

1991

Gudmundsen v. : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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BRIEF
J. Reul

IN THE SUPREME COURT OF THE
STATE OF UTAH

IN RE:

SERGE B. GUDMUNDSEN,

Disciplinary Proceeding.

No. 14580

BRIEF OF RESPONDENT

Appeal from the Judgment and Findings of the
Board of Commissioners of the Utah State Bar

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FILED

JUL 20 1976

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE
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SERGE B. GUDMUNDSEN,)	No. 14580
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BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is a disciplinary proceeding against the appellant, Serge B. Gudmundsen, brought by the Board of Commissioners of the Utah State Bar.

FINDINGS OF FACT AND RECOMMENDATIONS
FOR DISCIPLINE

The Board of Commissioners of the Utah State Bar, following a hearing before Commissioner James B. Lee, found the actions of the appellant in his handling of two matters complained of by Verus N. Thornley to be in violation of the Code of Professional Responsibility and Canners of Judicial Ethics of the American Bar Association in the following particulars: DR2-110 (B) (3) in failing to withdraw from one case after his physical condition had made it unreasonably difficult for him to carry out his professional responsibilities; DR2-110 (B) (4) for refusing to withdraw from one case

after he had been discharged by the client, Verus N. Thornely; and DR9-102 (b) (4) for failing to deliver to the client funds in his possession which had been advanced by the client and to which she was entitled upon her request.

The Board of Commissioners further found the appellant's handling of one matter complained of by Charles T. Hales to have violated the Code of Professional Responsibility and Canons of Judicial Ethics of the American Bar Association in the following particulars: DR2-110 (B) (3) in failing to withdraw from the case after his physical condition had made it unreasonably difficult for him to carry out his professional responsibilities; DR2-110 (B) (4) for refusing to withdraw from the case after he had been discharged by the client; DR6-101 (3) for neglecting a legal matter entrusted to him; DR7-101 (A) (2) for failure to fulfill his contract of employment; and DR9-102 (B) (3) (4) for failing to account for funds advanced by the client and failure to deliver said funds upon demand of the client.

Based upon the above findings, the Board of Commissioners of the Utah State Bar recommended to this Honorable Court that Serge B. Gudmundsen be suspended from the practice of law until he can satisfy the Board of Commissioners of the Utah State Bar and this Court that he is competent to practice law in the State of Utah.

RULING SOUGHT BY RESPONDENT ON APPEAL

Respondent requests affirmance of the Findings of Fact and imposition of the Recommendations of the Board of Commissioners of the Utah State Bar upon the appellant, Serge B. Gudmundsen.

STATEMENT OF THE FACTS

The action of the Board of Commissioners of the Utah State Bar was initiated in response to complaints filed with the Bar by two clients of the appellant, Serge B. Gudmundsen (TR 8-11). The fact pattern in each complaint is highly similar:

Mrs. Verus N. Thornley and her minor son were charged with disturbing the peace in a complaint filed by her neighbor following a verbal altercation between the two. Mrs. Thornley contacted Mr. Gudmundsen to defend herself and her son in the criminal matters and to bring a civil suit against the neighbor for damages arising from a long history of such hostile incidents (TR 88). In an oral agreement, Mr. Gudmundsen agreed to represent the Thornleys in all three matters for \$200.00 for each criminal case, and \$1,100.00 for the civil suit (TR 89). It was Mrs. Thornley's understanding that these fees would fully cover each action and the entire fee of \$1,500.00 was paid to Mr. Gudmundsen shortly thereafter (TR 90). The evidence submitted at the Bar hearing and the Findings of Facts of the Bar Commissioners show that Mr. Gudmundsen fully defended

Mrs. Thornley in the criminal proceeding against herself (TR 91-93, Finding of Fact No. 2), did nothing to represent Mrs. Thornley's minor son (TR 93-94, Findings of Fact No. 3), and proceeded slowly and erratically on the civil suit despite his client's frequent demands for more diligent progress until his health forced him to discontinue his practice in the summer of 1974, nearly two years after the agreement between he and Mrs. Thornley had first been reached (TR 94-109). During that time, the only known action taken by Mr. Gudmundsen was to file a complaint (TR 98), file a Notice of Readiness for Trial (See State Bar Exhibit 14), and take the defendant neighbor's deposition and accompany Mrs. Thornley to her deposition (TR 103).

Immediately following the conclusion of the criminal trial, Mrs. Thornley expressed reservations about continuing the civil suit, but was strongly encouraged by Mr. Gudmundsen that a suit alleging malicious prosecution would have a good chance for success (TR 95-96). At a subsequent meeting, Mrs. Thornley again expressed her reservations about continuing the suit, but consented to proceeding when told that only a partial refund of her fee was possible due to time and effort expended in preparation (TR 99-100). At a later date, after numerous delays, Mrs. Thornley informed Mr. Gudmundsen by letter that he was to withdraw as attorney for plaintiff, and

refund all unearned fees immediately with an accounting (State Bar Exhibit No. 15). Mrs. Thornley also demanded refund advanced for defense of her minor son since the charge had been dismissed on the Juvenile Court's own motion and without any apparent effort by Mr. Gudmundsen (State Bar Exhibit No. 15). Following receipt of this letter, the appellant herein called Mrs. Thornley and again convinced her to continue with himself as counsel while promising greater diligence (TR 102-103). Prior to this incident, which occurred more than thirteen months after their initial meeting, only the complaint had been filed. Thereafter, the Notice of Readiness was filed and depositions were taken. Several months later, Mr. Gudmundsen advised Mrs. Thornley not to plan a vacation for the upcoming summer since trial was imminent (TR 104). By the middle of that summer, appellant had suspended his practice without notice to his client. The next information Mrs. Thornley received indicated Mr. Vlahos had entered the case as substitute counsel and was entering appearances on her behalf at various hearings without her knowledge, including one on a Motion for Summary Judgment initiated by the defendant (TR 105). Beyond the last mentioned meeting, Mrs. Thornley was unable to locate or communicate with Mr. Gudmundsen (TR 104-109).

The second complaint was made by Mr. Charles T. Hales who retained Mr. Gudmundsen after being arrested and charged along with his wife with driving under the influence and public intoxication. At their first meeting, appellant suggested to Mr. Hales that he also file a false arrest suit against the arresting officers for the brutal treatment he received during his custody in connection with these charges. Mr. Hales accepted this advice (TR 22). Mr. Gudmundsen then agreed to represent the Hales on all three matters for \$200.00 for each criminal charge and \$1,800.00 for Mr. Hales' false arrest and battery suit (TR 19-21). Appellant did fully defend both Mr. and Mrs. Hales in criminal actions attaining a not guilty verdict for Mr. Hales, and eventual dismissal of the charges against Mrs. Hales (TR 24-25). As in Mrs. Thornley's case, these events occurred over a period of approximately twenty-two (22) months. During that time, appellant did not file the complaint in the civil suit or perform any work known to Mr. Hales, despite the fact that Mr. Hales was acquitted of the charges against him within a couple of weeks of their first meeting. During this twenty-two (22) month period Mr. Hales contacted Mr. Gudmundsen numerous times -- each time receiving assurances that the complaint would be prepared for his signature with days. Like Mrs. Thornley, Mr. Hales also terminated Mr. Gudmundsen demanding an accounting and refund of all unearned fees (State Bar Exhibit No. 5), only to be talked out

of that decision on appellant's promises to proceed with proper diligence in the future (TR 26-27, defendant's exhibit No. 3). Eventually, Mr. Hales was forced to retain another attorney and obtain a judgment in state district court before he could get a refund on any of the fee he advanced (State Bar Exhibit No. 1). During the interim, appellant made no accounting or refund of Mr. Hales' moneys despite numerous letters of demand and visits to appellant's office by Mr. Hales' second attorney, Mr. Farr (TR 28-29 State Bar Exhibits 4, 6-10).

ARGUMENT

POINT I

APPELLANT WAS AFFORDED A FAIR AND ADEQUATE HEARING

Respondent agrees with appellant's contention that due process of law requires a fair and adequate hearing in connection with matters such as that presented here, but denies that the hearing in this case precluded the presentation of a valid defense. The Hearing Commissioner fully acknowledged Mr. Gudmundsen's inability to attend for reasons of bad health (TR 5-7). At the outset of the hearing, Commissioner Lee asked counsel for Mr. Gudmundsen if he had any objection to the proceeding on the grounds that appellant's rights would be prejudiced by his absence. Counsel responded that Mr. Gudmundsen had authorized his counsel to represent him at the proceeding

and agreed to the hearing going forward at that time (TR 5). Appellant's counsel further indicated that no firm date could be predicted when appellant would be sufficiently recovered to attend the hearing. In the course of his reply, counsel for Mr. Gudmundsen seemed most concerned with the record reflecting that Mr. Gudmundsen's absence was due to his continuing health problems, and at no point did he make an explicit or strenuous objection to the proceeding going forward in Mr. Gudmundsen's absence (TR 5-6). Following counsel's response, the Hearing Commissioner noted the numerous continuances already extended to appellant and concluded that a diligent handling of these complaints coupled with the protection afforded Mr. Gudmundsen's rights by the presence of his counsel required that the hearing commence. This decision by the Hearing Examiner was neither arbitrary, unfair, nor prejudicial to the rights of the appellant herein.

At Page 9 of his brief, appellant states: "An examination of the transcript from the court will evidence that the counsel for the appellant was indeed unable to make an adequate defense of his client . . . for appellant was repeatedly denied opportunities to introduce matters in contradiction and mitigation of testimony of the adverse witnesses by reason of the absence of the appellant." It is interesting to note that this purely conclusory statement is not supported by any citation

to any portion of the record revealing any refusal to admit any evidence or information contradicting that given by the witnesses and complainants at this hearing. In fact, the transcript discloses that counsel for the appellant made no proffer of or reference to any type of evidence or information which could contradict or qualify or in any way change the meaning of any of the evidence submitted by the complainants and witnesses in this hearing. Appellant's brief to this Honorable Court is likewise void of any reference to or indication of the existence of any evidence or information which would mitigate or disprove the charges brought against the appellant in this proceeding, or any other explanation of the meaning of this allegation.

Moreover, the medical evidence submitted to the Hearing Examiner to establish appellant's inability to attend discussed only appellant's inability to travel due to the delicacy of the surgery performed on his eyes. Since appellant, Serge B. Gudmundsen, was personally responding to interrogatories in the law suit initiated against him by Mr. Hales just shortly before the date of this hearing, it must be concluded that Mr. Gudmundsen was capable of comprehending questions and framing answers relating to these matters. Appellant, therefore, could have prepared affidavits for this hearing or could have been deposed by his own counsel for purposes of

preparing an admissible evidentiary record on his own behalf. Similarly, appellant was not prohibited from introducing his files on these cases to demonstrate the extent of his diligence and work product. Appellant was, therefore, not denied the opportunity to present a valid defense merely because he was not present and the hearing was conducted under the Rules of Evidence in effect in the District Courts of this State.

The effect of this argument by the appellant is to boot-strap a defense where none exists. That is, appellant declined to offer a defense when he had the opportunity to do so, and now he submits to this Honorable Court that the absence of that defense is denial of due process. The fact is, appellant was afforded every reasonable opportunity to rebut the information alleged in the complaints filed by Mrs. Thornley and Mr. Hales, and so received a fair and adequate hearing.

POINT II

THE PROCEDURE CHALLENGED HEREIN
WAS PROPERLY CONDUCTED AND THE
FINDINGS OF FACT AND RECOMMENDATIONS
OF THE BOARD OF COMMISSIONERS OF
THE UTAH STATE BAR WERE NOT DRAWN
ARBITRARILY FOLLOWING THAT PROCEEDING.

Respondent fully agrees with appellant's contention that it is the power and duty of this Honorable Court to review the record in this matter to insure that the hearing was properly conducted and that the Findings of Fact and Recommendations published by the Board of Commissioners of the Utah State

Bar were not arbitrarily drawn from the evidence produced at that hearing. Indeed, this review could not proceed otherwise since it is the sole and exclusive province of this Court to impose the penalties recommended by the Board of Commissioners.

In respect to these duties and responsibilities, respondent denies that this Court has not been presented with any significant evidence because of arbitrary or improper exclusion at the hearing challenged herein. Again, appellant had every reasonable opportunity to present alternative forms of direct testimony such as affidavits, depositions, or documents from his case files to rebut the allegations contained in the complaints made against him to the State Bar. This is nothing more than the same boot-strap argument made before, that because appellant declined to put on a defense the findings and recommendations of the Board of Commissioners are arbitrary for being one-sided. In fact, there is substantial evidence in the record for every finding reached by the Board of Commissioners. Against that evidence, the hearing record is void of any proffer or indication of any evidence or information which would contradict, mitigate, or otherwise qualify the evidence supporting the findings published by the Board of Commissioners. Similarly, appellant's brief fails to cite this Court to one instance where any evidence of substantial importance was excluded by the Hearing Examiner, or any mention or protest of appellant's counsel that such evidence

existed and could not be presented unless the hearing was postponed until the appellant could appear personally. As such, apart from appellant's conclusory statements there is no information before this Court which would indicate that it does not have before it all the evidence pertinent to this matter.

Appellant argues in his brief that he was denied due process by being prevented from introducing evidence that the demands of the complainants were unreasonable when the work product of the appellant was compared to the total fees received. First, the evidence presented was that the fees for each individual action were agreed to before money was paid by either of the complainants, and the appellant himself at Page 12 of his brief cites Utah Code Annotated 78-51-41 for the proposition that the rate of compensation for legal services is a matter wholly between the attorney and his client. That evidence would need to be rebutted before this argument would have been material. No such rebuttal evidence was offered.

Second, such evidence is immaterial to the charges made against Mr. Gudmundsen regardless of the fee agreements. This is a disbarment action, not a suit for recovery of unearned fees. Appellant has been charged with failure to account for fees paid when so requested by his clients, failure to withdraw when requested, failure to withdraw after he became physically incapable of continuing his work, substitution

of counsel without the consent of his client, neglect of a legal matter entrusted to him, failure to carry out his contract of employment, and prejudice of his client's case by his actions. Whether in the opinion of anyone else he earned more than the originally stipulated fees in his criminal defense of any of these individuals has no bearing on any of the above charges. For the same reasons, appellant's inclusions of an affidavit referring to the settlements of each claim, one in satisfaction of the judgment resulting from Mr. Hales' law suit, and the other from an out of court settlement with Mrs. Thornley, has no bearing upon the charges presented here whatsoever. In the final analysis, this whole line of argument presents a complete confusion between disbarment charges and a suit for return of unearned fees when the two are separate and distinct proceedings relying on different charges, considerations, and defenses. To raise in one proceeding a defense unique to the other, as appellant does here, is simply not to respond to the charge at issue. Appellant made the same objection in respect to Mr. Hales' complaint at the Bar Hearing and it was properly denied by the Hearing Examiner for the same reasons presented now.

Thirdly, as has been discussed previously, appellant had every reasonable opportunity to submit all proper and material evidence he could otherwise offer if present personally

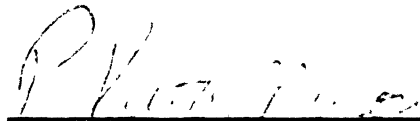
through deposition or affidavit or submission of his case file into evidence. The fact is, if he had any material evidence to present on his behalf he declined to do so, and so has no standing to complain of that fact now.

CONCLUSION

The record in this matter clearly discloses that appellant herein was afforded a fair and adequate hearing in this disciplinary proceeding. The Findings of Fact and recommendations of the Board of Commissioners of the Utah State Bar presented to this Honorable Court are all based on substantial and uncontroverted evidence presented by the complaining parties and their witnesses. At this hearing the appellant had the opportunity but declined to present positive evidence in rebuttal of that offered by the prosecutor for the State Bar. The errors alleged by the appellant on this appeal are inconsistent with the record or immaterial to the complaints lodged by the complainants herein. This hearing procedure was, therefore, proper and there is no evidence that the record presented to this Court does not contain all of the material evidence and information necessary for this Court to fully review this matter and take final action. The ultimate settlement of the monetary aspects of Mrs. Thornley's and Mr. Hales' complaints cannot alter the important facts which establish that the manner in which Mr. Gudmundsen handled their cases constituted a breach

of the Code of Professional Responsibility and Cannons of Judicial Ethics in several particulars for which reason this Court should suspend Serge B. Gudmundsen's authority to practice law until he can demonstrate to this Court that he is able to resume practice in a competent and responsible manner.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "P. Keith Nelson", is written over a horizontal line.

P. KEITH NELSON
Attorney for Respondent
716 Newhouse Office Building
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

MAILED, postage prepaid, a copy of the
foregoing Brief of Respondent to Pete N. Vlahos,
Attorney for Appellant, Legal Forum Building,
2447, Kiesel Avenue, Ogden, Utah 84401.

DATED this ____ day of July, 1976.

Secretary