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In Re: Robert B. Hansen Disciplinary Proceeding : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

In Re: ROBERT B. HANSEN)

No. 15605

Disciplinary Proceeding)

BRIEF OF APPELLANT

APPEAL FROM FINDINGS, DECISION AND RECOMMENDATION
OF THE UTAH STATE BAR COMMISSION

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IN THE SUPREME COURT OF THE STATE OF UTAH

In Re: ROBERT B. HANSEN)	
)	No. 15605
Disciplinary Proceeding)	

APPELLANT'S BRIEF

NATURE OF THE CASE

Robert B. Hansen, Appellant, was charged in a complaint before the Board of Commissioners of the Utah State Bar with four counts of unprofessional conduct, each count relating to legal work done by him for a particular client.

DISPOSITION BY THE
BOARD OF COMMISSIONERS

After a two-day hearing, the Hearing Examiners entered conclusionary type findings to the effect that Appellant had, as to three of the four counts, violated specified canons of the Rules of Professional Conduct. On the Fourth Count, dealing with legal work done for one James Dick and one John R. Dick, the conclusionary findings entered by the Hearing Examiners are negative in tone, but the Examiners concluded that the acts noted in their findings did not violate the Rules of Professional Conduct, nor the Utah Rules of Civil Procedure. The recommendation made by the Hearing Examiners was that Appellant be suspended for one year, and that the Board of Bar Commissioners adopt and approve the recommendations and forward the findings and the recommendation to the Utah Supreme Court.

The Board of Bar Commissioners entered an order dated January 6, 1978, adopting the findings of the Hearing Examiners and recommending to the Supreme Court that Appellant be suspended from the practice of law for a period of one year.¹

1. We believe that it is important to note at this point that the Board of Bar Commissioners did not have a transcript of the evidence available to it. Its order was entered January 6th, and the court reporter completed and certified the transcript on January 18, 1978. The recommendation of the Bar Commissioners, which is an essential step in this disciplinary proceeding, was thus based entirely on the conclusionary findings of the Hearing Examiners. These findings are devoid of any of the specifics. Even if the Board of Bar Commissioners was willing, without knowing any of the details or specifics, to accept the conclusion that the Appellant was guilty of unprofessional conduct, the Board, nevertheless, surely needed to know the details before it could determine whether the recommended one-year suspension was appropriate. It did not have these details, because the transcript of the evidence was not available, and the findings of the Hearing Examiners are mere conclusionary statements and are not even useful in determining the details and circumstances of the claimed violations.

THE NATURE OF THE RELIEF SOUGHT

Appellant, by this proceeding, urges the court to set aside some of the negative findings on the grounds that they do not fairly reflect the evidence, and that the court note the mitigating circumstances which are shown by the evidence, but ignored in the findings. We urge the court to reject the recommendation for a one-year suspension.

STATEMENT OF FACTS AND ARGUMENT

We believe that we can most effectively present this matter by (a) noting, as to each of the four counts, the specific allegations of the complaint; (b) setting forth the particular canons of Professional Conduct referred to in the complaint; (c) referring to the applicable findings; (d) detailing the evidence and noting wherein we believe the findings are either contrary to or do not fairly reflect the evidence; and (e) arguing the facts.

We object to the findings in three basic particulars. First, because of the conclusionary form of the findings the Hearing Examiners really didn't deal with several specific evidentiary disputes. Second, there are no findings at all concerning mitigating circumstances. Third, we submit that some of the findings really do not accurately or fairly reflect the evidence. With this explanation as to the manner in which we propose to proceed, we turn to the specific counts of the complaint, which we have elected to discuss in inverse order.

POINT I. COUNT IV OF COMPLAINT: THE LEGAL WORK PERFORMED FOR JOHN R. DICK AND JAMES DICK. THE FINDINGS ARE CONTRARY TO THE TESTIMONY AND THE DOCUMENTARY EVIDENCE PRESENTED IN CRITICAL ASPECTS, DO NOT ADDRESS THE FACTUAL ALLEGATIONS, ARE UNFAIR OVERALL AND INDICATE A GENERAL LACK OF CAREFUL ATTENTION THAT SHOULD BE GIVEN FINDINGS IN A DISCIPLINARY PROCEEDING.

(a). The Charge. The complaint charges that Appellant undertook to represent John R. Dick and James Dick in the purchase of real property from American National Mortgage Co. It asserts in paragraph 1 that American National did not hold title, and that this was a fact which Appellant did not ascertain. Paragraph 2 alleges that title to the property being sold was held by a third party named Soelberg. It next alleges that subsequent litigation instituted by Appellant in the names of John R. and James Dick resulted in American National obtaining a "judgment" on its "counterclaim" against John R. Dick in the sum of \$1,341.65. Paragraph 4 then alleges that the Dicks assert that they did not have knowledge of, did not consent to or in any way authorize Appellant to institute the litigation in their names; that they were unaware of the judgment until a subsequent title report revealed it, and that the judgment constituted a lien on the real property owned by the Dicks. Paragraph 6 asserts that Appellant was the real party in interest in the litigation. It is then charged that his conduct violated Rule IV, Canon 1, DR 1-102 (4), (5), (6), and Canon 5, DR 5-103 of the Rules of Professional Conduct of the Utah State Bar, and the provisions of Rule 17(a) and Rule 11 of the URCP.

(E) The Canons. For the convenience of the court we next set forth the rules of conduct referred to in this charge. They are as follows:

Rule IV Canon 1, DR 1-102 Misconduct.

(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.

Rule IV Canon 5, DR 5-103 Avoiding Acquisition of Interest in Litigation

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

- (1) Acquire a lien granted by law to secure his fee or expenses.
- (2) Contract with a client for a reasonable contingent fee in a civil case.

(B) While representing a client in connection with contemplating or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Rule 17(a) requires an action to be brought in the name of the real party in interest, and Rule 11 requires the attorney to sign the pleadings, and states that the signature of an attorney constitutes a certificate by him that he has read the

pleading; that there is "good ground" to support it, etc.

(c) The Findings and Decision. The Hearing Examiners concluded that the conduct of Appellant in representing John and James Dick did not violate either the specified Canons nor the Utah Rules of Civil Procedure, which are cited, yet in Finding No. 7 they made a series of findings which are negative in tone, and are not consistent with the evidence. Further, the findings really don't address the charges made in the complaint, nor the specific evidence offered. We submit that on this count Appellant is entitled to be exonerated and to have express findings that he did not commit the wrongs with which he was charged. We thus turn to the evidence.

(d) The Evidence. The opening statement on the Dick matter made by Mr. Stark, representing the Utah State Bar, follows the complaint (R. 12-15). There is no serious conflict in the testimony of Appellant on the one hand and John R. and James Dick on the other. Neither John R. Dick nor James Dick appeared personally, but it was stipulated (R.223) that the testimony each gave in his deposition could be used.

The uncontradicted evidence shows that Appellant did undertake to represent the Dicks in the purchase of certain real property (R.225,351, John Dick Dep. 9,10, James Dick Dep. 5). The first assertion made in the complaint and in the opening statement by Mr. Stark was that Appellant did not ascertain the outstanding interest of Mr. Soelberg. On this they are simply wrong. Appellant testified (R.434) that he had a title report,

and he knew that Soelberg was the owner of the property. The contract itself, wherein the Dicks were the purchasers, and American National Mortgage Co. was the seller, was introduced in evidence as Ex. 49. Paragraph 6 of that contract expressly states:

"It is understood that there presently exists an obligation against said property in favor of LeRoy Soelberg, Sr. and Jean E. Soelberg, with an unpaid balance of \$3,600 as of May 15, 1965."

Further, John R. Dick testified that Appellant told them that Soelbergs had an interest (Dep. p.10). John Dick was asked if he knew Mr. Soelberg was the seller of the property to American National Mortgage, and he testified: "I think it so stipulated here. We know that he had some interest", and he explained that Appellant had so advised them (Dep. p.10). Thus, the charge in the complaint and Finding 7(b) that Appellant did not ascertain the identity of the fee owner is simply wrong and contrary to the undisputed evidence. The finding criticizes the Appellant where no criticism is warranted.

The Appellant did not ascertain that the Dicks were only paying \$600 a year (Ex.49), whereas American National Mortgage was obligated to pay Soelberg \$1,000 per year (R.373). This was noted by the Utah Supreme Court in the case of Dick v American National Mortgage Co., 29 Ut.2d 404, 510 P.2d 1906 (1973). There this court noted that the Dicks had agreed to pay \$5,700 for the property, and that after the down payment they were to pay \$50 per month. The court noted the obligation

in the amount of \$3,600 owed to Soelberg noted in paragraph 6 of the real estate contract prepared by Appellant (Ex.49). American National had not paid Soelberg, and was in its allowed grace period. Appellant brought suit, because American National had not paid, and the majority of the Utah Supreme Court held that in paying Soelberg Appellant was a volunteer. Mr. Justice Ellett dissented, stating that the Dicks did not need to wait until the grace period had expired, and thus risk losing the property. In any event, this court held that American National Mortgage could legally agree to sell the property with an annual payment of \$600, even though it had an annual obligation to Soelberg of \$1,000 (Ex.44).

Apparently American National Mortgage did not make a payment to Soelberg, and he went to James Dick and complained (Dep. p.9). The Dicks complained to Appellant, and he agreed to save them harmless from any loss they might suffer by reason of Soelberg not being paid, and specifically agreed that he would pay American National Mortgage the difference between the \$600 that the Dicks were obligated to pay to American National and the \$1,000 it owed to Soelberg, and he did so. (R.353). This is erroneously charged as being an improper purchase of an interest in litigation. It is, of course, no such thing, and the Hearing Examiners should have expressly so found.

The next charge in the complaint is that the Dicks assert that they did not have knowledge of, consent to, or in any way authorize Appellant to institute the litigation, for or on their behalf or in their names. (see Count 4, paragraph 4).

There was considerable evidence introduced in regard to this charge, but there is no finding on it. The Hearing Examiners merely found that Appellant undertook to prosecute litigation in the District Court, and an appeal to the Supreme Court, but are silent as to whether the Dicks knew the suit was filed.

Again we assert that the Appellant should have been totally absolved by an express finding that the Dicks did know of and acquiesce in the suit. There really is no dispute in the evidence. The complaint is in evidence as Ex. 38. It was filed September 12, 1967. It shows that John R. and James Dick are the plaintiffs.

When the deposition of John R. Dick was taken, he admitted (p.16) that Appellant told him that a suit against Soelberg would be necessary. He was asked when he became aware that Appellant had brought the suit "on behalf of you and your father against American National Mortgage, and he answered, "during the period of negotiations with Soelberg, Bob indicated that legal action would have to be taken of some nature...He then filed it in our names" (p.16). He admitted that a demand letter threatening suit, dated October 13, 1966, had been sent by Appellant, and Mr. Dick said that he assumed that he had received a copy of it about the date it bears, because it was contained in Mr. Dick's file. A copy of the complaint dated September 12, 1967, showing the plaintiffs to be James Dick and John R. Dick was produced from Mr. Dick's files, and Mr. Dick

testified (Dep. 18-19) that the handwriting on the complaint "Sept. 1967" was his handwriting, and that he would assume that that is the date he received it, and that it was fair to say that by September of 1967 he knew that Appellant had commenced a lawsuit in the name of Mr. Dick and his father. When they paid off the contract, the Dicks said they didn't want anything more to do with it, and Appellant told them that they would need to cooperate in the lawsuit (Dep.21). Thereafter, in May of 1971, they saw some interrogatories in the lawsuit bearing their own names (Dep.23). James Dick was interrogated about these same matters. Basically he could not remember (Dep.27), but he doesn't contradict the testimony of John R. Dick.

Appellant testified clearly that by sending the demand letter (R.356) and the complaint and the answer (R.436) to the Dicks, they were advised of the lawsuit (R.436). He discussed the suit with them while it was pending (R.357). He also told the Dicks that they would have to help with evidence, and that they did furnish needed evidence (R.436). He also testified that the Dicks had advanced some of the money to pay Soelberg and had a financial interest in the lawsuit when he filed it. (R.432). This is confirmed by John R. Dick, who testified that when Soelberg first told them that he was not being paid, they prepaid \$600 (Dep. 13). This payment relates to and rebuts the charge that the Dicks were not the real parties in interest.

Thus, the charge made in the complaint that the suit was

filed without the knowledge or consent of the Dicks is contrary to the uncontradicted evidence. Appellant was entitled to an express finding that the Dicks knew he had filed the lawsuit in their names.

The next assertion made in the complaint on the Dick matter is that a "judgment" was entered on "the counterclaim" in the sum of \$1341.65 (Count Four, p.3). As a matter of fact, there was no judgment entered on the counterclaim for \$1,341.65. When this court affirmed the lower court it ordered (Ex.44), "Respondent is entitled to its costs." The attorney for American National Mortgage then filed a cost bill, which included some \$1227 in attorney fees. (Ex.38). No court had awarded attorney fees in the amount of \$1227 or any other amount. Appellant filed a motion to tax costs (R.356). Opposing counsel got a continuance (R.358), and the matter was not pressed by either (R.358). The case was decided in the Utah Supreme Court in June of 1973 (Ex.44). In the Fall of 1976, immediately before the Election, one of the Dicks was involved in a divorce proceeding, and a title report showing the cost bill for some \$1,341 was developed (R.358). Mr. Petty called Appellant, and Appellant told him that there was no judgment (R.248, 360). Appellant said that he could get it cleared up, but Mr. Petty wrote a letter fixing a deadline, and when it was not met, Mr. Petty filed a suit and the story was released to the newspaper on the eve of the election (R.361). Mr. Petty admits that

Appellant agreed to call up his motion to tax costs (R.255), but Mr. Petty filed a civil complaint against Appellant on October 28th (R.253). Mr. Petty admits that he is the one who filed the complaint with the Bar (R.260) and that he did this of his own volition, not on behalf of the Dicks (R.260) and James Dick testified that he would not have wanted to complain to the Bar (Dep.40).

This matter was ultimately resolved by Appellant calling the motion to tax costs on for hearing. The court disallowed attorney fees, and costs were taxed at \$18, which Appellant paid (R.256,362).

There is testimony to the effect that Mr. Dick paid some attorney a fee (not to Appellant) of \$1,100 to get this item cleared up (Dep.37). This was referred to by Mr. Stark in his opening statement to the hearing examiners (R.15). If any attorney charged the Dicks \$1,100 to get this cost bill determined by the court, all we can say is that they were very badly overcharged.

In summary, the complaint charged, and the Hearing Examiners found that the Appellant had not identified the fee owner (Soelberg). The charge was not sustained. The finding is simply wrong. The complaint charged that Appellant filed the suit without the knowledge or consent of the Dicks. The charge was not sustained. The findings did not address that point at all. The complaint charged that the action was not brought in the name of the real party in interest. That charge is wrong. The findings don't address it. The complaint

charges that as a result of the litigation a "judgment" was granted on a "counterclaim" for \$1,341, and the Hearing Examiners found that a judgment was entered which clouded the title. Surely the Appellant was entitled to a finding that the Supreme Court had awarded costs on appeal, the prevailing attorney had wrongfully claimed attorney fees, a timely motion to tax costs was filed, and a judgment was finally entered for \$18 which the Appellant paid. The conclusionary finding that he did not violate specified canons is simply not adequate, and the negative findings are not warranted.

POINT II. COUNT THREE OF COMPLAINT: THE STATE V PIEPENBURG CASE. THE FINDINGS ARE INADEQUATE IN NOT RESOLVING EVIDENTIARY DISPUTES, IN NOT DETERMINING WHETHER A COMMUNITY STANDARD EXISTED AS TO CONFIDENTIAL DISCLOSURES, AND IF A STANDARD EXISTED, WHAT THAT STANDARD WAS AND THE FINDINGS ARE IN ERROR IN CONCLUDING APPELLANT VIOLATED BAR CANONS.

In Count Three, Appellant is charged with an improper investigation into the background of prospective jurors in an obscenity case. That case also has heretofore reached the Supreme Court in State v Piepenburg, 571 P.2d 1299.

(a) The Charge. Part of the alleged misconduct charged included contacting L.D.S. Bishops in the locality of the specific juror's homes. The complaint, by reference to Rule IV, Canon 7, charged Appellant with a vexatious and harassing investigation of the jurors (R.222). It also charged that Appellant was interviewed by a local television reporter, and

in the interview disclosed the jury investigations and stated that because of this background information, he was certain that two of the jurors would hold out for conviction. It is alleged that at least two of the jurors selected were advised prior to the trial that persons associated with the Attorney General's office had been investigating them, and this, they charged, violated specific Canons of the Rules of Professional Conduct of the Utah State Bar.

(b) The Canons. These canons are again set forth in full for the convenience of the court:

Rule IV Canon 7

- (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial, or disposition of without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
- (6) Any opinion as the guilt or innocence of the accused, the evidence, or the merits of the case.
- (D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.
- (J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

Rule IV, Canon 7

- (E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harrassing investigation of either a venireman or a juror.
- (F) All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigation of members of a family of a venireman or a juror.

During the hearing a question was asked of Mr. Wickstrom, one of the attorneys representing the Bar, if what they were charging was merely the alleged improper interview with the reporter and he answered, no, that he read the allegations of Count Three as charging Appellant with making a vexatious and harrassing investigation of the jurors (R.222).

(c) The Findings and Decision. The Hearing Examiners again made conclusionary type findings and arrived at a legal conclusion that the acts described in paragraph 6 of the Findings (the background investigation) did not violate the provisions of Rule IV, Canon 6 DR 7-108 (E) and (F) (which is the canon dealing with vexatious and harrassing investigation of jurors).

The Findings and Decision go on to conclude that Appellant did violate Rule IV, Canon DR 7-107 (B) (6) and Canon DR 7-107 (D), but not 7-107 (J). These, as set forth above, relate to the making of an extrajudicial statement concerning the guilt or innocence of the accused, and the making of an extrajudicial statement that a reasonable person would expect to be published

(d) The Evidence. We next turn to the evidence. In this charge we think there was a dispute as to the circumstances

under which some of the statements were made. That dispute is not resolved by the findings. The dispute is between the testimony of Mr. Horton, who was the television reporter, and testimony of Appellant.

Appellant readily admitted that he became associated as counsel in the Piepenburg case (R.363), and that he had used the resources of the Attorney General's office to make a background investigation of the potential jurors (R.366). He intended that it be used to make peremptory challenges (R.367). There was no personal contact made with any juror at all (R. 365). He arranged to have someone from the Attorney General's office call an L.D.S. Church official or his wife or a neighbor to see if a prospective juror would likely follow the law and would be acceptable in a pornography suit (R.366). The Hearing Examiners, as noted above, concluded that what he did in this investigation did not violate the canons of ethics, as charged by the complaint and we will, therefore, not deal further with that investigation.

Appellant is found to have been guilty of unprofessional conduct in regard to an interview that he gave to Mr. Horton. We first point out to the court that there is a Statement of Principles and Guidelines for Reporting, duly adopted by the Utah State Bar and the media organizations, which was introduced in evidence as Ex. 33. Paragraph 3 of the Principles provides that:

"No trial should be influenced by the pressure of

publicity or from public clamor. Lawyers, journalists... share the responsibility to prevent the creation of such pressures."

Appellant testified that he was aware that the Bar and the Press had adopted the guidelines (R.406). We think that this is of importance, because an attorney familiar with the adoption of those guidelines had reason to assume that journalists would accept dual responsibility under the guidelines. One of the expert witnesses called by respondent acknowledged this (R.109-111). Mr. Horton had not heard of this guideline (R.152,154).

We next refer to the circumstances under which the statements were made by Appellant to Mr. Horton. According to the testimony of both Mr. Hansen and Mr. Horton, the jury had been impaneled, the court had become concerned about the investigation of the jurors, and a hearing had been held in chambers. Mr. Horton had been in the courtroom and knew of the court's concern (R.131 and 371). After the hearing in chambers, Mr. Horton wanted to know what had taken place and Appellant said that the judge was concerned about whether they were actually contacting jurors. Appellant said that he had told the judge that he had not contacted any jurors, and the judge was satisfied that they were only conducting a background investigation, and not endeavoring to influence how the jurors voted (R.371.) He intended Mr. Horton to publish that interview (R.372-3). That interview occurred at counsel table. Mr. Horton testified that he took notes (R.132).

Appellant testified that he then terminated the interview by asking if there was anything else Mr. Horton needed, (R. 373) and Mr. Horton said, no, and they went out to go to lunch. As they were leaving the building, at the outside door, Mr. Horton asked another question, preceded with words such as, "incidentally", or "by the way", how do you think you did with the jury. Appellant answered that because of what he thought was a pretty good background investigation on five of the eight jurors, that two of them would be strong enough for a prosecution on a movie that "was this dirty--and I had seen the movie" that they would not acquit (R.374). It was not his intent that these remarks be broadcast. He thought they were off the record. The reporter didn't have his recording equipment with him and was not taking notes (R.374). This conversation was broadcast (Ex.10).

It is at this point that the testimony of Appellant and the testimony of Mr. Horton are not in harmony, and the findings do not address the problem, nor resolve the conflict.

We submit that Mr. Horton was not candid at the disciplinary hearing. He admitted that he was in court all morning (R.131). He testified about what Appellant told him (R.132), said he was taking notes (R.133), and then he said, "at one point, I asked him," now that the jury has been selected what he thought of the outcome, and he indicated that he believed some jurors would not permit acquittal, and that when this statement was made, they were at counsel table (R.133).

He was asked on cross-examination (R.139) if there was not quite a furor about the possibility that a prior interview with Mr. Deamer might be released to the public, and he said he wouldn't describe it that way, but did testify that Mr. Deamer was sufficiently concerned about his interview, that he had called and gone down to the station to see it. Mr. Horton was asked if that story, which had been aired the night before, was not one of the problems being addressed by Judge Leary, and he said, "not to my knowledge" (R.139). He was asked if he inquired of Appellant as to what had happened in chambers, and he said he might have (R.140). He was there when the attorneys went into chambers (R.140). He was asked what the hearing was about, and he said he didn't know; that Mr. O'Connell was upset about something. He thinks it was because Mr. Horton wanted to take pictures in the courtroom, and that at that point he doesn't know what O'Connell had heard about the jury investigation (R.141). His attention was then directed to a deposition he had given November 2, 1977 (R.141) where he had testified (R.142) that Mr. O'Connell became aware "of this jury background thing. This issue had come up and he got quite perturbed. I can't remember exactly how he found out. He may have overheard Mr. Hansen and I talking about it. Anyway, the attorneys went into chambers for a few minutes," (R.142). Mr. Horton on cross-examination said that his deposition was not correct. It was the photographs which he had not been permitted to take and not the jury investigation which made Mr. O'Connell upset (R.142). He was cross-examined at some length about this, and

all we can do is ask the court to read it, beginning at R. 143. The news release that he actually used on the air was in harmony with what he said in his deposition, and not in harmony with what he testified on cross-examination (see Ex. 10). It seems contrary to common sense that there would have been a serious problem about him taking pictures. He asked permission to take them. Permission was denied, and none was taken. This should not have upset anybody but him. But the defense attorney was very upset, and in Mr. Horton's deposition and in the news release (Ex.10) which he wrote, Mr. Horton said that Mr. O'Connell was upset about the jury investigation. Appellant directly contradicts Mr. Horton on this (R.370). Appellant testified that the interview which he intended to make public, which had taken place at the counsel table (R.370) and at which Mr.Horton said he took notes, (R.132) related to the background investigation. That interview ended and they walked out of the building to the outside door. It was at this point, according to Appellant, that the question was asked about how Appellant thought he came out on the jury (R.374). On direct examination Mr. Horton said that this conversation had occurred at counsel table as a part of the overall interview (R.133). On cross-examination, beginning at R.149, he indicated that this may have occurred when they were walking out the door. This difference in the testimony, it seems to us, is quite material as to whether Appellant should have anticipated that the

statement should have been published, and thus would be a violation by him of Canon 7, DR 7-107 (B) (6) and (D). Appellant testified unequivocally that he intended the interview at counsel table to be used. He knew he was talking to a reporter. He can't remember whether the reporter was taking notes (R.375), but the reporter said he was (R.132), and they talked about the background investigation. The hearing examiners concluded that making the investigation violated no canon, but it is impossible to tell from the way the findings are set up whether the examiners thought telling the press about the background investigation violated the canon. We submit that these should have been separated. Appellant admits that he told the reporter about the background investigation, and said he intended that to be published (R.425 and 428). He said that under different circumstances, as they were walking out of the courthouse building, he was asked, incidentally, or by the way, how did he think he came out, and he said under those circumstances he thought he was off the record, and made the comment about two jurors probably holding out for conviction. He did not intend that statement to be made public (R.374). The reporter was not taking notes (R.375). Appellant thought that the journalist shared the responsibility with him under the Principles and Guidelines (Ex.33) and would not publish it (R.408). The examiners put these two conversations together (Findings 6(d)). They do not address the question of whether the statements were all made at the counsel table, as Mr. Horton first testified,

or whether what to us is the critical statement (about how the jury would vote) was made under different circumstances, as they went out the door (R.374). The findings are not helpful on this point--they don't tell us whether the panel (a) believed that Mr. Horton was told by Appellant of the judge's concern about the background investigation of the jury nor (b) whether the conversation about how the jury might vote and the interview on the background investigation took place at the counsel table, or at two different times and places.

We submit that Appellant had the right to rely on the journalist following the Principles and Guidelines (Ex.33). The reporter had been in court and knew of the judge's concern after the conference in chambers. It thus was not unreasonable for Appellant to assume that the conversation going out the front door would not be published. We further submit that Mr. Horton was evasive and his testimony was contradictory, and where there is a conflict between his testimony and Appellant's, Appellant's should be accepted.

Logic also confirms the credibility of Mr. Hansen's testimony that his predictions regarding the jurors' decision was not to be broadcast. It is not reasonable to conclude that an experienced trial attorney would want a juror to hear broadcast a statement that one of the prosecuting attorneys had the juror "in his pocket." What more offensive statement could a prosecutor make to a juror who is going to rule on his case than this statement?

Finally, we submit that it was error for the hearing examiners to take testimony at length from the television and newspaper journalists as to what reporters could be expected to publish (R.99,100,172,189,206). That isn't the test, and we objected to it.

The canon deals with what a reasonable person would expect to be disseminated and the testimony of the journalists as to what they would do or what reporters would do was not the issue. When they were asked what an attorney would probably think, they said frankly they didn't know R.199, 210).

The inconsistent testimony of the parade of reporters called by the prosecution could not establish a community standard as to lawyers confidential disclosures. Yet the findings are silent on this critical issue.

There was no competent testimony concerning a community standard, other than Ex. 33, which is the Principles and Guidelines. This puts joint responsibility on the attorney and on the reporter. Mr. Horton had been in the courtroom all morning, and he knew what was going on and what the problem was with the jury, and it was not unreasonable for Appellant to assume that he would not broadcast the conversations they had while they were leaving the outside door after the formal interview was over and they had walked outside.

We submit the most that can be said of Appellant's conversation under these circumstances is that he made a judgment error in relying on the principles and Guidelines and what he

considered was the "off the record" nature of his disclosure. The courts have not considered a mistake in judgment a basis for disciplinary action. State ex rel State Bar Association v Pinkett (1953), 157 Neb.509, 60 NW 2d 641; In re Mason (1947 Mo. App.) 203 SW 2d 750.

This court has determined that the burden of proof of persuasion of misconduct should be by clear and convincing evidence, In re Macfarlane 10 Ut.2d 217, 219; 350 P.2d 631. Certainly the evidence relied on in this count is not "clear and convincing."

For the Hearing Examiners to find a violation of the canon and to recommend suspension of Appellant under these circumstances is not proper.

POINT III. COUNT TWO OF COMPLAINT: THE WINONA EMARINE MATTER. THE FINDINGS ARE MISLEADING IN CONCLUDING APPELLANT DID NOT MAINTAIN COMPLETE AND ADEQUATE RECORDS AND DID NOT MAINTAIN THE FUNDS IN A SEPARATE TRUST ACCOUNT, THE FINDINGS ARE INADEQUATE IN NOT SETTING OUT THE MITIGATING CIRCUMSTANCES AND IN ERROR IN CONCLUDING A CRIMINAL VIOLATION

(a) The Charge. Appellant is charged in Count Two with collecting money for Winona Emarine and failing to notify the client of the receipt of funds; failing to render a proper accounting; failing to maintain complete and adequate records; failing to pay the funds over to his client promptly upon demand; failing to maintain said funds in a separate trust account and committing a misdemeanor.

(b) The Canons. The particular Rules of Professional Conduct allegedly violated are as follows:

Rule IV, Canon 9

(B) A Lawyer shall:

- (1) Promptly notify a client of the receipt of his funds, securities, or other properties.
- (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
- (3) Maintain complete records of all funds, securities and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

UCA 78-51-42. Refusing to pay over money--Penalty.--

An attorney and counselor who receives money or property of his client in the course of his professional business and who refuses to pay or deliver the same to the person entitled thereto within a reasonable time after demand is guilty of a misdemeanor.

(c) Findings and Decision. The Findings and Decision of the examiners, again in conclusionary type findings, found Appellant to be in violation in regard to all of the charges. We submit that the findings on this count are, at the best, unfair in the light of the total record. In regard to the keeping of accounting records and the deposit of the funds in the trust account, they are misleading. Further, the hearing examiners did not address themselves at all to any findings regarding mitigating circumstances.

(d) The Evidence. The material evidence on this count is as follows:

Appellant did represent Mrs. Emarine in a divorce action and thereafter in the collection of child support. The divorce action was filed in June of 1962 (Ex.40), and until 1966, payments went directly to her (R.40). Beginning in 1966, payments were made to the Clerk of the Court, and released to Appellant. He had a power of attorney, authorizing him to cash the checks (R.40-41), and she got payments from 1966 to 1969 (R.41).

Appellant was extensively involved in the collection of commercial accounts. At the peak of his activity he was handling approximately 500 accounts, and received approximately 100 payments a month thereon (R.309)

Appellant had a certified public accountant set up a bookkeeping system for him, and throughout more than 20 years of practice he maintained a separate trust account into which he deposited trust monies (R.371,326). Both he and his long-time secretary testified how the system worked. A receipt book was kept, and receipts were written as the money came in (R. 325,384). His bookkeeper, Mrs. Pennington, posted all the receipts to a client ledger card (R.329). He had two separate accounts with separate deposit slips, separate account numbers, and separate checks. One was a trust account, and the other was a legal account (R.328,381). All of the money that came in found its way into the receipt book (R.329). If the secretary had a question as to whether it was to be deposited in the trust account or in the legal account, she put a question mark on it, and Appellant marked the receipt with a T, if it was to go into the trust account, and with an L, if it was to go into the law account (R.311). Ex. 47A is an example of one of those receipts. The collection would include funds for the client, and it would also include Appellant's attorney fee (R.329-334). Mrs. Pennington would post the receipt to the client's ledger card (R.329). She prepared a check to remit the funds to the client but she would hold it for ten days, so that the check she had received would have time to clear. At that point she would notify the client that the money had been received and that they would remit the funds within ten days (R.306, 336). She would then periodically withdraw the attorney fees from the trust account and deposit them to the

legal account, and mark her books accordingly (R.330,331). The system was in effect when she went to work in 1959, and she was requested to continue it (R.325), and there is no indication of any problems with the system while he was in the private practice and maintaining an office and fulltime help (R.315). He closed his office and moved to his home in early 1969 (R.322, 385). Mrs. Pennington's employment changed to part-time in February of 1969 (R.311). She worked one day a week in the office in Appellant's home (R.314). She worked on this basis until she quit in March of 1975 (R.315). From 1969 to 1975 she did not generally make out the checks to the client, but she did post the receipts, make some of the bank deposits, etc. She quit issuing the check to the client, because she no longer knew the fee arrangement (R.319), and others might already have done it (R.334). After Appellant moved to his home other people made deposits, but the receipt was attached to the deposit slip (R.333). She maintained a ledger card on the Emarine account (R.335). When she made the check out to the client, she left all three copies of the check and voucher together for ten days, to let the check clear (R.340). She would get Appellant to sign the check, would file the copies and send out the original check. She would post the transaction twice a month (R.337).

Mrs. Emarine's name, at the time of the divorce was Belcher (Ex.40). The checks that Appellant collected were written by Mr. Belcher and sent to the County Clerk beginning

in 1966 (R.41). Appellant picked them up and had a power of attorney so that he could cash them (R.41). Many of the cancelled checks issued by Mr. Belcher were obtained, as noted below, after this dispute arose, and they are in evidence (R.50-53). On the backs of many of those checks are bank stamps indicating the deposit to the account of Robert B. Hansen. A question was asked during the hearings as to whether or not these had in fact gone into his legal account, rather than the trust account. It was explained that some of his part-time help had apparently used the wrong bank stamp, but that the deposit slip which accompanied the check was for the trust account, and the checks had gone into the correct account in most instances (R.443). The deposit slips were put in evidence as Ex. 57 (R.418, 443). The C.P.A. had gone through the deposit slips, to determine whether or not the checks had gone into the trust account or into the law account. That study reveals that the deposit slip used controlled.

Two exhibits were prepared by the C.P.A. covering the Emarine account. At the time of the divorce her name was Belcher. It later changed to Tucker, and then to Emarine, and ledger cards and records reflect all three names (R.335). Ex. 56 compared the receipts maintained by the Appellant with the ledger cards maintained by the County Clerk, and notes that the receipts agree with the County Clerk records. Ex. 56 shows a total of 75 checks, and all but six of them went into the correct account. The first one that went into the law

account was received 12-18-68, and the other five which went into the law account are the next five checks received, beginning 1-17-69, and continuing through 4-29-69. This corresponds with the time when Appellant was moving from his private office to his home in early 1969 (R.322,385), and his adult children started making some deposits. Ex. 56 shows that the receipt system indicated that a deposit should have been made to the trust account, but the actual deposit slips show that they were deposited to the law account. The court will recall that the receipt system used receipted for every check, and then the receipt was marked with a T if the money was to go into the trust account, and with an L if the money was to go into the law account. The final note on the first page of Ex. 56 states that the receipts correctly indicated that these should have gone into the trust account, but the deposit slips were for the law account. There is no showing that this was intentional. There is an affirmative showing that the time corresponds with his move from his downtown office to his home, where his children were just starting to make deposits (R. 385-6). Further, the deposit caused no problem. Ex. 32, which consists of six checks from Appellant to Mrs. Emarine, shows that these funds were promptly disbursed to her. Appellant also confirmed this. He said that all of those which went into the legal account went out properly (R.416). This is also summarized on Ex. 56.

If this is the commingling of funds, which the Hearing Examiners found, we respectfully submit that the findings should have specifically addressed what happened. We think that the uncontroverted record showed that the Appellant had a bookkeeping system set up by a firm of certified public accountants (R.381), that the system always has included a law firm account and a separate trust account (R.328). When the money was received, a receipt was prepared in a receipt book (R.325), and the receipt book was marked with a T or with an L, to indicate which account the funds should be deposited in (R.311). Great numbers of checks were handled, and even on the Belcher-Tucker-Emarine account, all of the checks except six went into the trust account (Exs. 56,57), and the six which were erroneously deposited into the law firm account were deposited during the same general period, which coincided with the Appellant closing his downtown office and moving into his home (R.385), where his children began to help with the deposits (R.385-6). All of these checks which miscarried into the law account were disbursed, and no mischief was caused thereby (R.416). There is a technical violation of the Code of Professional Conduct on comingling, but the circumstances under which this occurred do not, we respectfully urge, warrant a suspension from the practice of law.

At this point, in the interest of continuity, we deem it advisable to note two other exhibits. One is Ex. 47 covering 37 collections made from Leslie Booth on behalf of Franklin

Life-Lowrys, and Ex. 59, which covers some disbursements to Lowry and disbursements to Winona Belcher, Tucker, Emarine. On the 37 collections made from Booth for the benefit of Franklin Life-Lowrys, none are shown to have been deposited otherwise than to the trust account. On Ex. 59, showing the disbursements to Lowry and Emarine, all of the disbursements are from the trust account, except one in March of 1967. Whether or not this is another isolated check which got into the law account is not explained by the evidence.

Thus, the Appellant had a system which included a separate trust account for his client's funds, and the trust account was being consistently used. The six deposits by someone while he was moving from his office downtown to his home are exceptions to the ongoing practice, and in every case, except possibly one, disbursement was promptly made to the client.

The conclusionary finding of the Hearing Examiners in paragraph 5 (i) to the effect that he failed to keep the Emarine monies in a separate trust account is thus misleading.

He did ultimately close his trust account, in the belief that the funds remaining in it were his (R.416, 292).

There is a finding, No. 5 (d), that Appellant failed to maintain complete and adequate records of the funds he collected for Mrs. Emarine. That finding does not reflect what the record shows. Mrs. Pennington testified that she did maintain ledger cards under the names Belcher, Tucker and Emarine (R.335), and there simply isn't any evidence that the bookkeeping system and the records being kept were not adequate. However,

when Appellant moved to his home and ultimately went into a career practice with the State and stopped the private practice of law, his records were in cardboard boxes some 40 to 50 in number (R.388) and he could not find her ledger card (R.389, 402). There was no effort on his part to conceal the amount of money collected. He prepared an affidavit in December of 1974 (Ex.12). He got the information from the County Clerk (R.44, 400-402). He sent the affidavit to Mrs. Emarine, and from it she discovered that the records showed payments she hadn't received (R.42-44). She was living in Hawaii, and was about to come back to Utah, and so she waited until she returned to Salt Lake (R.46). She had received the money from 1966 to July of 1969 (R.41), by which later date he had closed his office. She hadn't heard from Appellant between 1969 and 1974, but she did receive a letter in 1974 (Ex.42) which enclosed the affidavit (Ex.12) reciting the monies received. Appellant told her that the figure came from the court, and she inquired as to who got the money (R.44), and he didn't answer (R.46). When she came back to Utah in July of 1975, she called several times. She testified that he put her off, saying that he would have to have time to check his records (R.47). When she got here, she tried to get an accounting but Appellant could not readily get into his books--and this is far different from the charge in the finding, that he did not maintain books. Mrs. Pennington testified that she made a ledger card under all those names--Belcher, Tucker and Emarine (R.335), and Appellant testified

he did not prepare and maintain them (R.413). He did get the county records (R.44), but he was not sure all of the checks had cleared, and had the impression (which turned out to be wrong) that some had not (R.415). On August 12, 1975, he wrote attempting to get Mr. Belcher's checks so that he could find out the amount of money he owed (Ex.16). He wrote to Mrs. Emarine on March 3, 1975, and sent her a copy of the court's records of payments made, and told her his records were not readily accessible (Ex.14). She got Attorney Quentin Alston to assist, and paid him a \$100 retainer (R.58,65). The newspaper reporter called Appellant, and said that Mrs. Emarine had complained at having to pay two attorneys, and Appellant voluntarily paid the \$100 retainer to Mr. Alston (R.404). This was during the election campaign. As noted, Appellant could not find his records. He wrote to Mr. Belcher, to try to get the checks, went to the bank to look at microfilms, he went to the Clerk's office to check the records, he hired Mrs. Pennington, to try to find the records, he searched for them himself, and hired a CPA to review the records, but could not readily find the records he needed. There is no evidence to contradict his testimony and that of Mrs. Pennington that records were kept but because he had closed his office and put his records in boxes that could not be found. He did not deny that he had a duty to render an accounting. He just could not find his records. As the checks of Mr. Belcher were found and the account was reconstructed, he promptly paid. As Mr. Belcher's checks were

gradually located, Mr. Alston identified preliminarily some monies he thought were due, and Appellant promptly paid them, after deducting his fee for collection (R.72-3). Mr. Alston then got further evidence that more money was due, and requested payment of \$1,285. This request was made September 16, 1976 (Ex. 22, R.81). Appellant deposited that amount with the Clerk of the Court on September 27th (Ex.26, R.82). Mrs. Emarine got additional Belcher checks (Ex.30) and again Appellant promptly paid the additional money (R.86) and the account was fully settled (R.119,121).

Appellant testified that he was not aware that money was being received and that it was not being disbursed (R.382,393). He also did not respond as quickly as he should have to the requests of the clients that he straighten out their accounts and pay the money he owed, but the record does not disclose any willful or intentional withholding of their money. To the extent the funds were deposited in his legal account--and this rarely occurred and then only on the Emarine account--it was inadvertent and caused no harm (R.416). To the extent that he was not aware that the funds had come in and not been disbursed (R.392) he is careless, but this does not warrant a one year suspension.

Appellant was entitled to an unequivocal finding on this Count that he maintained complete and adequate records and that the monies paid for Mrs. Emarine's benefit were deposited in a

trust account except for 6 payments which, although placed in a legal account, were promptly and properly paid to the client.

The findings, dealing with a single set of facts, determined that failing to pay over money to the client not only constituted a violation of the bar canons but also was a criminal violation of 78-51-42 UCA. The bar has no jurisdiction to determine a misdemeanor and certainly the bar proceeding held in this case did not afford the Appellant the safeguards traditionally allowed in a criminal proceeding.

Appellant was also entitled to a finding that although he did not pay over some of the payments due the client promptly and was not able to render an accounting upon immediate demand, it was not a willful withholding and the seriousness of the offense was mitigated because:

(1) Appellant moved more than a 20 year collection of records from his private office to his home because of his acceptance of the public practice of law with the Attorney General's office and a particular record was not thereafter readily accessible.

(2) He reduced his professional clerical help because of this change in status.

(3) The account was an old one, continuing for a period from a point in time more than 15 years from the date of charge to 3 years before the charge, making more difficult the retention and retrieval of records.

(4) He was in the midst of an election campaign when the accounting was demanded and had precommitted excessive demands

on his time.

(5) When he was unable to locate his own records, he exerted reasonable efforts to reconstruct the account.

(6) He promptly paid all sums the reconstructed accounting showed due.

In numerous cases it has been held or recognized that absence of a fraudulent or evil intent is a mitigating circumstance which should be taken into consideration in determining the extent of the discipline imposed. See the collection of cases in 96 ALR 2d 857 §19.

POINT IV. COUNT ONE OF COMPLAINT: FRANKLIN LIFE-LOWRY MATTER. THE FINDINGS ARE MISLEADING IN CONCLUDING APPELLANT DID NOT MAINTAIN COMPLETE AND ADEQUATE RECORDS, AND DID NOT MAINTAIN THE FUNDS IN A SEPARATE TRUST ACCOUNT. THEY ARE ERRONEOUS IN CONCLUDING APPELLANT WAS GUILTY OF NEGLIGENCE, AND IN CONCLUDING A CRIMINAL VIOLATION, AND INADEQUATE IN NOT SETTING OUT THE MITIGATING CIRCUMSTANCES.

(a) The Charge. On this matter, Appellant is charged in almost identical language as in the Emarine case--with commingling funds, not keeping adequate records, not notifying the client of the receipt of money, and not disbursing promptly. The canons of ethics are those as set forth above on the Emarine matter.

On this matter, he is also charged with not completing his work, which involved trying to make a collection from a Mr. Gardner and a Mr. Boothe.

(b) Evidence. The evidence in regard to the accounting records kept and the manner of depositing client's funds, including the Lowry funds, is detailed above. Appellant did have a trust account. He did have an accounting system with client ledger cards. He did keep receipt books. The receipts were posted and the money was disbursed, all as is detailed in the Emarine Count.

In paragraph 4(g) of the Findings, the Hearing Examiners concluded that Appellant failed to maintain the funds collected for Franklin Life-Lowry in a separate trust account, and commingling the same with his own funds. We do not believe that this finding is in accord with the evidence. Part of the funds

collected came from one Leslie L. Boothe. Ex.47 is a compilation of 37 payments made by Boothe. None of these appear to have been deposited to the legal account.

Ex.59 shows 11 disbursements by the Appellant to Lowry, and all 11 of those checks were drawn on the trust account. We don't believe that there is any exhibit or any testimony showing that the Franklin Life-Lowry money was commingled. It is true that sometime after Appellant closed his law offices, moved his files into his home, and went to work full time for the Attorney General's office, he assumed that the money remaining in the trust account was his own (R.292), and he drew the money out and used it, but that is not the commingling charged in the complaint, nor covered by the findings.

The Hearing Examiners also found (Finding 4(c)) that Appellant failed to maintain complete and adequate records of the funds to be collected. Again, we do not believe that this finding is supported by the evidence.

Appellant, as detailed above in the Emarine Count, testified that the bookkeeping system he was using was set up by a firm of certified public accountants (R.381). When the money came in, a receipt was written therefor (R.302,391-2). Mrs. Pennington, who did the in-house bookkeeping, testified about the system (R.306,330), and there is no dispute about the fact that the Appellant always maintained a trust account with its own checks and its own deposit slips and a legal account with separate

checks and separate deposit slips (R.306,326,328,391). The trust account had been maintained for more than 20 years (R. 391,325). After the receipt was written Mrs. Pennington posted the receipt to client ledger cards (R.306). She, at that time, (R.336) advised the client of the receipt of the money and that it would be disbursed within about ten days, when the check had cleared. She also at that time wrote the check to the client, but held the check itself and the vouchers (copies) for approximately ten days. When the check cleared, the funds were disbursed to the client (R.336). The system worked well from 1964 to 1969 (R.315). The money went in the correct accounts, and the checks disbursing the money were sent to the clients (R. 315). The receipt book was marked with a T to indicate that the check should be deposited to the trust account and with an L to indicate that it should be deposited to the legal account (R.306). The receipt books were posted to the client ledger cards about twice a month (R.329,337). Mrs. Pennington did testify that one of the Lowry ledger cards was incomplete, but she also said that there may have been a card under Franklin Life (the original client for whom suit was filed) R.247, Ex.8), and that she may have completed the Lowry card from the Franklin sheet (R.346). This does not prove the records were not kept.

We respectfully submit that the Appellant had an adequate accounting system. However, when he moved from his downtown office to his home and started to work on a full-time basis in the Attorney General's office, the system broke down.

His longtime secretary and bookkeeper worked only a six hour day, once a week (R.327). She posted the receipts to the customer's ledger card (R.327), but she no longer assumed the responsibility of notifying the client that the money had been received. She further discontinued issuing the checks, because she no longer knew the amount of the attorney fee, and did not know whether someone else had already issued the check (R.334). The result was that funds were paid and deposited by his part-time help (R.385). Appellant admittedly should have, but did not follow the matter to the extent of knowing that the money was being received and that it was not being disbursed (R.276,392).

On the Lowry matter it is clear that the initial client was an insurance company--Franklin Life. The complaints against Messrs. Gardner and Boothe were filed in the name of Franklin Life (Exs. 8 & 9 for the two Gardner suits and Ex. 52 for the complaint in the Boothe suit). Mr. Lowry was the agent for Franklin Life, and he asked Appellant to pay the money to him. Appellant considered Franklin Life to be the client, Lowry to be the agent, and he obeyed the instructions. Appellant simply assumed that this was agreeable with Franklin Life (R.382-4). Some of the checks were made payable to Mr. Lowry, and after he died other checks were made payable to Mrs. Lowry (see, for example, Ex. 59). However, Mrs. Lowry herself testified that she had never talked to or received a letter from the Appellant (R.20) and technically the attorney-client relationship was never established between the Appellant and Mrs. Lowry as an individual. The treated Mrs. Lowry as the real party in interest (R.

275). She did become executor of the James E. Lowry estate (R.18) and she did by letter (Ex.4) request an accounting. The letter is dated March 4, 1971. The original of this letter was introduced as Ex. 55, and on the bottom of it is a notation from Appellant to his secretary which he said was intended to have the secretary follow through on it (R.393). His notation appears to be dated May 8th. Mrs. Lowry did get a ledger card (R.25). This was attached to a letter of July 1, 1976, in which Appellant indicates that he had collected \$449.08 on the Leslie Boothe account, and that the check represented the balance due. (R.25). He also offered to pay 50% of the amount still due from Gardner--not because he had guaranteed (R.29) that he could make the collection, but because she had complained that he had not properly pursued the work (R.26,30). Ex.7 is the offer to pay which she declined. She was asked on cross-examination if the \$162.72 that Appellant tendered was not the correct balance, and she said she didn't know (R.31). Her son also requested an accounting and did not get it (R.37). Appellant testified that he filed the suits for Franklin Life (R.377); that the money collected from Boothe also reduced the Gardner debt (R.378); that he moved to his home and put the records in boxes (R.377-8); that he could not find the records nor his file on the Gardner lawsuit. He however, had finally located it in a vertical file in his furnace room the Saturday before the hearing (R.388). He describes the extent of his search in an effort to get the records (R.389), and that he did not know the money was not being disbursed (R.392).

In response to Mrs. Lowry's letter,

he thought Mrs. Pennington had obtained and sent the requested information (R.393). He could not find all the Franklin Life ledger cards (R.394). He tendered \$162.72 principal and \$81 in interest, which he got from part of the ledger cards which he was able to find, going forward from 1967 (R.394). He unequivocally testified that every cent of the Franklin Life-Lowry money went into the trust account, "I know it did," (R.392). He was requested to turn the file over to another attorney if he was too busy. He testified that he thought he could handle it, but another reason he didn't turn it over to another attorney is that he couldn't find the file (R.398). He also testified that one of the Lowry letters which was sent to him was recently found unopened, and he didn't know why (R.421). He also testified that when he met with the Bar on Mrs. Lowry's complaint, the Bar told him to get her the best information "you have got available, and see if you can't satisfy her." It was after that that he made the tender of the settlement check to her (R.424).

We believe there is a technical defense to the Franklin Life-Lowry charge. The client was Franklin Life. Mr. Lowry was its agent and upon his death the agency relationship terminated. There is no showing that Mrs. Lowry was an agent of Franklin Life. The evidence involved Appellant's failure to account to and pay over to Mrs. Lowry.

We believe there are two technical defenses to the neglect:

charge in the Lowry matter. The last activity in the Franklin Life-Lowry matter occurred in 1966 (Ex.59). The complaint was filed with the Bar Commission in 1977. If the 3 year statute of limitations as prescribed by the Bar in Rule 10 of the Rules of Discipline, amended February 9, 1977, is to be meaningful, it must preclude an 11 year lapse between the last activity in the matter on which a neglect charge is claimed and the bringing of a complaint. As a second technical defense to the neglect charge, the American Bar Association issued informal opinion No. 1273 in 1973, which holds that the word "neglect" means a pattern of inaction and does not include a single instance of neglect no matter how gross. It states:

"Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client, or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith."

In other words, a lawyer is not guilty of neglect unless he knows he is performing incompetently or knows that he ought to be performing when he isn't.

Appellant was entitled to an unequivocal finding on this count, as in the Emarine count, that he maintained complete and adequate records and that the monies paid for Franklin Life-Lowry's benefit were deposited in a trust account.

Appellant was also entitled to a finding that although he

did not pay over the sum of money due Franklin Life promptly and was not able to render an accounting upon immediate demand, it was not a willful withholding and the seriousness of the offense was mitigated because (1) Appellant moved more than a 20 year collection of records from his private office to his home because of his acceptance of the public practice of law with the Attorney General's office and a particular record was not thereafter readily accessible, (2) he reduced his professional clerical help because of this change in status, (3) the account was an old one which had been inactive since 1966, making more difficult the retention and retrieval of records, (4) he was in the midst of an election campaign when the accounting was demanded and had precommitted excessive demands on his time, (5) when he located the Franklin Life ledger card, he sent a copy of it to the client and promptly paid the sums the accounting showed were due, (6) he followed the counsel of the Bar Commission in determining as best he could the amount due and making prompt settlement thereof, and (7) he went the extra mile and tendered half of the balance due from an account that would ordinarily have been written off as a bad debt.

The Franklin Life-Lowry claim, as with the Emarine claim, is one in which there is a complete absence of fraudulent or evil intent. That fact should have been taken into account as a mitigating circumstance in determining the extent of the discipline imposed. See the collection of cases in 96 ALR 2d 852, §19.

POINT V. THE FINDINGS ARE ERRONEOUS IN CONCLUDING THE ATTORNEY GENERAL IS SUBJECT TO PRECLUSION BY THE BAR FROM PRACTICE OF HIS OFFICIAL DUTIES.

The office of Attorney General is, in Utah, an office established by the Constitution. The qualifications and duties of office are described by the Constitution. See Constitution of Utah, Article VII, Sections 1, 3 and 18.

The Constitution provides a method for removal of the Attorney General from his office. See Article 6, Sections 17, 18 and 19.

When an office such as the Attorney General, which is mandated by the Constitution, is coupled with a Constitutional provision for removal from office, it has traditionally been held to mean that the Constitutional method for removal is the exclusive method of removal. See 63 AmJur 2d Public Officers and Employees, §178 and the cases cited in footnote 65. The Utah Constitution and the Utah Statutes provide that the Attorney General shall practice law in the official capacity as Attorney General. See Utah Constitution, Article VII, §18 and 67-5-1 UCA 1953 as amended.

If the Bar, through disciplinary proceedings precludes his right to practice law, the Bar through its disciplinary proceedings thereby interferes with his Constitutional duties as Attorney General. To exercise disciplinary sanction beyond that of a reprimand is tantamount to impeachment and hence by indirection a circumvention of the Utah Constitution and an unlawful interference with the exclusive constitutional provision relating to removal from office.

The Constitution and the statutes enlarging the Constitutional duties of the Attorney General impose upon the Attorney General duties inconsistent with certain of the canons of ethics enjoined upon members of the Bar. For instance, Canon 5 forbids an attorney to represent a party when the attorney has a conflict of interest with respect to another party. The Attorney General, by Constitution and statute, must represent all of the Utah officers and their agencies. Many times there are conflicts of interest among Utah agencies. Is the Attorney General subject to suspension for violating this canon?

If the Bar through its disciplinary proceedings can remove the Attorney General, it can through this means deprive the people of their voice in the selection of a strong and vigorous Attorney General. The only two cases that have dealt directly with this issue have determined that misconduct of a District Attorney when he is elected and subject to constitutional removal procedures can be addressed only through impeachment proceedings outlined in the State Constitution. Simpson v Alabama State Bar, 311 S.2d 307; Watson v Alabama, 311 S.2d 311. For a more elaborate statement of this point, see Appellant's Memorandum which is a part of the trial record.

CONCLUSION

In the Dick case, the Bar should have unequivocally made findings absolving Appellant from all wrong doing and not equivocated in the findings so as to cast a suspicion on the

propriety of his actions in the matter contained in the count. In the Piepenburg count, the Bar should have found him innocent of any violation of the canons. In the Emerine and Lowry counts the Bar should have found that he maintained complete and adequate records, that he was innocent of commingling of funds as charged but that he misplaced the records and was not thereby able to reasonably make payment of any owed sums upon demand or to render a timely accounting. The findings should have contained the mitigating circumstances that Appellant had recently moved his more than 20 years records from his private office to his home, had significantly reduced his clerical help because of this change in status, was in the midst of an election campaign when the accounting was demanded and had precommitted excessive demands on his time, the records needed to render the accounting extended over more than 10 years each, when he was unable to locate his own records, he exercised reasonable efforts to reconstruct the accounting and promptly paid all sums owned under the reconstructed accounting. In addition, in the Franklin Life-Lowry matters, the findings should have completely absolved him on the neglect charge.

The Legislature has placed on the Supreme Court and the Supreme Court has accepted the fact that:

"We do not consider the recommendations of punishment made by the Bar to be in the same category as we do their findings of fact, because it is our responsibility to discipline an erring attorney, and we cannot delegate that duty to others. The Utah State Bar makes its recommendations upon a reading of the printed record of

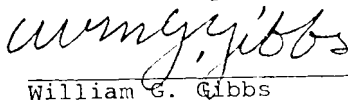
proceedings had before committees and not before the individual commissioners of the State Bar. We are, therefore, in an equally good position to evaluate the situation as are the commissioners." In re George Bridwell, Disciplinary Proceeding, 474 P.2d 116.

In this case, the Bar Commissioners never even had before them a transcript of the proceedings but only the conclusionary report of the Hearing Examiners which they adopted in total. We submit a reading of the record in this case does not warrant a suspension from the practice.

Dated this 17th day of April, 1978.

Respectfully submitted,


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