLANT  
BE SUSPENDED FOR TWO MONTHS IS NOT  
JUSTIFIED.



The Board of Commissioners of the Utah State Bar recommended a formal reprimand and two months' suspension. It is submitted that the opinion of the court and its publication in the reporter system is far more reaching than any reprimand of the commissioners. To add a suspension for two months would serve no purpose, and would only work a hardship on the appellant.

"While it is recognized that this court will accord substantial weight to the recommendations of the Bar Commission concerning the disciplinary action, if any, to be imposed (In re King 7 U2. d 258, 322 P. 2d 1095), the court is not a rubber stamp for those recommendations and can, and should, consider each case, the circumstances and the need therein. In re McFarland, 10 U2. d 217, 250 P. 2d 631; In re Badger, 28 U. 2d 240, 501 P. 2d 1006."

Were there, in fact, a violation of the Rules of Professional Conduct, it is conceded that any punishment determined should not exceed that which is necessary for the protection of the public and the profession. The California court, in the Petition of Gaffney, 171 P. 2d 873, observed:

"The law is interested in the regeneration of erring attorneys and, in the enforcement of a sound discipline, its disposition ought not to place unnecessary burden upon them."

However, it does not appear that there is any violation of the rules in this case, so that a suspension of the appellant for two months serves no purpose but to damage his livelihood.

#### CONCLUSION

It is submitted that the evidence does not support the findings and recommendations of the Commission, and that the imposition of the sanctions there found would be unjustifiably repressive. As indicated, the public reproof following the opinion of this court will have far reaching effects on the appellant, and would more realistically treat the apparent concern of the Bar Commission about the acts of the appellant.

It is therefore submitted that affirmation of the Commission's recommendations is neither supported by the

Bybee (ms)

evidence, nor justified by the facts.

Respectfully submitted,

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Walter R. Ellett  
Attorney for the Appellant