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IN THE SUPREME COURT
OF THE STATE OF OREGON

In re Complaint as to the Conduct of James E. Leuenberger, Accused.	Oregon State Bar Case N° 98-59 Supreme Court Case N° S50178

Accused's Petition and Brief

On Review from the Trial Panel Decision
of Oregon State Bar Disciplinary Board
Dated December 11, 2002

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Index of Contents of Brief

Index of Authorities

Oregon Case Law

Oregon Statutes

Court Rules

OSB Rules

ABA Standards for Imposing Lawyer Sanctions

Other Authorities

Petition

Pursuant to ORS 9.536, ORAP 11.25(2)(a), and BR 10.5(a), the accused petitions the Oregon Supreme Court to reject in whole the decision of the Trial Panel of the Oregon State Bar Disciplinary Board.

Brief

As to the Bar's First and Second Causes of Complaint

DR 7-110(B)(2) and (3), Improper *ex parte* contact with a Judge.

UTCR 5.060(1) provides:

> "Any stipulated or *ex parte* matter may be delivered by mail or messenger to the trial court administrator for distribution to a judge for signature. An *ex parte* default, a stipulated order or a stipulated judgment also may be personally presented to a judge by the attorney or the attorney's agent. Other types of *ex parte* matters personally presented to a judge must be presented by the attorney."

Under that rule, there are three types of personally-presented *ex parte* matters. Two types, default and stipulated, may be presented by an agent of an attorney. The third type, all other personally-presented matters, must be presented to the court by the attorney.

The record clearly shows "prompt delivery" of the motion by fax transmission prior to the accused's personal presentation of the motion to the court under UTCR 5.060(1).

DR 7-110(B), in pertinent part, provides:

> "In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

"* * * *

"(2) In writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer.

"(3) Orally upon adequate notice to opposing counsel or the adverse party if the adverse party is not represented by a lawyer."

The Bar ignores the clear distinction between DR 7-110(B)(2) and (B)(3). A communication "as to the merits of the cause" made "in writing" requires only prompt delivery of the written communication to opposing counsel, whereas a communication "as to the merits of the cause" made "orally" requires adequate notice to opposing counsel.

Under the Bar's construction of DR 7-110(B), a written *ex parte* motion and order cannot be personally presented to the court by an attorney without adequate notice to opposing counsel. Because such a construction would read DR 7-110(B)(2) completely out of existence as to personally-presented motions, and because all the words of DR 7-110(B) must be given meaning, the court should decline to adopt the Bar's construction of DR 7-110(B).

In 1997, Washington County SLR 7.021(3) provided:

"Any motion which is presented ex parte shall have attached to it a certificate of service which shall include the date, time and manner of service upon the opposing party(ies), the party(ies') attorney(s), or that no service was made, if appropriate. When the service includes telefacsimile transmission, the following shall be added to the Certificate of Service:

"I further certify that I served a copy of said documents on _____ by telefacsimile transmission to him / her at (___) ___-____ on _____, at the hour of _____ _.m."

Thus, under the applicable SLR, "prompt" delivery necessarily included fax transmission service of *ex parte* documents before presentation to the court.

In the case of each ex parte communication at issue here, all communication to the merits was solely in writing, without oral argument, and promptly delivered to opposing

counsel by facsimile transmission. Tr 139-142, 147, 152-153.

The accused did not violate DR 7-110(B)(2) or (3).

DR 7-102(A)(2), Knowingly Advancing an Unwarranted Claim.

First Instance

The accused believed and still believes that a challenge to the court's jurisdiction may be presented at any time. The accused moved on his client's behalf to vacate an amended supplemental judgment which had been entered at a time when the trial court did not have jurisdiction of the cause to enter such an amended judgment because the judgment amended thereby was, itself, a supplemental judgment for attorney fees which was, at the time of amendment, on appeal.

The amendment did not award any additional fees, but rather merely corrected a defect which barred issuance of execution. Thus, opposing counsel Kosydar could have invoked the trial court's jurisdiction by moving for relief under ORCP 71 and, as required by that rule, filing a copy of the motion with the Court of Appeals. While a judgment is on appeal, the trial court retains jurisdiction, under ORS 19.033(1), only "pursuant to statute or rule." Kosydar did not invoke the trial court's jurisdiction pursuant to statute or rule; rather, she simply submitted, without motion, an amended supplemental judgment correcting the defect.

The court sanctioned the accused for filing the motion on a finding that it was interposed "to delay and hinder" the sheriff's sale. The accused appealed the sanction judgment, arguing, by reference, that the motion to vacate was based on valid legal grounds. *See* Appellant James E. Leuenberger's Brief and Abstract of Record, App 1-4. The basis for the accused's motion is summarized above.

The Court of Appeals held that the trial court did not abuse its discretion in imposing sanctions against the accused. However, the Court of Appeals denied an application by Kosydar for attorney fees on appeal under ORS 20.105, stating that the accused had "objectively reasonable grounds for appealing."

The accused submits that such determination by the Court of Appeals disposes of the question of whether or not the accused's motion was warranted by existing law for the

motion, itself, served as the basis for the appeal of sanctions on the motion.

The motion and the law on which it is based speak for themselves.

The Bar argues that an order denying attorney fees on appeal under "ORS 19.160" where there is "slight merit" for the appeal "does not alter the Court's holding sustaining the trial court's sanction." How that argument supports the bar's case is not clear. However, Court of Appeals order [Accused's Exhibit No. 109] denying attorney fees, in its entirety, reads as follows:

> "Respondent has petitioned for an award of attorney fees *pursuant to ORS 20.105*. The court determines that appellant had objectively reasonable grounds for appealing. The petition for attorney fees is denied." [Emphasis added.]

The standard in ORS 20.105 is that an award of attorney fees is appropriate only on a finding that "there was no objectively reasonable basis for asserting the claim, defense or ground for appeal." The accused submits that any distinction between an "unwarranted" claim and a claim without "objectively reasonable basis" is one without a difference discernible here.

Further, the accused reminds the court that the disciplinary standard here is subjective, not objective. To be found in violation of DR 7-102(A)(2), the accused must have "knowingly" advanced an "unwarranted" claim. Here, the Court of Appeals found the higher standard of an "objectively reasonable basis" for the appeal.

Second Instance

The accused believed and still believes that a motion to stay a sheriff's sale is warranted under existing law under the following circumstances:

(1) The accused had, on July 30, 1997, filed a motion under ORS 18.410 which, then, required the court to determine, by written order, the amounts due on the judgments.

(2) The accused's ORS 18.410 motion had been fully briefed and argued, but the court had not entered a written order.

(3) The writ of execution for the sheriff's sale was based only on the original judgment and

amended supplemental judgment.

(4) Because the writ of execution for the sheriff's sale was not based on the supplemental judgment on appeal, the court retained full jurisdiction to act on the accused ORS 18.410 motion and on his motion to stay the sheriff's sale pending entry of the ORS 18.410 order to which the accused's clients were, under law, entitled.

The court sanctioned the accused for filing the motion for the improper purpose of delay and held that the motion was contrary to existing law, citing ORS 19.033 and ORCP 72. Neither of those provisions applied because, as noted in (4) above, the writ of execution for the sheriff's sale was not based on the supplemental judgment on appeal.

In *State ex rel Gattman v. Abraham*, 302 Or 301, 309-10, 729 P2d 560 (1986), the court wrote:

> "The question remains whether the term 'the cause' in ORS 19.033(1) refers only to that portion of the case which has been appealed under the 67B judgment or refers to the entire case. * * * *
>
> "We hold that ORS 19.033(1) means that the appellate court has 'jurisdiction' of the issue or matter on appeal, be it a case, action at law, suit in equity, cause of action, cause of suit, proceeding, or claim for relief. The purpose of the statute is to give the appellate court jurisdiction of the issue or subject matter of the appeal to the exclusion of the lower court except as provided in the statute. *Ellis v. Roberts*, 302 Or 6, 9, 725 P2d 886 (1986). It was not the intention to oust the trial court of jurisdiction of those parts of the litigation which are not directly involved in the appeal."

The accused appealed the sanction judgment, arguing, by reference, that the motion to stay was based on valid legal grounds. *See* Appellant James E. Leuenberger's Brief and Abstract of Record, pp. 13-22 and App 5-9. The core basis for the accused's motion is summarized above.

In neither of the above instances did the accused violate DR 7-102(A)(2).

DR 7-102(A)(1), Taking Action Merely to Harass or Maliciously Injure Another.

The accused's clients were attempting to refinance their home. A delay of the sheriff's sale was necessary for that refinancing to occur. The accused did not interpose the motion sooner because his clients did not wish to incur liability for further plaintiff's attorney fees. The motion alerted Kosydar to the defect of jurisdiction and lack of proper procedure "pursuant to statute or rule," and she elected to delay the sheriff' sale *before* the accused's motion to vacate was first heard on July 30, 1997.

As stated above, the court sanctioned the accused for filing the motion on a finding that it was interposed "to delay and hinder" the sheriff's sale. DR 7-102(A)(1) does not mention "delay." The rule would apply only if the motion was interposed "merely to harass or maliciously injure" the plaintiff.

Even if the terms "harass" and "maliciously injure" are taken by the Trial panel to subsume the term "delay," any delay is still subject to the adverb "merely."

The term "merely," means: "Without including anything else; purely; only; solely; absolute; wholly." *Black's Law Dictionary,* 988 (6th Ed., 1990).

To "delay" is not to "harass." To "delay" is not to "maliciously injure." Where a "delay" has both legal foundation and legitimate ancillary purposes, it cannot be "merely to harass or maliciously injure another."

Here, the asserted purposes were to delay the sheriff's sale until the amount due on the judgments could be ascertained and the judgment amount refinanced. The accused's motions asserted his client's legal rights to require that the proper steps be taken to correct a defect in the judgment and to have the court's ORS 18.410 order as to the specific amount due. In such circumstances, the accused submits that to have failed to interpose the motion would have violated his duty of zealous representation. DR 7-101.

Both motions served purposes beyond mere delay, and certainly were not for the purposes expressly prohibited by DR 7-102(A)(1)—merely to harass or maliciously injure another. Tr 142-145.

Those actions were necessitated by opposing counsel's obdurate refusal to state, in writing, a correct specific amount due on the judgment for refinancing purposes. Tr 143-144.

The accused was, thus, forced to seek an ORS 18.410 order as to the amount due on the judgment because the title company involved would not insure title without either a written statement of the amount due from the judgment creditor or an ORS 18.410 order stating the exact amount due on the judgment. Tr 54-71, 145.

The accused did not violate DR 7-102(A)(1).

DR 7-106(C)(7), Intentionally Violating an Established of Rule of Procedure.

Before filing the motion, the accused reviewed the rules set forth above and determined that no rule prohibited him from personally presenting the motion to the court after fax transmission to Kosydar and the other non-defaulting parties.

In 1997, there was no written rule prohibiting the Kerbers or their attorney from making their motion to vacate *ex parte*. The ORCP were silent as to which motions could and could not be made *ex parte*. The UTCR were silent as which motions could and could not be made *ex parte*. The Washington County SLR (1997) were also silent as to which motions could and could not be made *ex parte*. The Bar's Formal Complaint is silent as to which rule was violated.

Due process requires that the accused be advised of precisely which rule or procedure he is accused of intentionally violating.

Even if such a rule exists and the accused violated it, he did not do so "intentionally" as required to be held culpable under DR 7-106(C)(7). Either no violation occurred or any violation was not intentional.

Even after trial, the accused remains mystified as to precisely which procedural rule he was accused of having intentionally violated under these causes of complaint. Even the Bar's closing argument merely asserted such a violation without specification. The first specification of such a rule came in the Trial Panel Decision: ORCP 14 and 17.

Because the accused took prudent steps to make sure that he followed the letter of the applicable rules of procedure and the ethical constraints imposed by DR 7-110(B) [Tr 112-114, 135-141, 152-153], he can only respond by asserting that the record shows that his intentions were to follow the rules, not to violate them.

The accused did not violate DR 7-106(C)(7).

DR 1-102(A)(4), Engaging in Conduct Prejudicial To Administration of Justice.

In light of the above, the administration of justice includes the accused's client's rights to pay the judgments by refinancing their home, to know the certain judgment amounts necessary for satisfaction, and to have all such judgments entered by a court exercising lawful jurisdiction. Any delay resulting from the accused's motion in representation of those rights was not prejudicial to the administration of justice.

ORS 1.025 imposes duties on all officers of the court:

> "(1) Where a duty is imposed by law or the Oregon Rules of Civil Procedure upon a court, or upon a judicial officer, clerk, bailiff, sheriff, constable or other officer, which requires or prohibits the performance of an act or series of acts in matters relating to the *administration of justice* in a court, it is the duty of the judicial officer or officers of the court, and each of them, to require the officer upon whom the duty is imposed to perform or refrain from performing the act or series of acts.
>
> "(2) *Matters relating to the administration of justice include*, but are not limited to, the selection and impaneling of juries, the conduct of trials, *the entry and docketing of judgments* and all other matters touching the conduct of proceedings in courts of this state.
>
> "(3) The duty imposed by subsection (1) of this section may be enforced by writ of mandamus."

Aside from and in addition to the accused's duty to zealously represent his clients' interests, the accused also had a duty under ORS 1.025 to require precisely the relief sought in the motion: vacation of an amended supplemental judgment entered by the court at a time when it was deprived of jurisdiction to do so except under specific rules which were not followed by Kosydar.

The accused submits that any prejudice to the administration of justice flowed from Kosydar filing a defective supplemental judgment in the first instance and from failing to follow the only lawful procedure for correcting the defect.

The accused did not violate DR 1-102(A)(4).

As to the Bar's Third Cause of Complaint

DR 5-101(A)(1), Financial Interests Affecting Judgment on Behalf of Clients.

Though the accused disagreed with Kosydar's assertion that he had a conflict of interest with his clients, he made full disclosure of the asserted conflict to his clients and obtained their consent to his proposed action in seeking that the sanctions judgments be satisfied first from the trustee's sale proceeds.

ORS 18.410 provides remedy when a judgment should be deemed satisfied, even though full payment has not been made. *Bird v. Norpac Foods, Inc.*, 325 Or 55, 934 P2d (1997). Kosydar's client cannot collect the amounts remaining on the foreclosure judgment for interest, and the three judgments for attorneys fees and costs, because he is judicially and equitably estopped to do so and several anti-deficiency statutes bar such collection.

The Complaint on the foreclosure alleged that no deficiency was sought, if the used the property as their homestead. It is undisputed that the used the property as their residence. Foreclosure was decreed on the relief sought in the Complaint.

On August 14, 1997, Kosydar told the court: "[W]e don't have a deficiency in this case."

On October 1, 1997, Kosydar told the court: "[T]here's no deficiency on this case; there is no deficiency allowed."

Kosydar told the sheriff's office that her client would bid his full judgment at foreclosure, "thereby obviating any argument about damages resulting from a deficiency judgment. Even if Mr. Taylor does not bid the full amount of his judgment, he is precluded from obtaining a deficiency under Oregon law in a judicial foreclosure of defendants' residence."

By the Complaint and the above statements to the court, Kosydar waived and is judicially estopped from seeking a deficiency judgment. *Hampton Tree Farms, Inc. v. Jewett*, 320 Or 599, 609, 892 P2d 683 (1995).

Further, Kosydar is equitably estopped from claiming a deficiency. *Stovall v. Sally Salmon Seafood,* 306 Or 25, 32-35, 757 P2d 410 (1988).

ORS 86.770(2)(a) provides that, except as otherwise provided as to foreclosure upon other secured property, "[N]o other or further action shall be brought, nor judgment entered for any deficiency, against the grantor * * * on the note * * * or other obligation secured by the trust deed * * * after a sale is made (a) By a trustee under ORS 86.705 to 86.795 * * *."

Anti-deficiency provisions are not limited to a sale on a particular trust deed. It is sufficient that there be "a sale" by "a trustee." In *Brown v. Jensen,* 41 Cal 2d 193, 259 P2d 425 (1953), *cert den* 347 US 905 (1954), construing a similar California statute, the court held that a second trust deed holder could not obtain a deficiency judgment after the first trust deed was foreclosed by a trustee's sale. The California statute was substantially similar to Oregon's, in that it provided: "No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage * * *." The court interpreted that language to mean that: "[I]n no event shall there be a deficiency judgment, that is, whether there is a sale under the power of sale or sale under foreclosure, or no sale because the security has become valueless or is exhausted. The purpose of the 'after sale' referenced in the section is that the security be exhausted and that result follows after a sale under the first trust deed." *Id. at 198.*

Here, the security was exhausted upon foreclosure of the senior trust deed. Kosydar's client not only participated in that sale as a purchaser, but the balance of the sale proceeds, after paying off the senior trust deed, was applied upon the client's trust deed. No further foreclosure sale of the property is available to Kosydar's client.

Furthermore, Kosydar's client elected the remedy of judicial foreclosure of a residential trust deed, and no deficiency is allowed under ORS 86.770(2)(b), which precludes a deficiency after a sale is made under a judicial foreclosure of a residential trust deed.

Finally, the proceeds of the subject trust deed were used to refinance the purchase price of the property. Under the anti-deficiency judgment provisions of ORS 88.070 and ORS 88.075, no deficiency judgment may be obtained against the debtor, up to $50,000.

To summarize, the accused made full disclosure to and obtained consent from his clients. He did this even though there could be, for all the above reasons, no deficiency judgment and, therefore, no conflict of interest existed. Under the applicable law and the

facts of this case, the accused's financial interests were in complete consonance with his clients.

The fact that the accused, years later in deposition, misperceived in hind sight a potential conflict does not alter the fact that no conflict, either potential or actual, could ever exist under the facts presented by this case.

Payment of the sanctions judgments was to be preferred over payment of the foreclosure judgment because the sanctions judgments would be enforceable against them, while the remaining amount on the foreclosure judgment could not be collected by any means under the law. The same arguments as to the unenforceable nature of any amount remaining on the foreclosure judgment are now before the trial court through new counsel for the accused's clients. Accused's Exhibit No. 108.; Tr 158-159.

There never was any conflict between the accused's financial interests and those of his clients. The accused did not violate DR 5-101(A)(1).

DR 7-102(A)(2), Knowingly Advancing an Unwarranted Claim.

The same argument given immediately above is applicable to rebut the Bar's complaint that the accused has violated DR 7-102(A)(2).

As to Sanction

Assuming, for the sake of argument as to appropriate sanction, that the court is unwilling to reject in whole the decision of the Trial Panel, the accused makes the following argument.

The Bar's first two causes of complaint are ex parte communication, no matter how many different names the Bar puts on the alleged actions.

The record shows that the accused diligently tried to follow the rules and to invoke the law in his clients' interest. He reviewed the rules governing *ex parte* communications before personally presenting written motions to the court without oral argument to their merits. He

satisfied himself and his clients that they had no conflict of interest because there could be no deficiency judgment. Thus, any violation of disciplinary rules by the accused was made negligently, not knowingly.

Even the fact that the accused was sanctioned twice by the same judge for essentially the same action does not make his second action knowing because it was the negligence of that judge which necessitated the second personal presentation of a written motion to the court without oral argument to its merits. The accused remains convinced that his actions were correct and in the best interests of his clients. A knowing violation would require the knowledge that his action was wrong under the law or rules.

ABA Standards for Imposing Lawyer Sanctions 7.2 states that:

> "Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system."

In contrast, ABA Standards for Imposing Lawyer Sanctions 7.3 states:

> "Reprimand is generally appropriate when a lawyer negligently engages in a conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system."

See also In re Dugger, 334 Or 602, 624, 54 P3d 595 (2002).

Here, if any violation was committed by the accused, it was not a "knowing" violation. Thus, the appropriate sanction would be a public reprimand, rather than suspension.

Among the mitigating factors applicable to this case are ABA Standards for Imposing Lawyer Sanctions 9.32(a) absence of a prior disciplinary record, (b) absence of a dishonest or selfish motive; and (k) imposition of other penalties or sanctions.

Conclusion

For the above reasons, the Supreme Court should find no violation of disciplinary rules has been committed by the accused defendant and reject in whole the Trial Panel Decision of the Oregon State bar Disciplinary Board. In the alternative, the Supreme Court should find that any violation of disciplinary rules by the accused was committed negligently, not knowingly, and, therefore, deserving of reprimand rather than suspension.

Respectfully submitted this 12th day of August 2003.

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Certificates of Service and True Copy

I hereby certify that, on the above-stated date, I served two true copies of this petition and brief by First Class, postage-paid, U. S. Mail on the opposing party's attorneys at the address listed on the front cover of this brief. If my signature appears below on a service copy, it shall signify that I certify the copy to be a true and complete copy of the original filed with the court.

Attorney for Accused