1971

In Re: George H. Badger : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE:

GEORGE H. BADGER,
Disciplinary Proceeding

Case No. 12,052

APPELLANT'S BRIEF

Appeal from Findings and Conclusions of Disciplinary Committee, and recommendation of Board of Commissioners, Utah State Bar

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TABLE OF CONTENTS

AUTHORITIES CITED

CASES

STATUTES CITED

TEXTS CITED

RULES CITED

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STATEMENT OF THE KIND OF CASE

Disciplinary proceeding before the Board of Commissioners of the Utah State Bar.

DISPOSITION BY BAR COMMISSIONERS

The Board of Commissioners of the Utah State Bar adopted the Findings and Conclusions of the Disciplinary Committee and recommended disbarment.

RELIEF SOUGHT ON APPEAL

George H. Badger seeks dismissal of charges and vindication, or that failing, seeks suspension for a limited period rather than disbarment.

STATEMENT OF FACTS

George H. Badger was admitted to the Bar on November 7, 1960, and commenced practicing law about May, 1961. He is 40 years of age, married, and is the father of five children.

He engaged in the practice of law through the latter part of 1966, when Robert Lord moved into the same offices. Badger completed the transition of his law practice to Lord about March, 1967, (R. 660) and since that time Badger has been engaged in various commercial enterprises, and not in the practice of law. (R. 118, 119, 659, 660, 661, 663, 667, 668, 718, 586, 595, 598, 599, 602, 648, 631).

Two independent matters are involved in this proceeding, the first having occurred in connection with the purchase of his residence at about the time that he commenced his practice of law, and while he was green and inexperienced in the practice of law (R. 591, 692). The second matter occurred about six months after Badger ceased to practice law (R. 659) and involved a brief association with a computerized check collection agency known as Federal Check Clearing House. Both matters involved Badger's activities in commercial enterprises and neither matter involved his relationship with clients in the practice of law. (R. 728.)

A civil fraud judgment was entered against Badger in February, 1964, in an action by Howells pertaining to the purchase in 1961 of his residence (Ex. 25, P. 51). The Court found that he had misrepresented the validity and value of certain promissory notes and mortgages assigned to Howells to secure payment of a previously unsecured balance due on the purchase price of the residence. (Ex. 25, P. 46-52). Badger denies that he in fact misrepresented said notes to Howells, alleges that the notes were given to secure a pre-existing unsecured obligation (R. 560, 561, 566, 684), and that Howells parted with

nothing in exchange for the notes (R. 560, 561, 566, 694, 702) and were no worse off if the notes were valueless than they were before the notes were received (R. 570, 572, 574), that Howells were in fact not defrauded. A delay of approximately 8 years occurred between the alleged misconduct and the commencement of the hearing in this matter (R. 726, 727), although oral complaint was made by Howells to the Secretary of the Bar shortly after the alleged misconduct (R. 726, 727), and Howell wrote a formal letter of complaint to the Bar approximately three years before the complaint was filed and about four years before the hearing before the bar commenced.

The Federal Check Clearing House matter occurred about six months after Badger ceased practicing law (R. 659, 660). He was employed as sales manager for a snowmobile distributor calling on merchants when he interested his employer in entering into a computerized check collection agency as joint-venture with another organization which was then engaged in collection of dishonored checks for merchants (R. 658). Badger had an option to purchase stock of his employer but never exercised that option (R. 719). He was not an officer, director or stockholder of his employer corporation (R. 658).

The joint-venture operated under the name of Federal Check Clearing House (herein referred to as FCCH), with an accountant handling the computer programming, print out of demand letters, accounting information and preparation of a summons. From the beginning of the operations independent counsel was employed by

FCCH to represent them in their legal matters (R. 627, 663). Initially that attorney was Robert Lord, the attorney to whom Badger had transferred his legal practice. Badger was not a partner with Lord and did not share in any fees earned by Lord from FCCH (R. 663, 630). Lord reveiwed the collection letter used by FCCH and furnished legal advice to FCCH on an hourly fee basis (R. 639, 617). FCCH assessed collection charges and punitive damages against check writers which they retained as their revenue and remitted the full amount of the check to merchants. Initially the demand letters were erroniously programmed to show Lord's initials, but with Badger's signature block (R. 631, 632), and a signature stamp that Badger had available for a commercial enterprise was used by FCCH without his knowledge or consent to sign Badger's name to the computer printed letters (R. 664, 610). When Badger and Lord learned of this error it was corrected to show Lord's name as the writer of the letter (R. 600, 664). Demand letters previously used by the other joint-venturer were used with a few minor changes suggested by Lord (R. 634). Those letters improperly advised the check writer that he was liable for attorney fees and included a reference to the criminal code concerning issuance of checks against insufficient funds. (Ex. 13, 14). Badger solicited business for FCCH from approximately two or three business, (R. 666) some of whom claim that Badger represented that he would act as attorney for FCCH in collecting checks. Badger denies that he made any such representations and denies that he at any time intended to act as attorney for FCCH in collecting

checks. (R. 631, 118, 119, 659, 660, 661, 663, 667, 668, 718, 586, 595, 598, 599, 602, 603, 648). The merchants who claim that Badger represented that he would act as attorney for FCCH did not employ FCCH services. (R. 216, 221).

More detailed statements of fact are included with the argument under specific points.

ARGUMENT

POINT I

HOWELLS WERE NOT DEFRAUDED

(a) *Howells parted with nothing of value.*

About Sept. 8, 1961, Howells exchanged a residence to Badgers for a $20,000.00, ½ interest in a real estate contract concerning some West Yellowstone property and assumption by Badger's nominee of an existing mortgage on the residence. (Exhibit 32) Title to the Yellowstone property failed as the result of a default by a third party and Howells then had a $20,000.00 unsecured claim against Badgers. (R. 560, 561, 562, 570, 571, 572) Badger then obtained two promissory notes (Exhibit 34, 35) totaling $55,000.00 which were assigned to Howels about January, 1962, well after Howells had deeded the residence and surrendered possession of the residence to Badgers. (R. 565, 695, 696). Said notes were assigned as security for the $20,000.00 indebtedness. (R. 566). The claimed fraud is an alleged misrepresentation by Badger to Howells concerning the validity of the $55,000.00 notes assigned to Howells as security for the $20,000.00 unsecured Badger obligation. From the time that the

West Yelllowstone transaction failed, Howells had an unsecured claim against Badgers (R. 570, 571, 572).

Howells were in no worse position after receiving allegedly worthless notes from Badger than they were before those notes were received since they still had th same unsecured claim against Badgers. (R. 570, 571, 572). Howells parted with both title and possession of the residence in reliance upon promises by Badgers to perform future acts of providing security and paying the obligation. (R. 560, 561, 562). Failure to perform a future promise cannot constitute fraud.

Probably the reason that the fraud was included in the findings was to prevent the possible discharge of the judgment in bankruptcy. Had the fraud question been an important consideration in deciding the case certainly Judge Hansen would have included fraud in his memorandum decision. (Exh 25, p 43-44).

(b) *The Court struck all findings of fraud.*

The memorandum decision made by the Court did not include findings of fraud but only findings that Badgers were indebted to Howells for the unpaid purchase price and for attorney fees. (Ex. 25, P. 43-44). The judgment is inconsistent in that it includes an award for attorney fees under the terms of the earnest money receipt (Ex. 32), yet purports to be based upon fraud which would be a tort claim upon which no attorney fees could be awarded.

Howells expressly consented to the Court reviewing the trial record in their affidavits and to the striking of all reference to fraud in the findings, conclusions and judg-

ment in the event that the Court found that the Defendants were not in fact guilty of fraud. (Ex. 48, pages 4-7) Judge Hansen in fact made the following order after a review of the Court record and the Howell affidavits:

> ". . . ORDERED, that all reference in the Findings of Fact, Conclusions of Law or Judgment entered in the above entitled matter to fraud by the Defendants George Badger and LaJuana I. Badger be and the same hereby are struck and deleted therefrom, and that no fraud exists or is found in this matter, it appearing to the Court that prior to the delivery of said notes to Howells by Badger the Badgers owed an unsecured indebtedness to Howells and thaat Howells did not part with anything of value or change their position in reliance upon or in exchange for said notes, and that when said notes proved to be valueless that Howells were still the holders of an unsecured claim against Badgers."

The Court had authority to correct its Findings and Judgment, Rule 60(b), URCP; Granite School Dist. v. Cox, 16 U. (2d) 20,395 P.2d 55; CJS Judgments, Sec. 230, 232, particularly in view of the stipulation by Howells authorizing such correction. (Ex. 48, Pages 4-7). It was unnecessary to give notice of the motion to correct the Findings and Judgment to or to obtain the permission of Howell's prior counsel because their services had long since been terminated and they were no longer representing Howells. (R. 801).

The Bar Committee was advised that Badger intended to ask Judge Hansen to review the record and to strike the findings of fraud and the Prosecuting Committee of the Bar was invited to appear before Judge Hansen and to participate in argument of the motion to correct the findings and judgment. (R. 801). Judge Hansen tried the case and was in the best position of anyone to rule on the fraud question and to determine whether or not Badger had committed fraud and whether the fraud findings should or should not be struck. The logical place to litigate the fraud question was before Judge Hansen. The prosecuting Committee elected not to participate in those proceedings and should not now be permitted to question Judge Hansen's order striking the fraud findings. The Court record of the Howell case as amended by Judge Hansen's order establishes a prima facia case of Badgers innocence.

(c) *Badger did not misrepresent the validity of the Bigler notes.* (R. 712).

Badger produced a contract giving an option (Exhibit 47) to his nominee, Stanley H. Mellor, to purchase for $80,000.00 the Idaho property pledged as security for the promissory notes, which option was granted in recognition of the security interest represented by the promissory notes (Exhibits 34 & 35) assigned to Howells as security for the $20,000.00 Badger obligation. Had Howells accepted, retained and enforced those notes they would have had to pay prior obligations of $180,000.00 secured by that property which is $100,000 more than the option price. (Exhibits 34 & 35). Bigler stipulated that

he was in fact indebted to Badger and agreed to pay Howells (Ex. 25, Page 35-36) but did not pay. Badger participated in the foreclosure action in the Idaho Courts where the validity of the interest mentioned in those promissory notes was recognized. (R. 702). It should be noted that the promissory notes (Ex. 34 & 35) show that they were recorded in the office of the County Recorder. Howells were offered an opportunity to acquire the Idaho property under the terms of the option agreement. (R. 703).

POINT II

UNCONSCIONABLE DELAY FROM ORIGINAL COMPLAINT BY HOWELL TO BAR REQUIRES DISMISSAL OF HOWELL CHARGES

(a) *Badger was deprived of his constitutional right to a speedy trial.*

Howell and his wife discussed their complaints concerning Badger with Dean Sheffield, Secretary of the Utah State Bar Association, early in 1961 or 1962. (R. 727). Howell wrote a letter of complaint to the Bar, July 22, 1965 (Ex. #1) wherein he asked the Bar to investigate Badger, indicated that he would be at the "disposal" of the Bar should they wish to contact him, and stated that the facts were set forth in case #134741 in the District Court of Salt Lake County. The complaint was not filed by the Bar until September, 1968, approximately 7 years after the Howell transaction (Ex. 32) and the first complaint to the Executive Secretary of

the Bar, and over 3 years after Howell's letter to the Bar (Ex. 1). The facts in the case were approximately 8 years old at the time of the hearing. Memories were dim, witnesses were no longer available, and this long delay made it impossible for Badger to defend the case on the merits by presenting witnesses other than himself. His records were incomplete and not readily available. Badger had long since abandoned his appeal to the Supreme Court from the judgment in the Howell case and paid that judgment. Had the Bar acted when the first complaint was made by Howell, remedies then available in that proceeding by way of appeal or otherwise could have been utilized to protect Badger's interests. It is manifestly unfair to call upon him to defend himself against charges concerning transactions more than 8 years old, particularly where no just cause for the delay exists.

Lawyers are first class citizens and as such are entitled to the same Fourteenth Amendment rights in disciplinary proceedings as any other person. Spevack V. Klein (1967) 385 U.S. 511, 87 S. Ct. 625. State v. Mathis (1957) 7 U. 2d 100, 103; 319 P.2d 134, 136. In the Spevak case the Court held that assertion of the privilege against self-incrimination by a lawyer who refused to produce records did not justify disbarment. The right to practice law is a property right and no attorney can lawfullly be deprived of such right except by due process of law. In re Ruffalo (1968) 390 U.S. 544, 88 S. Ct. 1222; In re Schlesinger (1961) 404 Pa. 584, 172 A.2d 835. In Klopfer v. State of North Carolina (1967) 386 U.S. 213, 87 S. Ct. 988, the Court held that the right to a speedy

trial is guaranteed to defendants in state courts pursuant to the Sixth Amendment which is held to be included within the Fourteenth Amendment protections. Badger was entitled to a speedy trial of the Howell complaint. Surely a delay of 6 or 7 years from the time of the first oral complaint to the Bar by Howell, of over 3 years from the first written complaint by Howell to the Bar, and of approximately 4 years from the time of that written complaint until the Bar hearing is a denial of Badger's right to a speedy trial. Prejudice is presumed when a person is denied such a fundamental constitutional right as the right to a speedy trial. 5 Wharton's Criminal procedure 514 and cases there cited.

The entire responsibility for providing a speedy trial to an accused lawyer rests on the shoulders of the Bar Commission, and this duty cannot be delegated. 21 Am. Jur. 2d 279. Badger had no duty with respect to it. There can be no question that Badger was greatly prejudiced by this unconscionable delay.

The time in which an accused is to be secured in his right to a speedy trial must be computed from the time when the prosecution has available to it evidence of the alleged offense sufficient to put them on a duty of making further inquiry. People v. Hrycink, 36 Ill. 2d 500; 224 NE 2d 250.

(b) *Stale disciplinary proceedings are regarded with disfavor.*

In his explanation of the majority opinion in the Bridwell matter Justice Ellett stated:

> ". . . disciplinary proceedings initiated a long time after the alleged commission of the act complained of should be regarded with disfavor and due allowances made for the lack of opportunity on the part of the accused attorney to present a proper defense under the circumstances." In re Bridwell, Utah Su, preme Court Case #11546, _____ U.2d _____, 474 P.2nd 116.

The doctrine of laches is applicable to disciplinary proceedings. 7 Am. Jr. 2d. 86; In re Steffensen (1938) 94 U. 436, 78 P.2d 531. State v. Haggerty (1942) 241 6 N.W.2d 203. Thornton on Attorneys, Sec. 880. Columbus Bar Assn. v. Teaford, (1966) 117 N.E.2d 872. Murrell v. Florida Bar (1960), 122 So. 2d 169; In re Ratner (1965), 399 P.2d 865; Florida Bar v. King (1965), 174 So. 2d 398.

(c) *This proceeding is barred by Statute of Limitations*

In the Bridwell case Supra, Judge Ellett indicated that:

> ". . . absent a statute or rule on the matter, we do not think the statute of limitations applies to a disciplinary proceeding against a member of the bar . . ."

It is respectfully suggested that the Court re-examine the applicability of existing statutes of limitations to a disciplinary proceeding. 76-1-11 (4), UCA, 1953, defines a crime or public offense as including the commission or omission of an act forbidden or commanded by law, and which is punishable by removal from office. An attorney is an officer of the Court and holds an office within the meaning of that statute. 76-1-13, UCA, 1953, classifies as misdemeanors all crimes or public offenses which are not felonies, and 77-9-6, UCA, 1953, fixes a

two year statute of limitations on misdemeanors. The two year statute of limitations on prosecution of misdemeanors; and, even the four year limitation on prosecution of felonies provided by 77-9-2, UCA, 1953, expired before the commencement of this proceeding and constitute a bar to the Howell matter.

77-51-1, UCA, 1953, provides in part as follows:

> "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases:
>
> (1) When a person has been held to answer for a public offense, if an information is not filed or an indictment found against him at the next term of the court at which he is held to answer.
>
> (2) If the defendant, whose trial has been postponed upon his application, is not brought to trial at the next term of the court in which the *information or indictment is triable* after is filed or found.

In State v. Mathis, 7 U. (2d) 100, 319 P.2d 134, this Court held that the time limitations provided by that statute are maximum limitations unless good cause for delay is shown. The Bar Association is an arm of the judiciary and of the State of Utah and as such is bound to protect the rights of the accused in the same manner as a person charged with a public offense in the criminal courts. Both periods limited by said statute expired before commencement of the hearing in this matter.

Section 78-12-25, UCA, 1953, fixes a four year limitation on commencement of a action where no other period of limitations is specifically provided; and 78-12-33, UCA,

1953, provides that the Statute of Limitations is applicable where the action is brought in the name of or "for the benefit of the state," and 78-12-46, UCA, 1953, provides that "action" includes special proceedings of a civil nature. The Utah Bar is an integrated bar and is an arm of the State of Utah, under authority granted by 78-51-12, UCA, 1953.

The policy reasons precluding stale actions in a civil proceeding are equally applicable to disciplinary proceedings as to other cases.

POINT III

THE EVIDENCE DOES NOT SUPPORT FINDING THAT BADGER WAS ATTORNEY FOR FEDERAL CHECK CLEARING HOUSE

(a) *Solicitation*:

Badger had discontinued his law practice over six months before he participated in Federal Check Clearing House, hereafter referred to as FCCH. (R. 659, 660). He was not then interested in doing any legal work for for FCCH and in fact FCCH was represented by Lord and other attorneys from the time that they commenced business (R. 631, 118, 119, 659, 660, 661, 663, 667, 668, 718, 586, 595, 598, 599, 602, 603, 648). Letters from Lord's office which still contained Badger's name on the letterhead (in connection with the transfer of Badger's law practice to Lord) (R. 660) were sent to persons who had issued dishonored checks. For a period of time those letters did erroniously contain the name and signature stamp of Badger, however when Badger discovered this

matter the compute was reprogrammed and his name was removed from the letter (R. 600, 637, 664). Badger was guilty of poor judgment and poor control of the situation to permit this to occur and to thus create the impression that he was attorney for FCCH, but in fact he was not and never intended to act as their attorney (R. 118, 119, 586, 595, 598, 599, 602, 603, 631, 659, 660, 661, 663, 667, 668, 718).

The only other evidence presented by the prosecution tending to indicate that Badger was acting as or intended to act as attorney for FCCH was the testimony of Doris Smith and Robert V. Johnson concerning a conversation between Badger and Johnson of Albertsons wherein they claim that Badger stated that if checks were not paid that he would take them to court since he was a lawyer. (R. 235). Melvin G. Jacobs was called as a witness by the prosecution to testify concerning that conversation, however he stated that there was no conversation with respect to Badger operating as an attorney (R. 205). Badger also denies that he represented in any manner that he was an attorney or that he would be involved in collecting checks for FCCH. (R. 631, 118, 119, 659, 660, 661, 663, 667, 668, 718, 586, 595, 598, 599, 602, 603, 648). In paragraph #2 of the Findings by the Committee (R. 47) it is claimed that in reliance upons such representatives Albertsons Inc. entered into an agreement through Badger to have FCCH collect dishonored checks for them. This finding is in error since the Albertsons store where Johnson, Smith and Jacobs were employed never used the service of FCCH. (R. 216, 221). The Albertsons store where Dastrup was employed did use

the service of FCCH, however Dastrup was not even aware that Badger was an attorney (R. 194), and it is unlikely that Badger even participated in solicitation of that store since Dastrup was unsure about his identification of Badger (R. 197, 199) and Badger expressly denied that he ever met Dastrup before the hearing (R. 719).

Badger did not use good judgment in participating in solicitation of any business for FCCH because of the false impression that such solicitation might create in the minds of persons who knew that he was an attorney; however, it is not illegal for a person who is not practicing law to engage in solicitation of business for a collection agency. His activities somehow created an impression in the minds of Johnson and Smith that he was soliciting legal business for himself, and the letter that was sent to check writers containing his name created that impression in the minds of others. Badger is guilty of poor judgment and poor control of the activities of his associates, but is not guilty of solicitation of legal business for himself; and, use of poor judgment in a commercial business does not warrant disbarment.

(b) *Use of word "Federal" in FCCH name*

Badger did not research the law concerning use of the word "Federal" in the name of FCCH, however he did discus it with four (4) attorneys, (R. 662) including an assistant United States Attorney, (R. 649) and use of "Federal" in the name was immediately discontinued after about four to six (4 to 6) weeks use, when objection was made by the office of the United States Attorney.

(R. 662). Use of the word "Federal" in FCCH name was poor judgment but does not warrant disbarment, particularly where these acts were done in a non-proessional capacity as a businessman and not as an attorney. Re Jones (1926) 68 U. 213, 249 P. 803.

(c) *Contents of collection letters*:

Statements contained in the collection letters to the effect that the debtor was liable for attorney fees and the indication therein that issuance of a dishonored check was a criminal offense were improper. (Exhibit 14). The statement concerning punitive damages and costs and the automatic issuance of a summons if the check was not paid by a particular date appear to have been accurate statements. (Exhibit 14).

Badger was not the author of the collection letter. Apparently substantially the same letter had been used for some time by Collect-A-Check who operated FCCH as a joint venture with "Ardco," and the letter was continued in substantially the same form with only minor revisions after being reviewed by FCCH attorney. (R. 604, 636, 611). Badger used poor judgment in permitting that letter to be used by FCCH while he was affiliated in any manner with that organization, however his contact with the program was limited (R. 602, 665) and covered only a short period of time, after which he disassociated with FCCH. (R. 665). It is important to keep in mind that Mr. Badger's activities were those of an employee of a commercial enterprise and not that of an attorney actively engaged in the practice of law. He did not share in any legal fees paid by FCCH (R. 617, 630,

663). An attorney will not be disbarred for misconduct not in his professional capacity, unless such conduct is infamous or very gross. In Re Jones, 68 U. 213, 249 P. 803, held that the change of name of the grantee in a deed after it's execution did not warrant disbarment.

CONCLUSION

The transactions involved in this proceeding were in a non-professional capacity, the first in connection with the purchase of a residence from Howell who was never a client of Badger, and the second in connection with a computerized check collection agency known as Federal Check Clearing House some six months after Badger discontinued the practice of law. It is only when misconduct by an attorney in a non-proessional capacity is "infamous or very gross" that he will be disbarred. Re Jones (1926) 68 U. 213, 249 P. 803 (holding that a change in the name of the grantee in a deed after its execution, in the name of the grantee in a deed after its execution did not warrant disbarment). The Disbarment recommendation of the Bar Commission is too harsh punishment for the circumstances existing in this case. In Re Bridwell, Utah Supreme Court Case #11546 _____ U.2d _____, 474 P.2d 116.

In view of the delay in the Howell matter of eight (8) years from the occurance of the alleged misconduct to the date of the hearing, of approximately seven (7) years from the first oral complaint to the Bar and three (3) years from the written complaint before the proceedings were comenced and approximately four (4) years from

the written complaint to the date of hearing, the Howell matter should be dismissed as a stale claim, as barred by the statute of limitations, by latches and because of denial to Badger of his right to a speedy trial. The record does not "clearly establish" Badger's guilt in the Howell matter, particularly where the Judge who made the finding of fraud has now struck all fraud findings from the record and has held that Howell was not in fact defrauded.

Substantial disputes exist as to the extent of Badger's responsibility for the content of the demand letters and concerning representations made concerning his intent to act as attorney for Federal Check Clearing House (FCCH). No evidence was adduced which would indicate that Badger ever commenced or participated in a lawsuit by FCCH or that he received any attorney fees directly or indirectly from FCCH. FCCH employed an independent lawyer from the beginning of its operations.

Badger did use poor judgment in being involved in any manner with FCCH when it was sending improper demand letters, in not preventing the improper use of his name and signature stamp on those letters, and in engaging in any manner in solicitation of business from merchants who might be aware that he was an attorney and who might thereby obtain the impression that he was soliciting legal business for himself. Badger also used poor judgment in failing to keep in close enough contact with the business activities of FCCH to prevent errors such as the use of his name on demand letters and the use of improper methods in those demand letters.

It should be kept in mind that in connection with these activities Badger was acting as a businessman and not as an attorney and accordingly he was not held to the same high standard as an attorney engaged in the practice of law.

If George Badger is to be punished for his poor judgment we feel that the punishment of disbarment recommended by the Bar Commission is too harsh. He has in fact been voluntarily suspended from the practice of law for over four years. His name should not be unnecessarily tarnished by disbarment under the circumstances.

Respectfully Submitted,

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