

2011

Jonathan W. Grimes v. : Reply Brief

Utah Court of Appeals

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IN THE SUPREME COURT OF UTAH

**In the Matter of the
Discipline of:**

Jonathan W. Grimes, #10462

Respondent.

)
) **REPLY BRIEF**
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Supreme Court No. 20110171

Appeal from the Third District Court, Salt Lake County

Judge L. A. Dever

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ARGUMENT

I. Grimes Has Failed to Articulate Any Truly Compelling Mitigation, and the District Court Erred When it Did Not Disbar Him for His Misappropriation

There is substantial case law in this jurisdiction addressing the appropriate discipline an attorney should face in cases of misappropriation. That body of case law, which the OPC cited in its opening Brief, indicates that disbarment is the presumptive sanction for cases of attorney misappropriation. Appellant's Brief at 6-9. Grimes concurs with that position in his Brief. Appellee's Brief at 11. The question, then, is whether the district court based its departure from that presumption upon "truly compelling mitigation," which is the only standard this Court has set forth for cases of misappropriation. See *In re Ennenga*, 2001 UT 111 (Utah 2001); *In re Ince*, 957 P.2d 1233 (Utah 1998); and *In re Babilis*, 951 P.2d 207 (Utah 1997). The OPC asserts that the mitigation Grimes presents, while unfortunate, does not rise to the level of truly compelling mitigation, and the district court's downward departure from disbarment was in error.

Much like in the *Ennenga* case, the district court in this matter found the correct level of discipline under the Standards for Imposing Lawyer Sanctions ("Standards"), but then incorrectly used factors of mitigation to justify a downward departure from the presumption of disbarment. In *Ennenga*, this Court went through the offered mitigation and explained why the factors did not rise to the level of "truly compelling mitigation," required under *Babilis*. *In re Ennenga*, 2001 UT at ¶¶ 12-16. That analysis is required in this case as well.

Grimes argues that the factors of mitigation he presented were compelling, and were properly used by the district court to depart from the presumptive sanction of disbarment. Appellee's Brief at 13. The mitigation Grimes relies upon is detailed in the district court's Order of Sanction. R. 339-41. Even the district court, which heard and considered Grimes' mitigation first-hand, did not find that the mitigation constituted truly compelling mitigation. In the district court's Order of Sanction, the court lists the mitigating factors under Rule 14-607(b) of the Standards immediately after acknowledging that this Court's guidance in these matters requires a showing of truly compelling mitigation to depart from a presumptive disbarment. *Id.* Interestingly, though the district court recognized that mitigation needed to reach the level of "truly compelling", the court did not state that any of the mitigation reached that level, and, as the OPC has argued, ultimately based its departure on an incorrect application of the *Crawley* case – not upon a finding that Grimes' mitigation was truly compelling.

Grimes relies upon the following factors of mitigation: Absence of a prior record; inexperience in the practice of law; personal and emotional problems; good character or reputation; interim reform; and, remorse. Appellee's Brief at 13-15. Grimes details his personal and financial problems, and suggests that these pressures exacerbated the underlying misconduct. *Id.* This Court, however, has roundly rejected the notion that personal or financial problems rise to the level of truly compelling mitigation in misappropriation cases. In *Ennenga*, the Court stated:

The trial court also concluded that Ennenga's 'personal and emotional problems [resulting from] his inability to meet his regular financial obligations' were mitigating factors. Although we understand that the pressure of not being able to meet one's financial obligations can be great, we cannot condone the taking of a client's money to resolve that problem, even with the intent to return their funds. Personal financial pressures cannot mitigate the offense of misappropriation.

In re Ennenga, 2001 UT 111 at ¶ 14. Grimes' statements regarding his personal and financial problems are unfortunate. It is easy to take a sympathetic view toward those issues, and the OPC believes that the district court adopted such a view. The interests of justice, however, outweigh the sympathy that the district court showed Grimes by reducing the presumptive sanction. Though the district court correctly acknowledged that the only way to justify the departure under this Court's prior guidance was to find truly compelling mitigation, the court never used that phrase when discussing Grimes' mitigation. The district court never referred to the mitigation as truly compelling, compelling or substantial, and in reading the court's Conclusion, it does not appear that the court used the *Ennenga* standard to justify the downward departure in Grimes' sanction. R. 341-43.

None of the mitigation rises to the level of truly compelling. Of all the mitigation, the personal and financial problems are probably the most significant, and this Court has clearly rejected those factors as rising to the level of truly compelling mitigation. Despite his arguments to the contrary, Grimes has not shown truly compelling mitigation, and the district court erred when it did not disbar Grimes.¹

¹ In fact, Grimes does not even refer to his mitigation as "truly compelling", and only refers to the mitigation as "compelling." Appellee's Brief at 13.

Grimes also attempts to distinguish his case from other cases of misappropriation, and argues the he didn't take as much money, and his mitigation is more compelling, so the discipline should not be as severe. Appellee's Brief at 15-18. Again, the Court addressed a similar argument in *Ennenga*, and rejected comparisons as a basis for a downward departure. As the Court wrote, "the standard for departing from the presumptive sanction of disbarment is a 'truly compelling' mitigating factor in the circumstances of *Ennenga's* case, not the comparative seriousness of other cases." *In re Ennenga*, 2001 UT 111 at ¶ 16. Grimes has not been able to articulate a truly compelling mitigating factor. That is the test for a downwards departure in Utah misappropriation cases, and the showing cannot be made in this case. That Grimes took less money than other attorneys who were disbarred for their misappropriation is not a factor this Court has considered in the past, and should not be considered now. There isn't a specific dollar amount hurdle for misappropriation cases, nor should there be. The dishonesty of misappropriating five dollars from a client is the same as misappropriating thousands. Though the magnitude of the misappropriation changes from case to case, it is still based upon the same misconduct, which should not be tolerated in any amount.

II. The District Court's Reliance Upon the *Crawley* Decision for A Misappropriation Case Was in Error

Grimes argues that the district court properly used the *Crawley* decision as basis for departing from the presumptive sanction of disbarment. Appellee's Brief at 21. As Grimes points out, the district court did state the "truly compelling mitigation test" before listing the mitigating factors in the Order of Sanction. *Id.* at

21-22. As the OPC has argued, however, the court did not actually use the truly compelling test as the basis for the departure. Grimes acknowledges as much when he states that the district court's recitation of the rule before listing the mitigating factors only suggests that the court found them compelling. *Id.* at 22. This suggestion is insufficient, and the OPC does not believe that the district court used the truly compelling test as a basis for the departure. Rather, the OPC asserts that the district court was swayed by sympathy for the respondent, and a misapplication of the *Crawley* decision.

There is no dispute that the *Crawley* decision gives wide discretion to the district courts in matters of attorney discipline. The OPC's position, however, is that the discretion encouraged under *Crawley* does not work to undercut the clear guidance this Court has provided in attorney misappropriation cases. In other words, even after *Crawley*, the "truly compelling mitigation" test is still the only standard by which a district court may properly deviate from a presumptive disbarment in a misappropriation case.

It is important to keep in mind that in *Crawley*, the OPC asked this Court to adopt guidelines addressing where probation would be appropriate in attorney discipline cases. *In re Discipline of Crawley*, 2007 UT 44 (Utah 2007) at ¶ 21. The Court declined to do so, and instead explained that it was pleased with the manner in which district courts used the flexibility in the Standards to tailor sanctions to particular cases of misconduct. *Id.* at ¶ 22. The Court found that in the *Crawley* case, the district court correctly used its discretion and upheld the sanction, and well as in the *Henderson* case (combined with the *Crawley* case).

Neither *Crawley* nor Henderson engaged in misappropriation, but Grimes argues that *Crawley* gave the district court the discretion to depart from this Court's guidance in misappropriation cases. The OPC disagrees.

Nothing in the *Crawley* case suggests that it applies to, or undermines, the direction this Court has previously recited in cases of attorney misappropriation. The OPC asked the Court to provide guidance regarding the use of probationary periods, and the Court declined to do so. To use that declination to suggest that district courts no longer need to follow the test of "truly compelling mitigation" for misappropriation cases goes too far, and overstates the language the Court used in the *Crawley* case. There is not any language in the *Crawley* decision to indicate that the Court intended the case to upend the established test for sanctions in misappropriation cases; thus, the OPC believes that *Crawley* was improperly relied upon by the district court. We urge this Court to reaffirm the long line of cases which articulated the "truly compelling mitigation" test, and disbar Grimes for his misconduct.

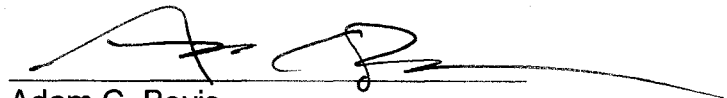
CONCLUSION

There is only one test in this jurisdiction which a district court may use to make a downward departure from presumptive disbarment in misappropriation cases. The district court referenced that test, but made no finding that Grimes had factors of mitigation which were truly compelling. It is sometimes easy in these cases to become sympathetic to the problems attorneys encounter in life. In many disciplinary cases those problems are properly considered mitigating factors, and district courts use them to craft sanctions which may help troubled

attorneys resume practice. This case, however, presents a situation involving the most serious misconduct an attorney can commit: the misappropriation of client funds. These types of cases do not afford the district court the discretion that it may have in less serious cases. As unfortunate as the mitigation offered may be in this case, it does not constitute truly compelling mitigation, and the district court erred by not disbaring Grimes.

DATED: September 6th, 2011.

OFFICE OF PROFESSIONAL CONDUCT

A handwritten signature in black ink, appearing to read 'Adam C. Bevis', written over a horizontal line.

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CERTIFICATE OF MAILING

I hereby certify that on this 6th day of September, 2011, I caused to be mailed via United States first-class mail, postage pre-paid, two true and correct copies of the foregoing Reply Brief to: Gregory G. Skordas, Counsel for Respondent, at 341 South Main Street, Suite 303, Salt Lake City, Utah 84111.

A handwritten signature in black ink, appearing to be "A. G. Skordas", is written over a horizontal line.