

1978

In Re: Robert B. Hansen Disciplinary Proceeding : Brief of Utah State Bar Commission

Utah Supreme Court

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Recommended Citation

Legal Brief, *In re Hansen*, No. 15605 (Utah Supreme Court, 1978).
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IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF UTAH STATE BAR COMMISSION

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

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FILED

JUN 1 1978

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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| Disciplinary Proceeding |) | |

BRIEF OF UTAH STATE BAR COMMISSION

NATURE OF THE CASE

Appellant was charged in a formal complaint before the Board of Commissioners of the Utah State Bar in four counts with multiple violations of the Rules of Professional Conduct of the Utah State Bar, relating to legal work done by him as an attorney and counselor of the Utah State Bar.

DISPOSITION OF THE
BOARD OF COMMISSIONERS

After a two-day trial, the Hearing Officers entered findings and decision that Appellant had violated specific Rules of Professional Conduct of the Utah State Bar relating to three of the counts; found no violations as to the fourth; and recommended to the Board of Commissioners that Appellant be suspended for one year. The Board of Commissioners approved and adopted the findings and recommended to this Court that Appellant be suspended from the practice of law for one year.

THE NATURE OF THE RELIEF SOUGHT

The order of the Board of Commissioners of the Utah State

Bar adopting the findings of the Hearing Examiners should be affirmed and its recommendation that Appellant be suspended from the practice of law for a period of one year should be adopted.

STATEMENT OF FACT AND ARGUMENT

Three of the counts, the Dick, Emarine and Lowry matters, related to activities of Appellant in the private practice of law. Much of the alleged misconduct as to these counts preceded the time when Appellant became Attorney General for the State of Utah. The Piepenburg matter related to activity of Appellant while he was Deputy Attorney General and associated as counsel for the prosecution in the trial of that case. The charges as to the Dick matter were dismissed. Nevertheless, Appellant devotes much space in his brief on it. We will comment only briefly.

Appellant complains that the Commission did not consider matters in mitigation. We submit that this is not so. Considering the multiple violations of the Rules, it is apparent the Commission considered mitigating circumstances in arriving at its recommendation for a one-year suspension.

It is the position of the Bar that the findings are supported by the evidence. The findings are clear and concise and meet the allegations of the complaint. They accurately and fairly reflect the evidence. It is noted that some of the findings are favorable to Appellant. Appellant has not demonstrated that the Commission acted arbitrarily or capriciously or that the findings are in

POINT I. THE FINDINGS AND RECOMMENDATION OF THE BAR COMMISSION SHOULD BE ADOPTED UNLESS THE COURT IS PERSUADED THAT THE COMMISSION ACTED ARBITRARILY, CAPRICIOUSLY, OR BEYOND THE SCOPE OF ITS POWERS.

This Court has consistently ruled that the findings and recommendation of the Bar Commission in disciplinary matters are to be accorded the "presumption of correctness and propriety." In re Johnston, 524 P.2d 593, 594 (Ut. 1974). They should not be overturned unless the Court is persuaded "that the Commission has acted capriciously, arbitrarily, or ~~beyond~~ the scope of its powers," Id.; In re Wade, 497 P.2d 22 (Ut. 1972), or unless the findings and recommendation are "plainly in error," In re Badger, 493 P.2d 1273 (Ut. 1972) modified on reh. 501 P.2d 106 (1952), or "not in accord with the preponderance of the evidence." In re Bridwell, 474 P.2d 116 (Ut. 1970).

While it is true, as set forth in Appellant's Brief, that the three-justice majority in Bridwell, supra, stated that the recommendation of the Bar Commission is entitled to less weight on review than the findings, subsequent decisions of this Court have treated the findings and recommendation with equal respect. In re Johnston, supra; In re Badger, supra; See In re MacFarlane, 350 P.2d 631, 633 (Ut. 1960). In Badger, the Court stated:

The Bar Commission has recommended that Mr. Badger's conduct justifies disbarment; such a recommendation, in the final analysis constitutes a value judgment, which may be

accepted, modified, or rejected by this court. However, this court has established a standard that it will sustain the recommendation of the Bar Commission unless it has acted arbitrarily, capriciously, or unreasonably. 493 P.2d at 1275.

The reasons for the respect accorded the findings and recommendation of the Bar Commission are obvious. Without the presumption of correctness and propriety, this Court would be placed in the position of considering de novo every disciplinary action brought in the State.

The same rationale applies to the findings of fact made by the hearing panel of three commissioners. As hearing officers they are the finders of fact and their findings are entitled to the same presumption of correctness by the Bar Commission.

In MacFarlane, supra, this Court noted that the Bar Commission is uniquely qualified to fulfill this role, stating:

On this problem it is relevant to observe that the propriety of the questioned conduct must necessarily be directed to the good conscience and ethical and moral standards of members of the Bar, and that the Bar Commissioners as its elected representatives are peculiarly suited to be the arbiters of such standards. They are vitally concerned with the general conduct of the Bar and its public relations and are also seriously concerned with a charge against a fellow member such as that involved in the instant proceeding. 350 P.2d at 633.

This Court has also refused to review the mental

process by which the Bar Commission reached its conclusions. In re MacFarlane, supra. Implicit in that holding is recognition that the hearing officers are uniquely qualified to decide upon the credibility of witness, the relative weight to be given competing evidence, and the inferences to be drawn therefrom. A mere reading of the "cold" record could not provide those insights.

For that reason, the only correct and workable approach is as stated by then Chief Justice Crockett in dissent in In re Bridwell, supra:

Nevertheless, it is my opinion that for the same reasons that presumptions of verity are indulged in favor of those judgments and orders, some deference should be indulged to the findings and recommendations of the Bar Disciplinary Committee and the State Bar Commission; and that accordingly, we should assume that they believed those aspects of the evidence, and the reasonable inferences to be drawn therefrom, that support their findings and recommendations; and that we therefore should survey the evidence in that light, and sustain their findings and recommendations unless it appears that they have acted capriciously, arbitrarily or unreasonably. 474 P.2d at 117.

Before turning to the separate counts, it should be noted that Appellant's basic line of attack is to storm the findings of the Commission head-on and attempt to re-argue the evidence before this Court. However, nowhere does Appellant attempt to show that the Bar Commission acted arbitrarily or capriciously. Beyond that,

Appellant must show that the findings are plainly in error or not in accordance with the preponderance of evidence, when that evidence is viewed in the light most favorable to the findings of the Bar Commission. This Appellant has clearly failed to do.

POINT II. COUNT FOUR: THE DICK MATTER. THE COMMISSION HAD NO AUTHORITY TO "EXONERATE" APPELLANT AND THIS COURT WITHOUT JURISDICTION TO REVIEW THE DISMISSAL OF THE COUNT. THE DISMISSAL SHOULD NOT BE MODIFIED.

Counsel for The Bar Commission are at a loss to understand Appellant's attack on the Commission's decision on Count Four and its pre-eminent position in Appellant's Brief. Although Appellant prevailed below, that the Bar Commission ruled that his conduct did not constitute a violation of the Rules of Professional Conduct, he apparently seeks further exoneration by attempting to re-argue the entire matter before this Court.

According to the Revised Rules of Discipline of the Utah State Bar (1971), the Bar Commission is empowered to enter an Order dismissing the complaint or to make a recommendation for discipline to the Supreme Court. Rule III(7). Nowhere is the Commission given the power to "exonerate" a subject attorney. The finding that the attorney did not violate the Rules of Professional Conduct and the dismissal of the charge is, in effect, an exoneration of the attorney.

Moreover, a dismissal by the Bar Commission is conclusive as to all parties. The Utah State Bar is not entitled to appeal an adverse ruling by the Commission. See Rule IV, Revised Rules of Discipline. Therefore, this Court does not have jurisdiction to review the Order of the Commission with respect to Count Four.

But assuming, arguendo, that the Court were to undertake a review of this count, there has been no showing of arbitrary or capricious action on the part of the Commission nor has there been an adequate showing that the findings go against the preponderance of evidence. The decision of the Commission should be upheld and not modified. The findings accurately reflect the evidence, even in their so-called "negative" aspects. Appellant is entitled only to his finding of no violation and the dismissal of the particular charge.

POINT III. COUNT THREE. THE PIEPENBURG MATTER. THE EVIDENCE SUPPORTS THE FINDINGS. EXPERT TESTIMONY WAS PROPERLY ADMITTED. APPELLANT MAY NOT SHIFT HIS PROFESSIONAL RESPONSIBILITIES TO ANOTHER.

After hearing extensive evidence with respect to Count Three the Commission found that Appellant made certain statements to a member of the press which a reasonable person would have expected to be disseminated by the public media and which related to the guilt or innocence of the accused, the evidence or the merits of the

case, or which were reasonably likely to interfere with a free trial. Appellant attacks those findings and attempts to re-argue the underlying facts before this Court, including the credibility of certain witnesses.

As set forth in Point I, above, the findings of the Commission are entitled to a presumption of correctness and the evidence must be reviewed in the light most favorable to the Bar, the prevailing party below. Appellant may not simply urge his version of the facts upon this Court, when the Commission has rejected that version, in the absence of a persuasive showing of arbitrariness, capriciousness or a disregard of the preponderance of the evidence. Appellant has failed to make the necessary showing.

There was no dispute in the evidence that Appellant made the statement, as broadcast, to Mr. Horton, whom Appellant knew to be a reporter (T.372, 374). The issue centered on the circumstances surrounding the interview and whether Appellant should have reasonably expected the statement to be broadcast.

The Commission obviously decided to believe the version of Mr. Horton, an unbiased witness, over that of Appellant. The hearing panel was in a singular position to observe the witnesses and rule on their credibility.

Nonetheless, Appellant would ask this Court to reject the testimony of Mr. Horton and devotes pages of his Brief to an apparent impeachment of the witness' observation or recollection of the facts. He chooses to ignore a similar impeachment concerning his own addition of new testimony at the hearing. (T.426, 427).

In any event, the evidence, when viewed in the light most favorable to the Bar, clearly supports the findings of the Commission. Mr. Horton interviewed Appellant at counsel table concerning the jury background investigation. (T.131, 132). The reporter was taking notes. (T.133). As part of the interview Mr. Horton asked Appellant for his prediction, based on the information received from the investigation, as to the outcome of the trial. (T.133). Mr. Horton testified that he did not recall prefacing his question with the words "incidentally" or "by the way". (T.133, 149, 150). The reporter then prepared a news release containing Appellant's statement and it was broadcast on the evening news. (T.134-136).

The Bar also offered extensive expert testimony from experienced members of the news media in Salt Lake City. (T.90, 162, 183, 201). These experts established that the business of the news media is to gather and disseminate information, (T.102, 205, 211-212); that a public

official speaks to a reporter at his own peril, absent some prior agreement that the communication is confidential, (T.95, 106, 166, 188, 207); and that the only way a public official can make certain that a statement will not be disseminated is to not make it. (T.166, 200, 204). The experts further testified in response to a hypothetical question, based on facts proven by the Bar that the reporter did not violate a confidence in broadcasting the statement. (T.96-102, 167-174, 189-192, 205-208). Their opinions did not change when the facts of the hypothetical were varied by counsel for Appellant. (T.103-113, 174-182, 193-195, 213-216).

The expert witnesses testified that Mr. Horton did not violate any confidence or understanding, even if Appellant used the words "incidentally" or "by the way," or if the interview took place on the way out of the building, or if the reporter knew of the judge's concern. (Id.) There was testimony that reporters often interview public officials while in transit. (T.179).

The Bar submits that the expert testimony was material to the issue of what a reasonable person could expect to be disseminated by the media. A reasonable expectation is determined by the general practice in the community and that practice is established by the media. The only way a public official can control dissemination is to

keep quiet and thereby eliminate the source. Once he speaks, he is at the mercy of the newsman. Of course, the newsman may agree in advance to keep it "off the record". If not, however, the statement may be broadcast if it is deemed newsworthy. Any expectation to the contrary by Appellant, or any other person, would be patently unreasonable.

Appellant also relies heavily on the "Statement of Principles and Guidelines for Reporting", (Ex. 33), as establishing a joint responsibility for not disseminating such a statement. Appellant was aware of the guideline contained in paragraph 33 of the Statement of Principles at the time he was interviewed. (T.406). Mr. Horton was not. (T.152, 154).

Assuming arquendo, that Mr. Horton was professionally and ethically bound by the guideline and, assuming further, that he breached that duty by broadcasting the statement, Appellant's conduct would still not be excused. The guidelines purport to impose a dual responsibility upon the bar and the media. This responsibility is in addition to the duties imposed on the bar by DR 7-107(B)(6) and DR 7-107(D). Appellant may not justify his breach of those responsibilities by claiming that he reasonably expected that the reporter would not violate them as well. It may be that they both violated their respective duties, however, the latter does not absolve the former. The Rules of

Discipline were meant to be obeyed by the Bar. We may not shift our obligation to others.

All of the arguments put forth by Appellant to show that Mr. Horton should have known not to broadcast the statement apply with greater force to Appellant's making the statement in the first place. If Mr. Horton should have known of the concerns of the judge and defense counsel and of the fact that dissemination of such a statement might prejudice the jury, Appellant was in an even better position to know these things. Appellant testified that he did know of these concerns. (T.429). Appellant also knew that the statement should never have been broadcast. (T.431). He should have known equally that the statement should never have been made.

There was no reason for Appellant to have made the statement in the first place. He did not know Mr. Horton nor did he have a special relationship with him. (T.372). Mr. Horton had no pressing reason to know Appellant's prediction of the outcome of the trial. The Rules of Discipline and the Ethical Considerations impose a clear duty on an attorney in these circumstances. That duty is to remain silent. There are ample facts in evidence to support the Bar Commission's findings and recommendation on this charge and they should be sustained by this Court.

POINT IV. COUNT TWO. THE EMARINE MATTER. THE EVIDENCE SUPPORTS THE FINDINGS. APPELLANT DID NOT MAINTAIN COMPLETE AND ADEQUATE RECORDS AND DID NOT MAINTAIN THE FUNDS IN A SEPARATE TRUST ACCOUNT. THE MITIGATION CLAIMED BY APPELLANT WAS GIVEN DUE REGARD.

Appellant undertook to perform legal services for Winona Emarine in the collection of child support payments due from her former husband, Berry Belcher. (T39, 40). Belcher had checks, generally, in the sum of \$65.00 each (Ex. 30), made payable to Winona Emarine or Winona Tucher (her former name) and deposited with the Clerk of the Court. (T40). Appellant either picked up the checks or had the Clerk mail them to him. Pursuant to a power of attorney (T40), Appellant then indorsed the checks and caused them to be deposited to his account (Ex. 30).

For a period of time, Mrs. Emarine received disbursements from Appellant. However, from July of 1970 until December of 1974, she heard nothing from him, at which time, the failure of Appellant to disburse surfaced. Appellant sent Mrs. Emarine an affidavit (Ex. 12) based on the records of the Clerk of the Court which indicated some child support payments had been made during the years 1969, 1970, 1971 and 1972 but not fully disbursed to her. She requested an explanation (Ex. 11) (T41, 42, 43). Again, by letter dated February 2, 1975, she asked who received the money because she hadn't (Ex. 13) (T44).

She contacted the Appellant personally by phone in the summer of 1975 and was told he had been too busy to check his

records (T46). After she made several attempts to get the matter settled and received no cooperation from Appellant, she hired an attorney to help her (T47, 49).

Her attorney then contacted Appellant and requested accountings and funds by letters dated August 2, 1975 (Ex. 1), August 21, 1975 (Ex. 17) and August 27, 1975 (Ex. 19). Appellant did not make an accounting and action was filed against him in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah in October of 1976 (Ex. 27).

In his brief Appellant admits he failed to account. It is noted that it was only just prior to the Bar Commission hearing that Appellant finally hired his former secretary and an accountant for the purpose of analyzing his records.

It was apparent that the child support payments made by Belcher during the years 1969, 1970, 1971 and 1972 were received by Appellant and deposited in his bank accounts. However, he failed to promptly notify Mrs. Emarine as to the receipt of these funds (T41)

It was only after the intervention of counsel that this matter got settled. Other than two small payments (T48), Appellant refused to pay over sums due until Mrs. Emarine exhibited to Appellant the original of Belcher's cancelled child support checks showing that they were indeed made and were deposited in Appellant's bank accounts and cleared the

bank (T50). (Mrs. Emarine obtained these checks from Mr. Belcher and his widow in a piecemeal fashion). Then and only then did Appellant disburse.

Even under these circumstances, Appellant, while paying interest, insisted on deducting his fee (T50, 51, 409).

Appellant paid \$449.28 on September 4, 1975, after production of some of Belcher's checks. Appellant deposited a check for \$1285.00 with the Clerk of the Court on September 27, 1976, which was paid on January 10, 1977, after production of some more of Belcher's checks. Appellant paid \$599.00 by check (T56) on February 23, 1977, after the production of the rest of Belcher's checks (Ex. 31).

At the hearing, Appellant admitted he failed to maintain all funds collected in a separate account and commingled the same with his own funds (T416). This is also admitted in his brief. Further, Appellant stated that he closed out his trust account and utilized the trust funds that were in that account for his own purposes (T416).

Appellant argues that he is entitled to an unequivocal finding, that he maintained complete and adequate records. On the other hand, he could not determine what checks had cleared the bank, nor could he render an accounting therefrom. He admitted the weakness in his record keeping system was the failure to keep a check register (T414). He stated he was concerned that the Belcher checks were bouncing. He admitted

that any such checks would have been mailed back to him, but he couldn't remember if they were. His records were inadequate to assure prompt and proper disbursement of clients' funds.

The evidence supports the findings that:

Appellant undertook to perform legal services for one Winona Emarine in the collection of child support, and he collected funds for his client;

Appellant failed to notify his client of the receipt of the said funds;

Appellant failed to render an appropriate accounting of funds collected to his client;

Appellant failed to maintain complete and adequate records of the funds which he collected;

Appellant failed to pay the funds over to his client promptly as they were received, or when requested to do so by his client;

That the foregoing conduct constituted violations of the provisions of Rule IV, Canon 9 DR 9-102 (B) (1), (3) of the Rules of Professional Conduct of the Utah State Bar;

That the said acts did constitute a violation of the provisions of Section 78-51-42, Utah Code Annotated, 1953 As Amended;

That Appellant failed to maintain the funds collected in a separate trust account and commingled the same with his

own funds;

That said acts violated the provisions of Rule IV, Canon 9 DR 9-102 (A) of the Rules of Professional Conduct of the Utah State Bar.

It is apparent the Bar Commission took into account matters of so-called mitigation. If any of the violations had been found to be the result of willful and deliberate misconduct, the Appellant should receive a harsher penalty and the Commission would have so recommended.

The Commission exercised restraint and gave the Appellant every benefit of matters in mitigation in recommending a suspension of only one year.

POINT V. COUNT ONE OF THE COMPLAINT: THE LOWRY MATTER. THE FINDINGS ARE ACCURATE, FAIR, AND IN EACH INSTANCE, SUPPORTED BY THE EVIDENCE. THE MITIGATION CLAIMED BY APPELLANT WAS GIVEN DUE REGARD.

The Appellant has raised three "technical defenses" to Count One. He claims that no attorney-client relationship existed between him and the complaintants.

In 1963, the Appellant initiated legal action against Allen B. Gardner and Leslie L. Boothe, naming Franklin Life Insurance Company as the plaintiff (T-269). The Appellant thereafter between 1965 and 1970, periodically collected amounts on the Boothe Suit. (T-272) In 1966 he began remitting the sums collected directly to Mrs. Lowry. (T-273) When asked if he didn't know and believe that Mr. Lowry, and

subsequently his widow, were the real parties in interest in that suit, he stated: "I must have thought that, yes."
(T-275)

The Appellant claims a three year statute of limitations as his second "technical defense". He alleges that the last activity on the Lowry matter occurred in 1966. This is obviously incorrect since he admits collections in 1970.
(T-275) The real issue, however, are the allegations contained in the Complaint, to-wit: his neglect and failure to properly account for the funds collected. These acts of omission continued up to and past the filing of the Complaint with the Bar. The Appellant admits he did not even attempt to make a final accounting until July of 1976. (T-281)

Appellant claims as his third "technical defense" that his acts did not constitute neglect as defined in the American Bar Association informal opinion No. 1273. The evidence on this point is overwhelmingly to the contrary, as discussed in greater detail hereinafter.

The Findings state that the Appellant failed to notify his clients of the receipt of funds within a reasonable time. The evidence shows that on at least twelve separate occasions between October 30, 1968 and May 14, 1970, he received payments on the Boothe suit and made no remittance to anyone until after the Complaint was filed with the Bar Association in 1976. (T-276) It would be bizarre to claim

this was done within a reasonable time.

The Findings state that the Appellant failed to maintain complete and adequate records of the funds which he collected. The evidence supports this finding. Exhibit 46 is Appellant's purported accounting of money received on the Boothe suit. Appellant admits that this was prepared after he met with the screening committee and at their suggestion, (T-286), and was compiled from his receipt books. At the hearing before the Commission, it was pointed out to the Appellant that in September of 1965 he filed a garnishee judgment and execution on the Boothe suit and obtained \$68.11 from First Security Bank. (T-284) He admitted he could find no accounting to show what happened to those funds. (T-284)

The Findings state that the Appellant failed to render an appropriate or sufficient accounting to his clients. The evidence shows that after the Complaint was filed, the Appellant submitted a check to Mrs. Lowry for \$162.72 with nothing more than an allegation that it was the balance due her of the \$449.08 collected. (Exhibit 7 and T-283) This could not be construed to be an appropriate or sufficient accounting.

The Findings state that the Appellant failed to promptly pay said funds to his clients as they were received or when requested to do so by his clients. The evidence showing lack of prompt payment has previously been discussed. The evidence

further shows that repeated requests were made by Mrs. Lowry and others to the Appellant to provide some accounting. Mrs. Lowry wrote a letter May 6, 1968, (Exhibit 1), requesting an accounting. No response was ever given. (T-20) Another request was made by registered mail dated March 4, 1971, (Exhibit 4), with no response. (T-21) During this period of time, Mrs. Lowry asked her son Jim to assist her in getting the matter turned over to another lawyer so the matter could be given better attention. (T-21) Jim Lowry made this request directly to Mr. Hansen at his office. (T-35) The Appellant's response was made on a check stub he sent her, (Exhibit 2), stating he would retain and finish the suit and have a progress report by April 15th. (T-22) No report was ever furnished. A third letter was mailed February 10, 1972, together with Mrs. Lowry's own records of the checks she had received and requesting an accounting. (T-23) None was given. (T-23) One of these letters was found by the Appellant shortly before his hearing, unopened. (T-278) Additionally, Mrs. Lowry's son made many phone requests of Mr. Hansen for an accounting, none of which were ever honored. (T-36 and 37)

The Findings state that the Appellant failed to maintain the funds collected in a separate trust account and commingled the same with his own funds. The Appellant admits that when he went to work full-time for the Attorney General he assumed the money remaining in the trust account was his own and drew

the money out and used the same. (T-292) The Canons require that funds belonging to a client be deposited in a trust account and left there until all disputes with a client are resolved. It is incomprehensible that the Appellant believed all of those funds remaining in his trust account were his when he had been receiving repeated requests from the Lowrys for an accounting and had failed to keep a proper accounting himself.

The Findings state that the Appellant did not complete the legal services which he undertook for his clients in a timely manner, that he neglected the matter, and that he failed and refused to reasonably or adequately communicate with his clients or their subsequently engaged counsel.

The lawsuit initiated against Allen Gardner in 1963 was for the principal sum of \$2,919.31. Allen Gardner and Leslie Boothe were agents for Franklin Life Insurance Company. (T-17) J. E. Lowry was the regional manager, (T-16), and in that capacity was responsible for overdraws of his agents. Both Gardner and Boothe drew advances against unearned commissions. Their deficit became the responsibility of Mr. Lowry and for that reason when sums were collected they were paid to him and then his widow after his death in 1964.

As Mrs. Lowry received money on the Boothe account, she would deduct it from the balance due from Gardner. (T-24) In February of 1976 she believed there was still \$1,054.21 due

her on the Gardner account. (T-24)

The Appellant admits that after 1964 he received no money on the Gardner account. (T-284) He also admits that other than some minor things that do not appear in the Court file, (Exhibit 8), or by any other documentation, he made virtually no collection efforts on this account after 1964. (T-285) Allen Gardner died in 1975, leaving no apparent estate and thus totally preventing any further collections for Mrs. Lowry. An eleven year old file with no action despite repeated requests from the Lowrys and subsequently ending by the death of the defendant must be considered neglect within the definition of the Canons.

Appellant further argues that since there was an absence of fraudulent or evil intent, the discipline imposed should be mitigated. It is submitted that if fraudulent or evil intent had been present, the Bar Commission would have been justified in recommending disbarment. Obviously, by only recommending a one year suspension, the Bar Commission has considered all of the mitigating circumstances to which the Appellant claims he is entitled.

POINT VI. THE ATTORNEY GENERAL IS NOT IMMUNE FROM DISCIPLINARY PROCEEDINGS BY THE UTAH STATE BAR BY VIRTUE OF HIS OFFICE.

The Rules of Professional Conduct for attorneys and counselors of the Utah State Bar are binding upon all its members. See Rule I. Appellant cannot insulate himself

from the application of these rules by being elected to the Office of Attorney General or by being Attorney General.

Appellant asserts the Commission is without authority to suspend him since such action would be tantamount to removing him from office. The purpose of these proceedings is not removal from office, but inquiry into fitness to practice law and determination of whether there should be a suspension.

Section 19, Article VI of the Utah Constitution provides for impeachment of state officers for high crimes, misdemeanors or malfeasance in office. The conduct complained of in these proceedings may or may not constitute grounds for impeachment, however, to remove Appellant by this method would require a trial before the Senate with proof of commission of high crimes, misdemeanors or malfeasance in office.

Appellant claims that the Utah Constitution and statutes presume that the Attorney General shall practice law in his official capacity. The Utah Constitution at Section 3 of Article VII provides:

"No person shall be eligible to the office of... Attorney General unless he shall have...been admitted to the practice in the Supreme Court of the...State of Utah, nor unless he shall be in good standing at the bar at the time of his election."

The matter of whether the Attorney General must maintain his license to practice law in order to retain office is not the subject matter of this proceeding. It could be decided in

another proceeding such as one brought under Rule 65B(b)(1), Utah Rules of Civil Procedure (quo warranto).

Appellant asserts that performance of statutory duties requires the handling of conflict of interest matters, and therefore, the Rules of Conduct do not apply to him. If, because of the statutes, there is an exception to the application of the rules regarding conflict of interest, it does not logically follow that there is exception as to all the rules.

Appellant argues the Court has no authority to suspend him, yet seems to concede the power of the Court to reprimand him. It would seem that the Court either has the power to discipline the Appellant or that it does not. The middle ground apparently urged by Appellant does not appear to be logical.

The cases of Simpson v Alabama State Bar 311 So.2d 307 and Watson v Alabama, 311 So.2d 311, cited by Appellant state the law in Alabama, prior to the adoption of the Code of Professional Responsibility. The Court in Simpson specifically stated that "The question of whether or not a district attorney may be disciplined for violation of this Code of Professional Responsibility is not before us." (P.310)

Only one Utah case could be located which deals directly with the problem. This is the case of In re Burton, 246 P 188, which involved a state district court judge. In the Burton case, disciplinary proceedings charged the judge with two

counts of misconduct while he was a judge and two related to his conduct prior to becoming a judge while he was a county attorney. It was argued that because a judge is forbidden from practicing law and because the state constitution provides for impeachment proceedings for judicial misconduct, that impeachment is the exclusive remedy, and the Utah Supreme Court has no power to disbar judges. The court noted that:

...there is good authority to sustain the proposition that, if sufficient cause exists therefore, an attorney at law may be disciplined or disbarred and his license to practice law cancelled and revoked, though he holds or occupies a judicial or other official position, or is not for other reasons engaged in the practice, and though further committed offenses or wrongs.
246 P. at 198-199.

The court went on to adamantly assert its power over all members of the bar, no matter what their official positions.

It may as well be said that we cannot deal with an attorney and counselor at law as a member of the bar of this court, if holding a judicial or other public or official position, if the wrongs and conduct committed render him subject to indictment, or at least until he is convicted, as to say that we may not deal with him for wrongs and conduct rendering him subject to impeachment, or at least not until he is removed from office. It is generally held that misconduct from an attorney, even outside of his professional dealings as such, may be sufficient to justify his discipline or disbarment...and this court is committed to the doctrine that an attorney, as a member of this court, may be disciplined and disbarred though the acts and conduct are not directly connected with his practice, if they show such a lack of honesty, integrity, and fidelity as to indicate that he is an unfit and improper

person to be entrusted with the powers and duties of an attorney...This court is further committed to the doctrine that its power to deal with its own officers, including attorneys, is inherent continuing, and plenary, and exists independently of statute and ought to be assumed and exercised as the exigencies and necessities of the case require...and that courts having power to admit attorneys to the bar, also possess, as a necessary and inherent incident of such power the right to disbar them for unworthy behavior, unprofessional conduct, or moral turpitude, or moral unfitness independently of authority given by statute. 246 P. at 199-200.

The court did acknowledge that their power in such instances went only to the status as attorney, and had no direct effect on the official position of the accused attorney, judicial or otherwise.

The position taken by the Utah Supreme Court in the Burton case is identical to that taken by most other state supreme courts. The Kansas Supreme Court disagreed with the position that an accused attorney who is also a judge can be subject to disbarment as an attorney only after forfeiture of that office."..it is the law of the land established by the great weight of authority, than an attorney possessing a license to practice law and holding a judicial position, such as is now occupied by the accused, is subject to disbarment in the proceedings of the character here involved." In re Stice, 184 Kansas 589, 339 P.2d. 29, 32 (1959). The court went on to cite supportive cases from the states of Ohio, Nebraska, Arizona, Connecticut,

Illinois, New Hampshire, Ohio, South Dakota, Washington, Wisconsin, and Colorado. See also, In re Watson, 286 P.2d 254 (Nevada, 1966), and State ex rel. Oklahoma Bar Association v. James, 463 P.2d 972 (Oklahoma, 1969).

It appears to be obvious that the Rules of Professional Conduct of the Utah State Bar as approved by the Supreme Court are intended to apply to an attorney who occupies the office of attorney general as well as to all other members of the Bar. This is notwithstanding the fact that Utah has impeachment and removal procedures prescribed by the constitution and by statute.

CONCLUSION

As to the Emarine and Lowry matters, Appellant does not seem to object to the findings that there was a failure of notification of the receipt of funds, failure to render an appropriate accounting and failure to pay the funds over. It is also noted Appellant admits there was a failure to maintain all funds collected in a separate trust account. Appellant argues that the Bar should have found that he maintained complete and adequate records. However, if this were the case, he would have been able to render an accounting when requested. Whatever records he did maintain were insufficient for this purpose.

Appellant argues that he is entitled to a finding that he did not commingle funds. The evidence is contrary. Furthermore,

Appellant admitted he closed out his trust account at a time when clients funds had not been disbursed.

Appellant complains that the findings should contain mitigating circumstances. Yet matters in mitigation were obviously considered by the Commission. If these acts of misconduct of Appellant were found to have been committed wilfully and deliberately, a harsher penalty, perhaps disbarment, would have been recommended.

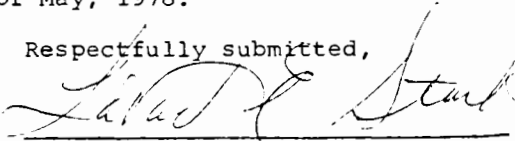
In the Dick matter, Appellant is entitled to no more than an Order dismissing that Complaint. See Rule III of the Rules of Discipline of the Utah State Bar.


In the Piepenburg matter, the evidence was sufficient to support the findings.

The findings of the Bar should be affirmed and the recommendation that Appellant be suspended from the practice of law for one year should be adopted.

DATED this 31st day of May, 1978.

Respectfully submitted,


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