

1986

In Re: John S. Davis : Brief of Respondent

Utah Supreme Court

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Jo Carol Nessel-Sale; Bar Counsel; Attorney for Respondent.

John S. Davis; Appellant Pro Se.

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870051

IN THE SUPREME COURT OF THE STATE OF UTAH

In Re:

JOHN S. DAVIS

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Case No. 870051

Priority No. 4

BRIEF OF RESPONDENT

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDATION OF DISCIPLINE OF THE
BOARD OF BAR COMMISSIONERS, BERT L. DART,
PRESIDENT, OF THE UTAH STATE BAR.

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FILED

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STATEMENT OF ISSUES

1. Did the Utah State Bar have jurisdiction to hold disciplinary proceedings on Appellant in F-198?
2. Is the Utah State Bar's recommendation of disbarment excessive and inequitable?

IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This is an appeal of the recommendation of the Utah State Bar, by and through its Board of Bar Commissioners, that Appellant be disbarred.

In November 1982 Appellant was convicted of second degree felony theft, for which he was sentenced as a third degree felony. In March 1983 Appellant was placed on Interim Suspension, pending completion of disciplinary action. In May 1986 a disciplinary trial was held and in November 1986 the hearing panel issued its Findings, Conclusions and Recommendations to the Board of Bar Commissioners, which affirmed them in January 1987.

Since February 5, 1987, those Findings, Conclusions and Recommendation of Disbarment have been pending in this court. It is from that recommendation and underlying findings that this appeal has been taken by Appellant.

STATEMENT OF THE FACTS

In October 1982 Appellant was convicted by a jury of Theft, a Second Degree Felony, in the Fourth Judicial District Court of the State of Utah in and for Utah County (R. 19). On November 26, 1982, Judge Don Tibbs entered the conviction as a Third Degree Felony and placed Appellant on probation. (R. 14 of F-198) The conviction was based upon evidence that in 1979 Appellant diverted to his own use approximately \$73,279.45 that belonged to his clients, Charley Joseph and Joseph Mascaro, who were investment partners in a real estate venture. (R. 13 of F-198) In 1980 Appellant was sued by Mascaro and another to recover their share of the \$141,037.09 paid by Chatillon, Inc., to Appellant, who received the money as attorney for the investment partnership and who had diverted and spent the bulk of it as his own. (R. 09 of F-198)

In connection with that litigation Appellant was deposed in June 1981 and stated under oath that he was still holding the money received from Chatillon in his trust account, whose location he refused to disclose. (R. 09 of F-198, Exhibit 5) Eventually the civil trial court ordered disclosure of Appellant's bank records. Contrary to what Appellant had represented, the funds received from Chatillon had been fully exhausted. (R. 09 of F-198) (For greater detail of these facts that underlie the criminal conduct and the civil action, see a copy of the 1984 Utah Supreme Court

decision affirming the criminal conviction and a subsequent related appeal attached as Addendum A.)

Contemporaneous with the criminal action was a complaint filed with the Utah State Bar by Charley Joseph in January 1982. (R. 98 of F-137) The ensuing Bar complaint alleged illegal conduct involving moral turpitude [DR 1-102(A)(3)] and misconduct in failing to pay a client monies held by Appellant and requested by the client and failing to properly account for client funds [DR 9-102(B)(3&4)]. (R.96 of F-137) (See Addendum B)

A Screening Panel of the Ethics and Discipline Committee determined that a Formal Complaint should issue and F-137 was filed (R. 10 of F-137)(Addendum C), alleging violations of Rule III and Rule IV of the Procedures of Discipline (See Addendum D for pertinent Rules) and subsections (5) and (6) of DR 1-102(A), in addition to those previously alleged. (See Addendum D for pertinent Rule and DR violations)

On motion of the Bar Counsel, for the Ethics and Discipline Committee and the Board of Bar Commissioners, Appellant was placed in Interim Suspension by this court March 7, 1983. (R. 29 of F-137)

Subsequently in January 1984, Bar Counsel was permitted to file an Amended Complaint (R. 35 of F-137)(Addendum E), which left the original allegations of F-137 as Count I, but as a result of Appellant's criminal conviction, added Count II, alleging Appellant had now violated Rule II, Section 4

and Canon 1, DR 1-102(A)(4) of the Revised Rules of Professional Conduct, Rule II(a) of the Procedures of Discipline, and Rule C, paragraph 23 of the Rules for Integration and Management of the Utah State Bar. (See Addendum F for Integration Rule)

Pursuant to a January 31, 1985, Order of Hearing Panel Chairman Gerald Kinghorn, Bar Counsel referred Count II of Amended F-137 to a Screening Panel for its consideration, as the Ethics and Discipline Committee had not reviewed those allegations before they were added to F-137. (R. 150 of F-137)(See Addendum G) A Formal Complaint was voted by the Ethics and Discipline Committee and it was issued as F-190.

On stipulation of Appellant and Bar Counsel, F-190 was dismissed without prejudice in April 1985 (R. 27-28 of F-198)(Addendum H) and reissued in proper form as F-198, still alleging only violations related to Appellant's criminal conviction. (R. 24 of F-198)(Addendum I)

As a result of the January 31, 1985, Order, the Hearing Panel dismissed Count II of Amended F-137 and granted Bar Counsel's Motion to Consolidate F-137 with F-198, as F-198 alleged the misconduct formerly contained in Count II of Amended F-137. (R. 161, 164 of F-198)

Approximately one month prior to the disciplinary trial of May 15, 1986, Bar Counsel dismissed Count I of F-137, the only remaining count in that Formal Complaint. (R. 231 of F-137) On November 18, 1986, the Disciplinary Hearing Panel

entered its Findings, Conclusions, and Recommendation of Disbarment over the signatures of its three members, Gerald H. Kinghorn, Randon W. Wilson, and E. Allan Hunter. (R. 267 of F-137)(Addendum J)

Subsequently the Board of Bar Commissioners affirmed and adopted those Findings, Conclusions and Recommendations, which were filed February 5, 1987, with this court. (R. 272 of F-137)

SUMMARY OF ARGUMENTS

The Utah State Bar did have jurisdiction over Appellant in F-198. This court's Order of Interim Suspension did not act as a bar to any subsequent disciplinary action against Appellant.

Rule 41(a) of the Utah Rules of Civil Procedure is not sound authority for Appellant's proposition that jurisdiction over him was lost by prior dismissals of similar allegations. The rules of evidence and procedure applicable to the conduct of non-jury civil trials apply only to the actual hearing on the Formal Complaint, not to all stages of the proceeding. Therefore, a disciplinary trial is a unique entity, not suited by its purpose to be perfectly analogous to civil trials.

The recommendation of disbarment is not excessive under the facts of this case and Appellant ought not receive benefit of any retroactivity of the sanction.

ARGUMENT

POINT I

THE UTAH STATE BAR HAD JURISDICTION OVER APPELLANT WHEN F-198 WAS ISSUED.

In 1985 Rule III(g) of the Procedures of Discipline of the Utah State Bar defined "member of the Bar" as "an attorney in good standing on the official roster of attorneys of the Supreme Court of Utah and the Utah State Bar." Rule VIII(a) provided then and now that "a disciplinary proceeding may be initiated against any member of the bar." Clearly the intent of Rule VIII is not served by the interpretation of these rules urged by Appellant, that he is immune from bar prosecution because he was not "a member in good standing" by dint of his interim suspension status.

In any event Appellant misconstrues Rule VII(b). (Addendum K) That section is a description of the sanction of suspension that is the culmination of a discipline proceeding against an attorney, where a Disciplinary Hearing Panel and the Board of Bar Commissioners have considered the matter and have made Findings of Fact, Conclusions of Law and Recommendations of Discipline. The sanction of suspension, which may be for any period not to exceed two years, can only be ordered by the Utah Supreme Court after it has reviewed the record pursuant to Rules XIII and XIV of the Procedures of Discipline.

Interim Suspension, defined in Rule VII(b)(1-5), is a different kind of suspension. It is not a subset of the Suspension described in VII(b) but a unique status which may be order before the disciplinary process is concluded, prior to consideration of the misconduct by the Screening Panel of the Ethics and Discipline Committee or a Disciplinary Hearing Panel.

A suspension under VII(b) can be stayed by the court but interim suspension under VII(b) cannot. It is a mechanism to swiftly remove an attorney from the practice of law in order to protect the public prior to imposition of a sanction, which may or may not ultimately be suspension. (Temporary conditions of probation are also authorized by this section if such are needed to protect the public during the pendency of the disciplinary action.) The language of VII(b)(1) contemplates that such petitions may be prior to, concurrent with, or subsequent to the filing of Findings, Conclusions, and a Recommendation of Discipline with the court.

Consequently Appellant's reliance of his lack of good standing to fend off the imposition of a sanction by this court is misplaced. His interim suspension was merely his removal from the practice of law during the course of the disciplinary process; it was not a disciplinary sanction.

POINT II

JURISDICTION OF THE UTAH STATE BAR WAS NOT LOST BY
THE PRIOR DISMISSALS OF THE ALLEGATIONS OF
APPELLANT'S CRIMINAL CONVICTION.

Appellant claims that the Utah State Bar no longer has jurisdiction to prosecute him for his felony conviction because similar action against Appellant had previously been voluntarily dismissed. Appellant is wrong. Count II of F-137 was dismissed by the Disciplinary Hearing Panel (R. 161 of F-198), not by Bar Counsel, although he had filed a Motion to Dismiss. The Panel's Order was in response to Appellant's motion to strike that allegation as he had not had it considered by a Screening Panel and it was improperly included in the Formal Complaint. F-190 was expressly dismissed upon stipulation of the parties "without prejudice" so that Bar Counsel could return the matter to a Screening Panel for a proper determination. (See Addendum I)

This factual dispute aside, Appellant misapplies Rule XII(b) of the Procedures of Discipline by attempting to extend it beyond its defined limits -- the "hearing on a Formal Complaint." (Addendum L) Pre-trial motions and the significance thereof are not part of the hearing, which is the actual disciplinary trial and which is the only disciplinary procedure that must be reported electronically or stenographically. Rule XII(b) gives notice to the parties and the Disciplinary Hearing Panel of the character of the proceeding and the rules that will govern

admissibility of evidence. For example it puts an accused attorney on notice that he may be called to testify by the prosecutor, a procedure impermissible if the Rules of Criminal Procedure were followed.

Appellant's argument is flawed because he has a fundamental misunderstanding of the purpose of the attorney discipline process. The goal is not winning. The objectives are to protect the public and to ensure the integrity of the profession. Rule I(a) of the Procedures of Discipline states it thusly:

"The purpose of the attorney disciplinary proceedings is to ensure and maintain the high standard of professional conduct required of those who undertake the discharge of professional responsibilities as members of the Utah State Bar, and to protect the public and the administration of justice from those who have demonstrated by their conduct that they are unable or likely to be unable to properly discharge their public trust as attorneys and counselors."

Rule I(c) also makes it clear that "the rules are to be construed so as to achieve the spirit of professional discipline of the Utah State Bar, and to effect substantial justice and fairness." These objectives would be undermined by Appellant's technical argument, and the interest of justice ill-served by a finding that a convicted thief could hereby escape accountability to his profession.

In Re Strong, 616 P.2d 583, 585 (Utah 1980) set forth the unique nature of the disciplinary proceedings: "Thus, the preservation of the integrity of the courts and the safety of the public must rise above the strict technical rules of evidence that govern the usual adversary proceedings between individuals. This is not a proceeding to determine conflicting claims of right where one party prevails over the other."

POINT III

THE RECOMMENDATION OF DISBARMENT IS APPROPRIATE.

Appellant argues that because he has been on interim suspension for four years that disbarment would be unduly harsh. He correctly claims that a minimum of nine years will have to have passed from the date of his interim suspension before he can apply for readmission. While it may be true that in some circumstances such a sanction would be excessive, this is not such a case.

Appellant has been convicted of felony theft, a crime of moral turpitude. See In Re Pearce, 136 P.2d 969, 971 (Utah 1943); In the Matter of Charles W. Colson, 412 A.2d 1160, 1168 (1979); In Re Alvin E. Honoroff, 126 Cal. Rptr. 229, 543 P.2d 597 (1975). He stole approximately \$73,000 from his clients, an action that is particularly repugnant because it shattered a bond of professional and fiduciary trust. Then he lied under oath about the preservation of that money in trust accounts, further evidence of his lack

of moral fitness to practice law. (See Statement of Facts)
Appellant produced no mitigation for the Disciplinary Panel.

In In Re James Murrell Jones, 696 P.2d 1215 (Utah 1985) this court disbarred an attorney for his conviction of two counts of felony theft by deception, where no evidence in mitigation was presented or found. In a concurring opinion Associate Chief Justice I. Daniel Stewart expressed his view and that of Justice Zimmerman that the automatic disbarment authorized by Rule 23 of the Rules for Integration and Management of the Utah State Bar ought to be reserved for felonies that are malum in se, of which theft by deception is one. Even under that restriction, disbarment is the only appropriate sanction in this case under the circumstances of Appellant's conviction for felony theft.

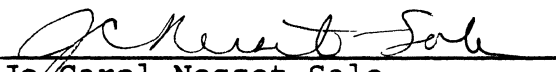
While delay in this matter was regrettable, it was occasioned both by the actions of Bar Counsel and of Appellant, who filed numerous motions throughout these proceedings, including, but not limited to, motions to hold in abeyance, motions to extend the time for discovery, and a petition for an interlocutory appeal. (R. 74, R. 168 and R. 194 of F-137) Given the egregiousness of Appellant's conduct, the interests of the public, the profession, and justice would not be served by allowing Appellant any consideration now for his period of interim suspension.

CONCLUSION

Appellant has attempted to distort the Procedures of Discipline and obscure their logical, clear meaning and application. He has received every consideration during the discipline process, as attested by the voluminous record, and now ought to be fully accountable for his misconduct.


Respondent urges the court to accept the Recommendation of the Board of Bar Commissioners that Appellant be disbarred and his name stricken from the roster of attorneys.

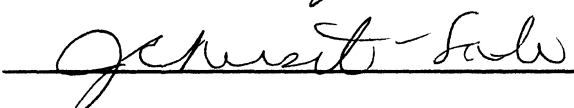
Respectfully submitted this 15th day of October, 1987.


Jo Carol Nesset-Sale
Attorney for Respondent

CERTIFICATE OF MAILING

I, Jo Carol Nesset-Sale, hereby certify that four true and exact copies of the foregoing Brief ^{vs. # 82} ~~were~~ mailed, postage pre-paid, to John S. Davis, 1068 North Grand Circle, Provo, Utah 84604, this 16th day of October, 1987.



Delivered by  this 15th day of October, 1987.

ADDENDUM A

IN THE SUPREME COURT OF THE STATE OF UTAH

-----ooOoo-----

David L. Wilkin
Dave B. Thompson.
Noall T. Wootto.
for Respondent

State of Utah,
Plaintiff and Respondent,

No. 18892

v.

F I L E D
June 25, 1984

John Shepard Davis,
Defendant and Appellant.

Geoffrey J. Butler, Clerk

Ronald R. Stange
for Appellant

HALL, Chief Justice:

This is an appeal from a third degree felony conviction of theft.¹ Defendant assigns the following as error: (1) insufficiency of the evidence; (2) denial of his motion to waive a jury trial; (3) admission of improper evidence during the State's rebuttal argument; and (4) inclusion of a partial written deposition in the evidence which the jury was permitted to take with them into their place of deliberation.

In 1978, Joseph Mascaro and Charley Joseph became investment partners for the purpose of purchasing options on two adjacent parcels of real property located in Utah County. While holding said options, Mascaro and Joseph (hereinafter the "partnership") initiated a sale of both parcels to Paul Tanner, who intended to develop the lots into a subdivision. Prior to the consummation of that sale, however, the term of the options expired and Tanner was able to negotiate a direct purchase on the larger of the two parcels (consisting of approximately 130 acres) from Stan Logan, the former owner thereof. The partnership was able to renew its option on the smaller 18-acre parcel, which it then exercised by purchasing the said parcel on uniform real estate contract for \$117,000. Inasmuch as this smaller parcel provided access to the larger parcel purchased by Tanner, it was essential to Tanner's proposed development. Tanner therefore purchased the smaller parcel from the partnership on uniform real estate contract at a price of \$165,000. He paid \$40,000 down on the contract,² but was unable thereafter to obtain the necessary financing to pay off the \$125,000 balance.

In December of 1978, defendant John Davis, an attorney, was hired by the partnership to collect the balance owing

1. In violation of U.C.A., 1953, § 76-6-404.

2. The \$40,000 received from Tanner was disbursed by the partnership as follows: \$33,000 was paid as a down payment on the partnership's contract to purchase the 18-acre parcel; \$4,000 was paid to the real estate company handling the transaction; and the remaining \$3,000 was split equally between

on the Tanner contract. During the initial meeting between defendant and the partnership, one of the matters discussed relative to the impending collection was that of attorney fees. Defendant indicated that his fee for the requested services would be between \$9,000 and \$12,000, depending upon the extent of the work involved. The partnership, however, countered with an offer of a flat fee of \$20,000 to cover the collection as well as defendant's representation of the partnership in any connected litigation. The record does not reveal which fee proposal was ultimately agreed upon.

Defendant was successful in negotiating a settlement between the partnership and Tanner, whereby Tanner agreed to sell his interest in both parcels if the partnership could find another buyer before Tanner could obtain financing. This settlement agreement was reduced to writing and signed by the parties (i.e., Mascaro, Joseph and Tanner) on February 8, 1979. Soon thereafter, defendant was commissioned by the partnership to effectuate the resale of the property. According to the testimony of Charley Joseph, defendant was to be paid an additional \$20,000 if he was successful in finding a new buyer and completing the resale transaction. That testimony was however contradicted by defendant, who testified that he had agreed to perform the said services in exchange for one-third of the total income derived from the transaction. The record does not contain any written documentation evidencing the parties' intentions with respect to attorney fees.

Less than a month and a half after the signing of the settlement agreement, defendant succeeded in negotiating a new sale of the subject property (both parcels) to Chatillion, Inc. (hereinafter "Chatillion") at a total price of \$1,280,000. Since the said property consisted of two distinct parcels owned by different individuals (i.e., a 130-acre parcel owned by Stan Logan and an 18-acre parcel owned by the partnership), the sale was accomplished by executing a separate earnest money agreement between Chatillion and each of the owners. The agreement relevant to these proceedings is that between Chatillion and the partnership concerning the 18-acre parcel. That agreement provided that Chatillion would pay the partnership approximately \$141,000 in cash and transfer to it property valued at \$240,000.

A closing was held on June 5, 1979, at which time Curtis Baum, Chatillion's principal officer and stockholder, tendered to the partnership a check for \$100,000,³ as well as the deeds to eight building lots. The check was made payable to defendant in his capacity as attorney for the partnership and was deposited by defendant in his trust account, as per the directions of Charley Joseph. The building lots were rejected by the partnership because they were of insufficient value. As

3. The cash balance of \$41,000 was to be paid within the following week. As will be shown infra, said payment was made in full, though perhaps not within the week after the closing.

a result, Baum tendered deeds to another eight lots, but failed to deliver therewith an appraisal to substantiate their value.⁴

At trial Joseph testified that at the time the initial funds were received from Chatillion and deposited, he gave defendant specific instructions regarding the disbursement thereof. Those instructions were as follows: (1) Joseph was to receive, and did receive on that particular occasion, a check for \$20,000 to cover his expenses; (2) \$30,000 to \$40,000 was to be applied toward the partnership's purchase of the 18-acre parcel from Shelby Taylor (original owner of the said parcel); (3) \$25,000 to \$30,000 was to be disbursed to Joseph Mascaro as his partnership share; and (4) an unspecified amount was to be reserved to cover closing expenses.

Also testifying in regard to the disbursement instructions was Curtis Baum, who claimed to have been present at the time the \$100,000 was deposited by defendant and to have been privy to the conversations between defendant and Joseph concerning the appropriation of that money. His recollection of the instructions given defendant was identical to that given by Joseph (in his trial testimony), with only one exception: he thought he recalled the amount set aside for Mascaro as being \$20,000 to \$25,000, rather than \$25,000 to \$30,000.

Another witness who claimed to have been privy to the subject conversation between defendant and Joseph was George Robinson, an employee of the defendant's on the occasion so specified. Robinson's testimony in this respect was consistent with Joseph's in nearly every respect, the only variation being that he did not recall a specific dollar amount committed to Shelby Taylor; rather, he thought the instruction with respect to the Taylor obligation was that an unspecified amount (of the deposited funds) should be used to make a down payment on an apartment complex that would then be conveyed to Taylor in satisfaction of the partnership's obligation to him.

Defendant's version of the instructions given him as to the disbursement of the \$100,000 was at variance with that adduced by the plaintiff through the testimonies of Joseph, Baum and Robinson, supra. He testified that Joseph's instructions were to apply the funds toward the retainer (i.e., allegedly a one-third contingency fee) and use them as needed at his (defendant's) own discretion.

Bank records produced at trial revealed that on June 5, 1979, prior to the recording of the \$100,000 deposit, defendant's trust account registered an overdraft of \$14.23. On June 18, 1979, less than two weeks after the said deposit was made, defendant's trust account registered an overdraft of \$435.67. During that two-week period, only \$25,903.64 from defendant's trust account was expended in connection with his

4. Appraisals were to be delivered within a few days. The record does not show whether said delivery took place.

work for the partnership;⁵ the balance was spent on defendant's personal expenses.

Over the period between June 25, 1979, and September 12 1979, defendant received and deposited in his trust account on behalf of the partnership additional payments from Chatillion totalling \$41,037.09. Of this amount only \$21,854 was expended in connection with business of the partnership. Thus, of the total \$141,037.09 received from Chatillion and deposited into defendant's trust account, only \$47,757.64 was spent in furtherance of partnership business, leaving a difference of \$93,279.45.⁸

Despite Chatillion's satisfaction of the cash obligation on the 18-acre purchase, the sale of that parcel was never fully consummated because an agreement was never reached in respect to the value of the lots tendered by Chatillion.

5. The \$25,903.64 figure was calculated on the basis of the following stipulated expenditures: (1) a \$20,000 payment to Charley Joseph; (2) a \$903.64 payment to Bitner Excavating in satisfaction of a debt owed by Joseph; and (3) a \$5,000 payment to defendant's employee, George Robinson, for work done for the partnership.

6. The parties further stipulated that defendant's personal expenditures from the \$100,000 included, inter alia, the following: (1) payment of \$1,753.27 to Jones Paint & Glass for installation of a window at defendant's residence; (2) payment of \$26,644.23 to Thorn, Inc., for accounts previously collected on behalf of Thorn, Inc.; (3) payment of \$6,920 to L. Flake Rogers for back rent on defendant's office; (4) payment of \$4,183.20 to Deseret Federal Savings for payments in arrears on defendant's home; (5) payment of \$3,119.70 to M. Dayle Jeffs, an attorney, in settlement of a 1977 default judgment against defendant for unpaid credit card debts; (6) payment of \$9,125 to F.M.A. Leasing for the lease of a 1974 vehicle and a Burroughs computer; (7) payment of \$4,713.75 to Burroughs Corporation for updating the memory of defendant's computer; (8) payment of \$6,530 to Provo 27th Ward as a charitable contribution; (9) payment of \$1,432.46 to Meredith & Day on a student loan debt; (10) payment of \$2,392.72 to Service Station Supply, Inc., for accounts collected on its behalf; and (11) payment of \$1,325.81 to Utah Office Supply for accounts collected on its behalf.

7. It was stipulated that the \$21,854 was spent as follows: (1) \$18,000 was paid to Charley Joseph; (2) \$2,500 was paid to George Robinson for work he performed for the partnership, (3) \$1,000 was paid to Mountainland Realty; (4) \$350 was paid to Aspen Engineering; and (5) \$4 was paid to the Salt Lake County Recorder.

8. The State acknowledged defendant's possible entitlement to a \$20,000 fee pursuant to the flat fee arrangement described at trial by Joseph and, therefore, charged defendant with the theft of only \$73,279.45 rather than the full \$93,279.45.

Also contributing to the failure to bring the sale to completion was the dispute that arose between the partners, Mascaro and Joseph, in November, 1979. The apparent cause of that dispute was that Mascaro had never received his share of the money paid by Chatillion. As a result, Mascaro, along with Shelby Taylor, who likewise had never received a payment out of the said funds, obtained other counsel and in May of 1980 brought suit to recover the sums allegedly owed them, naming as defendants Charley Joseph, Chatillion, Inc. (Baum), and the defendant herein, John Davis. Defendant represented himself and Joseph in that action. However, he did not file an answer to the complaint, and consequently a default judgment was entered against them. He then succeeded in getting the judgment set aside and was ordered to respond to the complaint within thirty days. Again, he failed to respond, and a second default judgment was entered. The trial court subsequently ordered defendant to withdraw as counsel because he was to be called as a witness by the plaintiffs (Mascaro and Brown).

On June 18, 1981, after the second default judgment had been entered against Davis (defendant) and Charley Joseph, Joseph Rust, attorney for plaintiffs Taylor and Mascaro, deposed defendant in connection with the continuing litigation between Rust's clients and Chatillion. At that deposition, defendant represented that he was still holding the monies received from Chatillion in his trust account,⁹ but refused to reveal the location of the trust account. After the deposition, Charley Joseph, who had been present and had heard defendant make the foregoing representation, inquired of defendant as to where he was holding the money. Defendant purportedly replied that he had the money but did not have to tell anyone where it was.

Joseph subsequently filed a cross-claim against defendant and, at the suggestion of counsel, also filed criminal charges against him for theft. Defendant declined to answer the cross-claim because, as he later explained at trial, he did not want to prejudice his case in the present criminal matter. Consequently, Joseph obtained a default judgment against defendant in the amount of \$180,000.

Attorney Rust petitioned the trial court for an order to require defendant to disclose information concerning his trust account. Several hearings were held on this matter, and finally an order was issued that defendant make full disclosure. As a result, defendant's bank records were obtained and it was discovered, contrary to what defendant had represented, that the funds received from Chatillion had been fully exhausted. As heretofore indicated, the records also revealed that the funds had been spent primarily in satisfaction of defendant's personal expenses.

9. That defendant made this representation was verified at trial by Joseph Rust, Charley Joseph and Brad Young (the court reporter who transcribed the deposition), all of whom were

The instant matter proceeded to trial on October 18, 1982. Defendant had made a motion before trial to waive his right to a jury trial, but his motion had been denied on the basis of a prosecution objection. The case was therefore tried before a jury, and defendant was found guilty of theft.¹⁰

I. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the evidence presented at trial was insufficient to support his conviction of theft. Under familiar rules of appellate review, we are constrained to view the evidence in the light most favorable to the jury's verdict and will only interfere with or overturn the verdict when the evidence is so lacking and insubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonable doubt.¹¹

To sustain a conviction of theft, the evidence must establish the following elements beyond a reasonable doubt: (1) that the defendant obtained or exercised unlawful control over the property of another (2) with a purpose to deprive him thereof.¹²

The underlying premise to defendant's claim of insufficiency of the evidence is the belief that his testimony provided the only reasonable and truthful account of the events and circumstances precipitating this action and therefore all conflicting evidence should have been disbelieved and disregarded by the jury. Overlooked in this premise is the fundamental rule that the prerogative to judge the credibility of witnesses and evidence in general belongs to the jury. In State v. Shonka,¹³ where the appellant made a claim similar to that made herein by defendant, this Court observed:

10. Defendant was sentenced to not more than five years in the Utah State Prison and fined \$5,000. Both the sentence and fine were stayed, however, and defendant was placed on two years' probation on condition that he work one day a week for fifty weeks for the Utah County Sanitary Administration and that he make restitution to the victims in the amount determined by the civil lawsuit on the same matter. Defendant's conviction, although originally a second degree felony, was reduced at sentencing to a third degree felony.

11. See State v. Jones, Utah, 657 P.2d 1263 (1982); State v. Forsyth, Utah, 641 P.2d 1172 (1982); State v. Asay, Utah, 631 P.2d 861 (1981).

12. U.C.A., 1953, § 76-6-404. It is noted that in order for a theft conviction to be punishable as a ~~second degree felony~~ (as this one was), the requirements of § 76-6-412 must also be satisfied. The latter section was satisfied in this case by the parties' stipulation that the value of the property alleged to have been stolen exceeded \$1,000.

13. 3 Utah 2d 124, 279 P.2d 711 (1955).

What the defense argument overlooks is that the jury was not absolutely bound to believe all of the testimony of the defendant. It was their prerogative to give it only such weight as they thought it entitled to considered in the light of all of the facts and circumstances surrounding the occurrence, including the self-interest of the witness.¹⁴

To establish the first element of the offense, plaintiff had to show (1) that the money received from Chatillion actually belonged to the partnership, and (2) that defendant obtained or exercised unlawful control over that money.

As proof that the money belonged to the partnership, plaintiff offered the following evidence: Curtis Baum's testimony indicating his intention to pay the partnership with the money tendered to defendant and his perception of defendant's role with respect to the money as that of a mere conduit or intermediary; the check for \$100,000 evidencing defendant's representative capacity by the fact that it was made payable to defendant not in a personal capacity, but rather as attorney for the partnership; and the testimony of both Joseph and the defendant to the effect that the money was deposited in defendant's account at Joseph's direction.

To prove the second half of this element (i.e., the exercise of unlawful control), plaintiff established first, through the testimony of Charley Joseph, Curtis Baum and George Robinson, that defendant received explicit instructions from Joseph to disburse the money received from Chatillion in the payment of partnership expenses. Plaintiff then showed that of the \$141,037.09 ultimately received from Chatillion, only \$47,754.64 was disbursed as directed (i.e., on behalf of partnership expenses), while \$93,279.45 was disbursed to satisfy defendant's personal obligations. Furthermore, plaintiff pointed out that while \$20,000 of the \$93,279.45 consumed by defendant was actually owed defendant by the partnership in attorney fees, defendant had only received authorization to take \$6,000 toward his fee from the total received from Chatillion. As to the additional \$20,000 offered defendant for arranging and transacting a new sale after the Tanner default, plaintiff pointed out that the sale had never been fully consummated and therefore the fee was not owing.

The only evidence offered by defendant to controvert plaintiff's proof on this first element of the offense was his own testimony relative to the agreement for attorney fees and the instructions for the disbursement of the money received from Chatillion. As heretofore indicated, defendant testified that he was to receive a one-third contingency fee for his

services subsequent to the Tanner default. Inasmuch as the sale to Chatillion was worth approximately \$381,000 to the partnership, defendant claimed that his portion was in excess of \$100,000. He further claimed that the partners had agreed to take as their portion the real property traded by Chatillion (valued at \$240,000). Thus, he maintained that the \$100,000 received from Chatillion actually belonged to him.

Even had the jury accepted defendant's representation as to the fee arrangement, they would not have been justified in concluding that his appropriation of the money received from Chatillion as his fee was proper because, as plaintiff pointed out, defendant never consummated the services for which he was to receive the alleged contingency fee.

Defendant further testified that the instructions he received from Joseph relative to the disbursement of the money were that it should be applied toward defendant's retainer and used at his own discretion. Based on those instructions, he claimed that his expenditures were justified and did not constitute an exercise of unauthorized control.

Viewing the foregoing evidence in a light most favorable to the jury's verdict, we believe reasonable minds could believe beyond a reasonable doubt that the cash paid by Chatillion belonged to the partnership and that defendant's disbursement of that cash to himself for his own purposes constituted unauthorized control.

As to the second element of the offense, to wit: intent to deprive, it is well-settled that such need not be proved by direct evidence, but may be inferred from the defendant's acts, conduct, statements or from the circumstances.¹⁵ According to plaintiff, the most salient evidence in this regard is as follows: Defendant twice failed to enter responsive pleadings in the civil action brought against himself, Joseph and Chatillion by Taylor and Mascaro, apparently to avoid being compelled to give an accounting of the money deposited in his trust account. Furthermore, he subsequently represented under oath at the June 18, 1981 deposition that he was still holding the money in his trust account, although bank records established that he had in fact expended the money nearly a full year earlier. Plaintiff contends that this evidence, combined with that set forth above relative to defendant's appropriation of the money, establishes beyond a reasonable doubt defendant's "intent to deprive."

Again, defendant urges that his testimony at trial that he honestly believed he was entitled to the money as his fee was sufficient to negate plaintiff's evidence (above) respecting the element of intent. The jury, however, whose

15. State v. Murphy, Utah, 674 P.2d 1220 (1983); State v. Kennedy, Utah, 616 P.2d 594 (1980).

prerogative it is to weigh such evidence, did not countenance defendant's position, and neither do we.

This is not the first time this Court has found "intent to deprive" under circumstances such as are existing here. In State v. Shonka, supra, this Court ruled that the evidence that defendant admitted taking the money, failed to record it or report it to her supervisors, failed to disburse it in the proper manner, and refused to permit an audit of her personal accounts was sufficient to support the jury's finding of intent to steal. By comparison, in the instant matter, defendant admittedly appropriated most of the money for his own use, failed to report such appropriation to the partnership, failed to follow the disbursement instructions given him by Joseph and avoided revealing the location of his trust account and the nature of the expenditures. We hold, as did the Court in Shonka, that the evidence so stated constitutes a sufficient factual foundation from which reasonable minds could infer that defendant took the money with the intent to deprive the partnership thereof.¹⁶

II. RIGHT TO WAIVE A JURY TRIAL

Defendant's second assignment of error is in respect to the trial court's denial of his motion to waive a jury trial. He claims that the court's ruling in this regard abrogated his constitutional right to an impartial trial.¹⁷ We do not agree.

We addressed the instant issue most recently in the case of State v. Studham.¹⁸ We determined therein that the trial court had not erred in denying the defendant's motion to waive his jury right. The rationale applied in reaching that determination is dispositive here:

Although an accused is guaranteed a right of trial by jury, neither the state nor the federal constitution guarantees him a right to "waive" a jury trial. On the contrary, Federal Rule 23(a), Criminal Procedure, and its counterpart, U.C.A., 1953, § 77-35-17,¹⁹ both allow such waiver only by the

16. Supra note 13, at 714.

17. Pursuant to the guarantees set forth in Article I, Section 12 of the Utah Constitution, to wit:

In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed

18. Utah, 655 P.2d 669 (1982).

19. This section provides, in pertinent part:

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

court's approval and the consent of the
prosecution.²⁰

In the instant case, neither the court nor the prosecution consented to the proposed waiver. Furthermore, the record is devoid of any indication that defendant was denied a fair trial as a result of the case being tried to a jury. We therefore hold that the trial court's denial of the requested waiver did not interfere with defendant's constitutional rights.

III. REBUTTAL EVIDENCE

Defendant next assigns error in the admission of a written excerpt of his June 18, 1981 deposition as rebuttal evidence. The circumstances out of which this alleged error arose are set forth hereafter.

During the presentation of its case-in-chief, plaintiff called upon Charley Joseph to testify concerning a response given by defendant at his June 18, 1981 deposition (to which Joseph had been privy) to the question as to whether defendant still had the money received from Chatillion in his trust account and, if so, where that account was located. Defendant's response to that question, as Joseph recalls it, was that the money was still in the account, but that he did not have to reveal the location of the account or anything further concerning it.

At that point in the trial proceedings, plaintiff moved to have the corresponding portion of the written deposition admitted into evidence as an exhibit. The trial court, however, expressed its view that such an admission would be duplicative in light of Joseph's testimony; whereupon, defendant made an objection to that effect which was sustained.

During plaintiff's subsequent cross-examination of defendant, defendant was asked to verify his deposition statement. His initial response was that he did not recall being asked the question or having answered it as Joseph had represented. After being shown the deposition to refresh his memory, he then claimed that he had misunderstood the question at the time it was asked (i.e., June 18, 1981) and that his answer had been clarified at a later deposition taken in September, 1981.²¹

20. Supra note 18, at 671. See also State v. Black, Utah, 551 P.2d 518, 520 (1976); Singer v. United States, 380 U.S. 24 (1965).

21. The portion of the September 23, 1981 deposition that purportedly clarified the response in the earlier June deposition was read into the record as follows:

Q. Am I to understand that you did not understand the question at that time?

A. Well, apparently not. I have since answered as required by the Court. I answered regarding the trust account at that time and I indicated that the trust account had been closed out.

Considering defendant's statements on cross-examination with regard to the status of the trust account at the time the June deposition was taken inconsistent with his representations in that same regard in the deposition, plaintiff called Brad Young, the court reporter who took the June deposition, as a rebuttal witness. Young verified the accuracy of the deposition and added his independent recollection of defendant's statement. At that point, plaintiff again moved to have the written excerpt from the deposition containing defendant's statement admitted as an exhibit corroborating Young's rebuttal testimony. Defendant interposed an objection to its admission on grounds that it did not constitute a prior inconsistent statement. The court ruled that it was the equivalent of a prior inconsistent statement and could be admitted as "an initial question of fact for the jury to determine." Defendant made no further objection, and the evidence was admitted as Exhibit P-1.

Defendant contends on appeal that evidence that goes to "an initial question of fact" can only be presented as part of the case-in-chief. He did not, however, base his objection to the admission of Exhibit P-1 on those same grounds at trial. Rather, his objection there was limited to the exhibit's admission as a prior inconsistent statement, which basis he apparently abandons on appeal. Rule 4 of the Utah Rules of Evidence provides:

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground or objection

(Emphasis added.) In light of this rule, we hold that defendant's present assertion of error in respect to the admission of Exhibit P-1 is precluded.

IV. THE USE OF DEPOSITIONS IN JURY DELIBERATIONS

Defendant's final assignment of error is in respect to the trial court's permitting the jury to take Exhibit P-1 (a partial deposition) with them into their place of deliberation. He argues that in so doing, the court violated Rule 17 of the Utah Rules of Criminal Procedure (U.C.A., 1953, § 77-35-17(k)) which provides in pertinent part:

(k) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits and papers which have been received as evidence, except depositions; and each

juror may also take with him any notes of the testimony or other proceedings taken by himself, but none taken by any other person.

(Emphasis added.)

Plaintiff's rejoinder to this argument is that there is nothing in the record that even suggests that Exhibit P-1 went with the jury into deliberation and therefore the defendant has failed in his burden of showing error.

In the absence of any indication in the record to the contrary, we assume that all evidentiary exhibits were sent with the jury into deliberation. Such an assumption is appropriate here. We therefore conclude that error was committed as assigned by defendant.

Our conclusion in this regard comports with decisional law in this as well as other jurisdictions. In State v. Solomon,²² this Court held that it was error to permit a portion of a witness's transcript to be taken to the jury room, reasoning as follows:

It is evident therefore that under the statutes such written testimony is not to be read by the jury in the jury room but is to be read to them in open court, subject to all objections to be made, the same as if the witness were present and testifying. The written record thereof should not be taken to the jury room where the jury might read it. A written instrument, made an exhibit in the cause but not consisting of testimony of a witness in the case, may of course be taken to the jury room the same as maps, diagrams, and other exhibits. But the testimony of a witness is in a different category. Such is the provision of the statutes and the common law always excluded depositions and written testimony from being carried from the bar by the jury. We can see no reason why the court should depart from the well established rule. It may often happen that the testimony on one side is oral from witnesses produced before the jury, while the testimony for the other side on

22. 96 Utah 500, 87 P.2d 807 (1939). See also State v. Wilson, 188 Kan. 67, 360 P.2d 1092 (1961); State v. Payne, 199 Wis. 615, 227 N.W. 258 (1929); Shedden v. Stiles, 121 Ga. 637, 49 S.E. 719 (1905).

essential matters is in the form of depositions or in the transcript from testimony at a previous hearing. If the hearing lasts for any length of time and the jury takes the depositions or transcript to be read and discussed while the oral evidence contra has in a measure faded from the memory of the jurors, it is obvious that the side sustained by written evidence is given an undue advantage. The law does not permit depositions or witnesses to go to the jury room.²³

While we are convinced of the commission of the asserted error, we are unable to find in the record any objection thereto. In the absence of a proper and seasonable²⁴ objection, an error such as this will be deemed waived. We hold, therefore, that defendant's failure to so object precludes assertion of this error.

Affirmed.

WE CONCUR:

I. Daniel Stewart, Justice

Richard C. Howe, Justice

Christine M. Durham, Justice

Dean E. Conder, District Judge

Oaks, Justice, having resigned, does not participate herein; Conder, District Judge, sat.

23. 87 P.2d at 811.

24. See State v. Hofer, 238 Iowa 820, 28 N.W.2d 475, 481 (1947); Proctor v. State, 235 Ga. 720, 221 S.E.2d 556, 558-59 (1975); Shedden v. Stiles, supra note 22; People v. Dixon, 37 Ill. 2d 416, 226 N.E.2d 608, 610 (1967); State v. Solomon, supra note 22.

kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

The Maryland court continued:

It is stated in *Poe on Pleading*, Tiffany Edition, Section 117, in reference to the count for money had and received: "This count is commonly said to be equally remedial with a bill in equity, and, in general terms, lies whenever the defendant has obtained possession of money which, in equity and good conscience, he ought not to be allowed to retain." Mr. Poe relied on *Moses v. Macferlan*, supra. See also *Murphy v. Barron*, 1 Har. & G. 258. While there was only a special count in the declaration here, the facts are set out with sufficient particularity to be treated as a count for money had and received.

The court analogized its holding to cases which it cited where a state or one of its subdivisions had recovered overpayments, quite independently of any statutory authority. Reliance was also placed on section 46 of the Restatement of Restitution.

In conclusion, the unfortunate and regrettable conclusion reached by the majority need not be reached. The purpose of unemployment compensation laws is to provide for workers who become unemployed through no fault of their own. Unemployment compensation funds are supported by contributions from employers and taxpayers. It has a worthy purpose, but that purpose is thwarted when a worker can refuse to abide by a rule of the administering department, refuse to sign a wage assignment after he has drawn compensation during his weeks of need while his grievance was being processed, and the Department has to sit idly by because it can do nothing to redress the injustice of double recovery. The purpose of the statutes is to compensate the employee for unemployment, not to unjustly enrich him.

I would sustain the order of the Department, the administrative law judge, and the Board of Review ordering the plaintiff to make restitution.

Cite as
36 Utah Adv. Rep. 48

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE of Utah,

Plaintiff and Respondent,

v.

John Shapard DAVIS,
Defendant and Appellant.

No. 20996

FILED: June 27, 1986

FOURTH DISTRICT

Hon. D. V. Tibbs

ATTORNEYS:

John Shepard Davis for Defendant and Appellant.

David L. Wilkinson, Dave B. Thompson for Plaintiff and Respondent.

PER CURIAM:

This is an appeal from various post-conviction orders of the district court, including the denial of a motion for a new trial.

In 1982, defendant was found guilty of theft, a third degree felony, in violation of U.C.A., 1953, §76-6-404. He appealed and argued, inter alia, that the trial court erroneously permitted part of a written deposition to be taken into the jury room. In *State v. Davis*, 689 P.2d 5 (Utah 1984), this Court affirmed the conviction and ruled that defendant was precluded from asserting the error on appeal in view of his failure to make a seasonable objection at trial.

After defendant's petition for rehearing was denied by this Court and the case was remitted to the district court, defendant filed an amended motion for a new trial based on the jury's access to the written deposition. The trial court denied this motion on the ground that it was not timely. Defendant appeals this ruling, alleging that he has now made a proper challenge to the error in district court. For the same reason that the issue was deemed waived on direct appeal (i.e., failure to make a proper and seasonable objection), the trial court properly denied defendant's motion for a new trial.

Defendant also requests that the sentencing orders be declared invalid and that the case be remanded for resentencing. However questionable the procedures employed in entering the formal order of sentence, the matter is now moot since defendant has served his sentence and has received a formal termination of probation. As stated in *Spain v. Stewart*, 639 P.2d 166, 168 (Utah 1981), "Where the requested judicial relief can no longer affect the rights of the litigants, the case is moot and a court will normally refrain from adjudicating it on the merits." The exception alluded to is where there is a continuing and recurring controversy but, because of the short time period for adjudication, appellate review of the issue is effectively

denied. *Wickham v. Fisher*, 629 P.2d 896 (Utah 1981). That is not the situation in the instant case. Since all questions raised as to sentencing orders are now moot, we will not address the merits of defendant's arguments.

As a separate point on appeal, defendant contends that the court's order of restitution was invalid due to irregularities before and during the restitution hearing. The record contains no formal order of restitution. The only record of that proceeding is an unsigned minute entry which is not appealable. *South Salt Lake v. Burton*, 33 Utah Adv. Rep. 27 (1986).

The issues raised in defendant's amended motion for a new trial were addressed in the direct appeal, and we affirm the trial court's denial of that motion. We decline to address any of the remaining issues (as to sentencing and restitution), since those issues are not properly before the Court.

So ordered.

ADDENDUM B

EXHIBIT B

Dear Mr. Hutchinson,

In 1979 I became involved in a business matter with John Davis's father-in-law and I also got acquainted with Mr. Davis. He being from Provo, I told him I was on a property matter with Paul Tanner also of Provo who is a home builder. When I mentioned his name Mr. Davis was very anxious to know all about our transaction and said he knew Mr. Tanner very well and was trying to collect money for an account he had in Provo by the name of Thorns Const. Ready Mix

Mr. Davis and myself went to see Mr. Tanner and he seemed surprised and wanted to know how I had got to know him. Mr. Tanner told me how good Mr. Davis was that he had been as was after him on several matters before.

Mr. Mascario (my partner) on this property deal then met with Mr. Davis and he explained to us his dealings he had previously with Mr. Tanner. We in turn hired him and Mr. Davis started to work on our transaction. Being very complex it took quite a long time to get things going on this deal and after a period of time Masscario got provoked at me and Mr. Davis and didn't show up for some of the meetings we would have and those he did attend he always had to leave early before the meetings were over. So I told Mr. Davis to continue that I had full trust in him.

Working with Mr. Davis and Mr. Baum (the buyer of said properties) for a year or more, the transaction was within a few days of being closed. Mr. Masscario got mad at Mr. Davis and myself and the next thing we knew he had other council to represent him.

Mr. Bert Wyncott now Mr. Masscario's attorney asked Mr. Davis for a complete breakdown of the transaction etc. which Mr. Davis personally done the closing of papers and distributing of the monies. During this time Mr. Masscario asked me if the down-payment was made, I told him there had been to hang on for a few days. Within a short period I was served with a summons from Mr. Wyncott and Mr. Masscario. I called Mr. Davis and he claimed he had been served also. Mr. Davis then came to my home. I told him to be sure and answer the summons for me and he said "don't worry about it, I'll take care of it because he had to fill his out also. I called him several times after that and asked him if he had filled out the necessary papers for an answer to the summons and he assured me he would take care of it. Mr. Davis never took care of the summons I had received and he never intended to. A short while later, I received a call from my wife, she was crying. We had been served with papers for a seizure on my home and other properties of mine which I have worked for all my life to accumulate. I immediately called Mr. Davis and he assured me he would get it straightened out. The next day we were informed that our checking account had a garnishment on it which caused considerable problems plus embarrassment. Things were worked out (temporarily).

Three months go by I'm calling Davis (long distance) constantly to get this transaction cleared up so we can all go about our business. Again we are served with another seizure on my home, properties etc. I called Davis and he claimed that the Judges are changed around and assured me once again not to worry that he knew what he was doing to please trust him and to assure my wife that he would take care of everything.

As the weeks and months wore on with Mr. Davis doing nothing I was served with a notice to appear at Attorney Rust's office for a deposition. At the deposition I answered all the questions the best to my knowledge. I informed them that I did not have any papers or documents that Mr. Davis kept everything.

On Mr. Davis's deposition the same day they asked him what the amount of the sale was and he answered, then they asked him where the other \$130,000.00 to \$140,000.00 was he claimed he had. Mr. Davis refused to tell Mr. Rust where the money was. They asked him 4 or 5 times more and he still refused to tell them anything.

As we left the attorney's office, I asked Mr. Davis why in the hell didn't he tell them where the money was. I in turn asked him if indeed he did have the money. His answer to me was "I'm not going to tell you or anyone else where it is."

A few days later there was for the 3rd time a seizure handed my wife on my home, and property. Again I call him to ask him please get this straightened out and reminded him again that if he had just taken the interest and time to answer the summons in the first place we wouldn't be going through all this. Again he said "trust me"

"don't worry I'll get it all straightened out" which he had no intention of doing.

Again we go to court and the Judge denies the judgement to be dismissed. A few days later I was informed by mail that the best thing for me was to get other council, as Mr. Davis would also have to get council for himself.

A few days later I received papers again from Mr. Rust's office for another deposition to be taken. At that point I hired Attorney Dale Potter to represent me. On the day of the deposition Mr. Potter and I was informed that Mr. Davis had closed his trust account many months before and that they were going to ask the bank where Mr. Davis has his account to bring all photostat copies of Mr. Davis checks to the hearing. Mr. Davis arrived shortly after the bank employee had delivered the photostat copies to Mr. Rust and not knowing the bank had already been there he informed Mr. Rust that he was going to serve him with a restraining order on his trust and bank account. He was a little late. With a few moments ~~W~~ again asked Mr. Davis where the money was and again he answered "I don't have to tell you and I'm not going to."

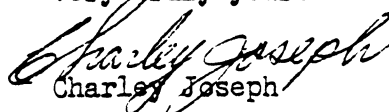
We again started my deposition and again I answered all questions to the best of my knowledge. We started to go over all of Mr. Davis checks that he had written. You can't imagine what I felt when I seen those checks written by Mr. Davis to people I didn't know or never heard about in my life. It was so hard for me to believe that he had done this indecent thing to me or even himself. At this point Mr. Davis raised his voice to Mr. Rust and my attorney got up and told Mr. Davis that we was still taking Mr. Joseph's deposition and we see fraud and embezzlement here as we go over each and every check. There was approximately only 4 checks that I recognized that had been written. Over a \$100,000.00 Mr. Davis wrote for his own personal use. All this time he had me believe that this money was in his trust account.

Right from the start when Chatillon (Mr. Baum's Co) gave us the money, I told Davis to be sure and distribute some money to Masscario and Shelby Taylor. I myself received \$38,000.00 in two separate checks at different times. This money is what Davis said he had in his trust account. I never authorized Mr. Davis to use any or pay any of his own personal bills with the money he received. That money belonged to Mr. Masscario, Mr. Shelby and myself.

Sir, this man has caused undo anguish to my wife and myself, he has hurt me in my business, and has added extra expense for me to hire Mr. Potter. I ask the bar to take the law to it's full extent and have this man barred from practicing law anywhere in or out of the state of Utah. He is a disgrace to his fellowmen, his community, and his state.

I have worked hard all my life have been fair and honest with people. It's still hard to believe that a man such as John Davis would jeopardize his family, his job, etc. for money that he spent that wasn't his to spend.

Very truly yours


Charles Joseph



Utah State Bar

Office of Stephen F. Hutchinson, Bar Counsel

425 EAST FIRST SOUTH / SALT LAKE CITY, UTAH 84111
Telephone: 1-800-662-9054, 531-9077

January 12, 1982

John S. Davis
Attorney at Law
1068 Grand Circle
Provo, Utah 84601

Dear John:

The enclosed complaint against you has been filed with the Committee on Ethics and Discipline by Charley Joseph. The activities complained of may constitute violations of the Revised Rules of Conduct of the Utah State Bar, to wit:

1. Canon 1, DR1-102 A(3)
Specification: Engaging in illegal conduct involving moral turpitude by converting trust funds belonging to a client to your own use or benefit.
2. Canon 9, DR9-102 B(3,4)
Specification: Failing to properly account for client funds in your possession or to pay said funds to your client as requested by the client.

You are requested to submit a written response to this complaint to this office within ten days. A copy of your response will be provided to the complainant. We will then notify you of the date and time set for consideration by the Committee.

You will receive a notice of this Committee meeting, and will be given an opportunity to appear and make a brief statement in support of, or in addition to, your written response. Similarly, the complainant will be permitted to appear and be heard. These appearances are not required unless the Committee separately communicates a specific request for you to appear.

If you have any questions concerning this matter,
please call me at the telephone number above
shown.

Sincerely,

Stephen F. Hutchinson
Bar Counsel

SFH.sgl

Enclosure

ADDENDUM C

EXHIBIT D
BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

IN RE

JOHN S. DAVIS

)
) COMPLAINT
)
)
)

No. F-137

I

The attorney charged with unprofessional conduct in this Complaint is John Davis, who is an Attorney and Counselor in the State of Utah, and a member of the Utah State Bar residing in the City of Provo, County of Utah, State of Utah, and whose address according to the records of the Executive Director of the Utah State Bar is 1068 Grand Circle, Provo, Utah

II

This Complaint is filed with the Board of Commissioners of the Utah State Bar by the undersigned as the regularly appointed Ethics and Discipline Committee of the Utah State Bar.

III

The unprofessional conduct charged in this complaint is alleged to be as follows:

COUNT I

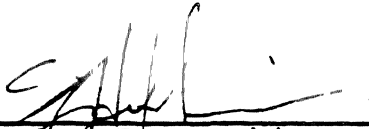
1. That during the summer of 1978, Respondent undertook to represent the partnership of Joseph Mascaro and Charley Joseph in certain real estate transactions

2. That, thereafter in June, 1979, Respondent collected proceeds of the aforesaid transactions on behalf of Mascaro and Joseph in an amount in excess of \$95,000, misappropriated the same and unlawfully converted the same to his own use and benefit.
3. That, thereafter Mr. Joseph and Respondent were named defendants in a lawsuit initiated by Mr. Mascaro and one Shelby Taylor; whereupon Respondent assured Joseph that Respondent would fully undertake the defense of the lawsuit on their joint behalf and would file an answer therein for them as co-defendants.
4. That, notwithstanding, the said representation to Joseph, Respondent intentionally and deliberately defaulted in the lawsuit, allowing plaintiffs to obtain a default judgment against himself and Joseph in excess of \$300,000. That the purpose of this intentional default was to avoid litigation on the merits, thus preventing or delaying discovery proceedings which would have revealed the aforesaid embezzlement, and to gain sufficient time with which to divert or conceal Respondent's assets.
5. That the aforesaid embezzlement and conversion, and the subsequent manipulation of the judicial process in order to conceal the same constitute violations of Rule III, Section 2-5, Section 3; and Rule IV, Canon 1, DR1-102 A (3), (4), (5) and (6), and Canon 9, DR9-102 B (3) and (4).

attorney charged pursuant to the Rules of Conduct and
Discipline of the Utah State Bar.



Pamela Greenwood
Chairman of Ethics and
Discipline Committee
Utah State Bar
425 East First South
Salt Lake City, Utah 84111



Stephen F. Hutchinson
Prosecutor
Utah State Bar
425 East First South
Salt Lake City, Utah 84111

ADDENDUM D

RULE III

OATH OF THE ATTORNEY

The oath of an attorney, to be taken upon Admission to the Bar and to be followed in practice by each member of the Utah State Bar, is promulgated and prescribed as follows:

I Do SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of Utah, and that I will discharge the duties of Attorney and Counselor at Law with fidelity;

I will maintain the respect due to Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. So HELP ME GOD.

(Rule IV)
Conduct Prescribed by Rule)

DISCIPLINARY RULES

DR 1-101 Maintaining Integrity and Competence of the Legal Profession.

- (A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.
- (B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.

DR 1-102 Misconduct.

- (A) A lawyer shall not:
 - (1) Violate a Disciplinary Rule.
 - (2) Circumvent a Disciplinary Rule through actions of another.
 - (3) Engage in illegal conduct involving moral turpitude.
 - (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.

DR 1-103 Disclosure of Information to Authorities.

- (A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
- (B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

ADDENDUM E

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

| | | |
|---------------------|---|-------------------|
| IN RE: |) | AMENDED COMPLAINT |
| |) | |
| JOHN SHEPPARD DAVIS |) | F-137 |
| |) | |
| |) | |

I

The attorney charged with unprofessional conduct in this complaint is John Sheppard Davis, who is an Attorney and Counselor in the State of Utah, and a member of the Utah State Bar, residing in the City of Provo, County of Utah, State of Utah, and whose address according to the records of the Executive Director of the Utah State Bar, is 1068 Grand Circle, Provo, Utah.

II

This complaint is filed with the Board of Commissioners of the Utah State Bar by the undersigned as the regularly appointed Ethics and Discipline Committee of the Utah State Bar.

III

The unprofessional conduct charged in this Complaint is alleged to be as follows:

Exhibit D

COUNT I

1. That during the summer of 1978, Respondent undertook to represent the partnership of Joseph Mascaro and Charley Joseph in certain real estate transactions regarding real property in Utah County.

2. That, thereafter in June, 1979, Respondent collected proceeds of the aforesaid transactions on behalf of Mascaro and Joseph in an amount in excess of \$95,000. and misappropriated the same and unlawfully converted the same to his own use and benefit.

3. That, thereafter, Mr. Joseph and Respondent were named defendants in a lawsuit initiated by Mr. Mascaro and one Shelby Taylor, whereupon, Respondent assured Joseph that Respondent would fully undertake the defense of the lawsuit on their joint behalf and would file an answer therein for them as codefendants.

4. That, notwithstanding, the said representation to Joseph, Respondent intentionally and deliberately defaulted in the lawsuit, allowing plaintiffs to obtain a default judgment against himself and Joseph in excess of \$300,000. That the purpose of this intentional default was to avoid litigation on the merits, thus preventing or delaying discovery proceedings which would have revealed the aforesaid embezzlement, and to gain sufficient time with which to divert or conceal Respondent's assets.

5. That the aforesaid embezzlement and conversion, and the subsequent manipulation of the judicial process in order to conceal the same constitute violations of Rule III, Section 3; and Rule IV, Canon 1, DR1-102 A (3), (4) and (6), and Canon 9, DR9-102 B (3) and (4).

COUNT II

1. Respondent was convicted by a jury on one count of theft.

2. On November 26, 1982, the Judgment and Commitment was entered, adjudging Respondent guilty as charged and convicted.

3. The count of theft of which Respondent was convicted is a felony in the second degree as defined by 76-6-404 and 76-6-412 (1) (a) (i), Utah Code Annotated (1953 as amended). The trial judge reduced the offense for which Respondent was convicted to a felony in the third degree.

4. The conduct of Respondent is in violation of Rule II, Section 4, and Canon 1, DR1-102 A(4), of the Revised Rules of Professional Conduct of the Utah State Bar, Rule II (a), Rules of Discipline of the Utah State Bar, and paragraph 32, Rules for Integration and Management of the Utah State Bar.

WHEREFORE, the undersigned, on behalf of the UTAH STATE BAR prays that proceedings be taken herein against the

attorney charged pursuant to the Rules of Discipline of the Utah State Bar and that the Utah State Bar be awarded its costs in bringing this action.

DATED this 3 day of January, 1984.

/s/ Pamela Greenwood
Pamela Greenwood
Chairman
Ethics and Discipline Committee

/s/ C. Jeffrey Paoletti
C. Jeffrey Paoletti
Prosecutor
Utah State Bar
425 East First South
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Formal Complaint was mailed certified mail return receipt requested to John Sheppard Davis Attorney at Law, 1068 Grand Circle, Provo, Utah 84601 this _____ day of _____, 19____.

ADDENDUM F

23. Conviction of crime. Judgment of disbarment. Duty of clerks of court. Except for good cause shown, upon conviction of an attorney of a crime involving moral turpitude by any court, the Supreme Court will enter a Judgment of Disbarment against the accused and will order that the name of the accused be stricken from the roll of attorneys of the court, and that he be precluded from practicing as such attorney in all the courts of this state. The clerk of a Utah state court in which any such conviction is had must, within thirty days thereafter, transmit to the Supreme Court a certified copy of the record of conviction, which shall be conclusive evidence thereof. An attorney so disbarred shall not be entitled to readmission until he satisfies the requirements set forth in the Procedures of Discipline of the Utah State Bar.

ADDENDUM G

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In Re:

JOHN S. DAVIS

)
)
)
)

ORDER

No. F-137

The Respondent filed a Motion to Sever and Dismiss the First Count of the Formal Complaint filed by the Bar and a Motion to Sever and Dismiss the Second Count of the Formal Complaint. Counsel to the Bar has responded to both motions and the Respondent has filed a further supplement to his response and a waiver of oral argument in the matter in order to enable the consideration of the merits of the motions without further need to schedule formal meetings of the panel.

The Respondent has also filed a Motion for a Pretrial Conference.

Upon receipt of the memoranda in support of and in opposition to the motions filed by the Respondent, members of the panel read and considered the claims of the Respondent in the various motions. After reviewing the files and records of the Bar, with respect to the initiation of the formal complaint herein and after full deliberation by the panel, it is hereby ordered:

1. The motion of the Respondent for a pre-trial hearing is granted and the pre-trial hearing will be held as

E.L. HITE

scheduled by the parties prior to the date of any evidentiary hearing in the matter.

2. The hearing date of January 15 is hereby stricken in accordance with the further terms of this order.

3. The panel finds that a hearing panel of the Ethics and Discipline Committee made a determination and directed the Chairman of the Committee to file a formal complaint as set forth more fully in the amended formal complaint, Count 1, now on file herein. The panel further finds that the evidence before the panel indicates no evidence of bias or prejudice against the Respondent. The motion of the Respondent to sever and dismiss the first count of the formal committee complaint is denied.

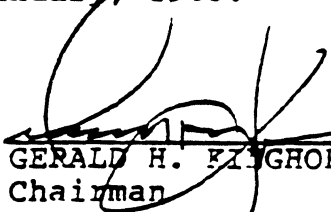
4. The motion of the Respondent to sever and dismiss the second count of the complaint is taken under advisement for a period of thirty (30) days from the date hereof. During the thirty (30) day period, the Bar counsel may or may not refer the allegations of Count 2 to the Ethics and Discipline Committee for the proceedings required by the Rules of Discipline. If Bar counsel determines that the matter should not be pursued, Count 2 of the formal complaint will be dismissed under the terms of this order. If the office of Bar counsel proceeds to refer Count 2 to the Ethics and Discipline Committee, further proceedings herein will be deferred until a determination is made by the Ethics and

Discipline Committee as to whether or not a formal complaint will be filed based on the facts and circumstances underlying Count 2 of the formal complaint.

In the event the matter is referred to the Committee and the Ethics and Discipline Committee determines not to file a formal complaint, Count 2 of the formal complaint hereir shall be dismissed and the panel shall proceed promptly to hear the allegations of Count 1. If the Ethics and Discipline Committee determines to direct the filing of a formal complaint after the required proceedings before the Ethics and Discipline Committee, Bar counsel may request that the formal complaint issued may be consolidated herein for hearing.

This matter will be reconsidered in 30 days without further hearing to determine whether proceedings have or have not been initiated before the Ethics and Discipline Committee. If proceedings have not been initiated, a hearing date will be set for a pre-hearing conference and a hearing on the facts and circumstances underlying Count 1 of the formal complaint on file.

DATED this 31st day of January, 1985.



GERALD H. FINGHORN
Chairman

ADDENDUM H

C. Jeffry Paoletti
Bar Counsel
Utah State Bar
425 East 100 South
Salt Lake City, Utah 84111

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

| | | |
|---------------|---|-------------|
| In Re: | : | STIPULATION |
| | : | |
| JOHN S. DAVIS | : | F-190 |
| | : | |

It is hereby stipulated and agreed between C. Jeffry Paoletti, Bar Counsel, and John S. Davis, Respondent that the Complaint filed in the above styled matter may be dismissed, without prejudice. Respondent will be making a presentation before Screening Panel "D" of the Ethics and Discipline Committee on Thursday, April 25, 1985 regarding the issuance of a Formal Complaint and, therefore, the present complaint may be dismissed without prejudice.

DATED this 7th day of April, 1985.

C. Jeffry Paoletti
Bar Counsel

John S. Davis
Respondent
Pro Se

APR 24 1985

C. Jeffry Paoletti
Bar Counsel
Utah State Bar
425 East 100 South
Salt Lake City, Utah 84111

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

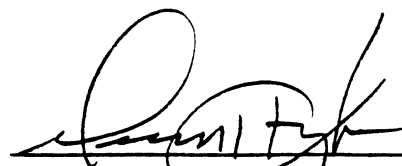
| | | |
|---------------|---|-------|
| In Re: | : | ORDER |
| | : | |
| JOHN S. DAVIS | : | F-190 |
| | : | |

Based on the stipulation of the parties in the above-styled matter, Respondent's Motion to Quash is granted and the Formal Committee Complaint on file is hereby dismissed, without prejudice.

DATED this 15 day of April, 1985.

HEARING COMMITTEE PANEL

BY



Gerald H. Kinghorn
Chairman

ADDENDUM I

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

| | | |
|---------------|---|-----------|
| IN RE: | : | COMPLAINT |
| | : | |
| JOHN S. DAVIS | : | F-198 |

I

The attorney charged with unprofessional conduct in this complaint is John S. Davis, who is an Attorney and Counselor in the State of Utah, and a member of the Utah State Bar, presently temporarily suspended, residing in the City of Provo, County of Utah, State of Utah, and whose address according to the records of the Executive Director of the Utah State Bar is, 1068 No. Grand Circle, Provo, Utah 84604.

II

This complaint is filed with the Board of Commissioners of the Utah State Bar by the undersigned as the regularly appointed Ethics and Discipline Committee of the Utah State Bar.

III

The unprofessional conduct charged in this Complaint is alleged to be as follows:

1. Respondent was convicted by a jury on one count of theft. Attached hereto is a copy of the

Complaint
John S. Davis
F-190
Page 2

information and jury verdict and incorporated by reference and marked Exhibit A.

2. On November 26, 1982, Respondent was sentenced based on the verdict. Attached hereto are copies of the minute entries reflecting the conviction and sentencing which are incorporated herein and marked Exhibit B.

3. The count of theft of which Respondent was convicted is a felony in the second degree as defined by 76-6-404 and 76-6-412(1)(a)(i), Utah Code Annotated (1953 as amended). The trial judge reduced the offense for which Respondent was convicted to a third degree felony.

4. Respondent appealed his conviction to the Utah Supreme Court. The Court, by its decision filed June 25, 1984, affirmed Respondent's conviction. Attached hereto is a copy of the decision of the Utah Supreme Court, incorporated herein and marked Exhibit C.

5. The conduct of Respondent is in violation of Rule II, Section 4, and Canon 1, DR 1-102(A)(4) of the Revised Rules of Professional Conduct of the Utah State Bar; Rule II (a), Rules of Discipline of the Utah State Bar; and paragraph 32, Rules for Integration and Management of the Utah State Bar.

WHEREFORE, the undersigned, on behalf of the UTAH STATE BAR prays that proceedings be taken herein against the attorney charged pursuant to the Rules of Discipline of the Utah State Bar and that the Utah State Bar be awarded its costs in bringing this action.

Complaint
John S. Davis
F-190
Page 3

DATED this 29th day of April, 1985.

Pamela T. Greenwood
Chairman
Ethics and Discipline Committee

C. Jeffrey Paoletti
C. Jeffrey Paoletti
Prosecutor
Utah State Bar
425 East 100 South
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Formal Complaint was mailed certified mail return receipt requested to John S. Davis, Attorney at Law, 1068 No. Grand Circle, Provo, Utah 84601, this 29 day of April, 1985.

Marjorie Kanner

ADDENDUM J

NOV 20 1986

BEFORE OF THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In Re:

JOHN S. DAVIS

)
)
) FINDINGS OF FACT,
) CONCLUSIONS AND
) RECOMMENDATION

)
) No. F-198
) and F-137 Consolidated
)

The Hearing Committee Panel appointed by the Board of Bar Commissioners comprised of Gerald H. Kinghorn, Randon W. Wilson and E. Allan Hunter convened on Thursday, May 15, 1986 at 9:30 a.m. for hearing pursuant to notice and stipulation of the parties at the conference room at the law office of Jones, Waldo, Holbrook and McDonough, 170 South Main Street, Suite 1500, Salt Lake City, Utah 84101.

The hearing was convened at 9:30 a.m. and recessed until the appearance of Mr. Davis or until 10:00 a.m. Mr. Davis appeared at 9:59 a.m. Present were Mr. John S. Davis, (herein referred to as the Respondent) appearing pro se, Karin Hobbs, counsel for the Utah State Bar, Joseph E. Tesch counsel for Charlie Joseph who was present pursuant to a subpoena for the Respondent.

Counsel for the Bar requested a ruling as to whether the hearing would proceed pursuant to the Procedures of Discipline of the Utah State Bar adopted September 25, 1985 or the provisions of Rule 12 of the Rules of Discipline of the Utah State Bar which were in effect prior to the adoption of the Procedures of Discipline of the Utah State Bar of September 25, 1985.

The Respondent insisted that the prior rules of discipline be used for the hearing and all subsequent proceedings. After hearing the arguments of counsel and reviewing the material documents, the Panel finds that no difference exists between the Rules and the Procedures adverse to the Respondent; if the Respondent calls the attention of the Panel to a matter where an adverse conflict may exist, the Panel will rule on the matter and the appropriate rules during the hearing.

The Panel will apply the Procedures of Discipline of the Utah State Bar adopted September 25, 1985 to the hearing except as provided more specifically above.

The Respondent moved for the exclusion of witnesses to be heard by the Panel from the hearing room. The exclusionary rule was invoked and each party was asked to state the name of all witnesses to be called. The Panel instructed the witnesses to stand and be sworn. The following persons were named by the parties as witnesses: Mr. Randall Hall, Mr. Jeff Paoletti and Mr. Charlie Joseph were sworn by the reporter and admonished not to discuss their testimony with each other or discuss the subject matter of the hearing.

The Respondent objected to counsel for Mr. Joseph remaining during the hearing. Under the public hearing provisions under which the Hearing is conducted, Mr. Tesch was allowed to remain in the room but was admonished while the witnesses were leaving.

the room not to discuss the opening statements, arguments or testimony of witnesses with his client or other witnesses.

Counsel for the Bar proceeded to make an opening statement. At the close of the opening statement by counsel for the Bar, the Panel confirmed that the hearing was going forward only under Count II of the amended complaint in the consolidated matters F-137 and F-198 which alleges that the Respondent was convicted of the crime of theft in the second degree, that the trial judge reduced the offense to a felony in the third degree; Paragraph 5 of Count II alleges that the conduct of the Respondent is in violation of Rule II, Section 4 (1) and Cannon 1, Dr 1-102 (A) (4), of the Revised Rules of Professional Conduct of the Utah State Bar, Rule II (a), Rules of Discipline of the Utah State Bar; and Paragraph 23, of the Rules for Integration and Management of the Utah State Bar.

The Respondent reserved the right to make an opening statement.

Counsel for the Bar reviewed the record and specifically the answer of the Respondent to the amended complaint. The Respondent objected to the characterization of his answer in paragraph 2 of the second defense as an admission that he was sentenced on November 26, 1982.

Counsel for the Bar offered proposed Exhibits 1, 2 and 3 as evidence. The Respondent examined the proposed exhibits and the Respondent having no objection, Exhibit Nos. 1, 2 and 3 were admitted and received in evidence.

Exhibit No. 4 was then marked and offered as an exhibit which is the transcript and record on appeal to the Supreme Court of the State of Utah in the case of State v. Davis 689 P.2d 5 (Utah 1984). The Respondent requested time to examine the exhibit and the Panel proposed that counsel for the parties disclose all their proposed exhibits to each other, have them numbered, organized and examined by counsel during a recess.

Upon resuming the hearing, counsel for the Bar offered proposed Exhibit No. 4 consisting of subparts 4a, 4b, 4c and 4d. Mr. Davis objected on the grounds that the exhibit is irrelevant. The panel ruled that the exhibit would be received into evidence, reserving to the panel the discretion to determine the relevancy and weight of the evidence; Exhibit No. 4 was admitted.

Proposed Exhibit No. 5 was marked and offered; the Respondent offered the same objection as to relevancy to proposed Exhibit No. 5 and the Panel ruled that the exhibit would be received subject to the same reservation of discretion as to relevancy and weight.

Counsel for the Bar then called Mr. Randall Hall as a witness. Prior to the examination of Mr. Hall, Bar Counsel requested that the panel rule that based on the exhibits the Respondent has been convicted of a crime as charged in Count II of the Amended Complaint.

After hearing the arguments of counsel and examining the exhibits, the panel ruled that the Bar had sustained its burden

of proof by clear and convincing evidence that the Respondent was convicted of a crime and a judgment of conviction was entered. The finding of the Panel expressly is without prejudice to Mr. Davis opportunity to argue the issues presently before the Supreme Court or other technical issues relevant to the conviction, mitigation or cause for disbarment. The finding of the Panel includes the reservation by the Respondent and renewal of the Respondents pre-trial motions.

Mr. Hall was then sworn and examined by Counsel for the Bar. Proposed Exhibit No. 6 was marked for identification, offered and admitted into evidence with no objection from the Respondent.

Mr. Hall was cross-examined by Mr. Davis. Mr. Davis offered proposed Exhibit K which was received in evidence without objection. Proposed Exhibit J was offered by Mr. Davis after identification by the witness and received in evidence without objection.

Examination of the witness was concluded by the parties. Members of the panel asked the witness certain questions the witness was excused.

Counsel for the Bar then informed the Court that the Bar did not intend to call any further witnesses, however specific notice should be taken of the case of State vs. Davis.

Counsel for the Bar having rested, the Respondent was invited to proceed.

The Respondent moved for dismissal of the complaint on the basis of the provisions of 76-3-402(2)(b). After hearing the

arguments of counsel, examining the statute, the exhibits and after considering additional grounds for the Motion to Dismiss as stated by the Petitioner that the Bar had failed to sustain its burden of proof on the remainder of the charges in Count II, the Respondent's motions to dismiss were denied.

The Respondent made an opening statement in which he renewed the pre-trial motions heard by the Panel on prior occasions.

The Respondent called Jeff Paoletti as a witness. Mr. Paoletti was seated and examined by the Respondent. After the examination of the Respondent, Counsel for the Bar declined to cross-examine Mr. Paoletti.

The Respondent called Mr. Charlie Joseph as a witness. Counsel for Mr. Joseph requested an opportunity to consult with Bar counsel with respect to protective matters regarding Mr. Joseph. The Panel briefly recessed and reconvened the hearing for further proceedings.

Counsel for the Bar stated a continuing objection to the testimony of Mr. Joseph as being irrelevant to the issues defined by the Respondent during his opening statement and on the basis that the Respondent was attempting to relitigate the issue of guilt or innocence in the criminal matter. After hearing the arguments of counsel, the objection of Bar Counsel was overruled and the Respondent was permitted to proceed to examine Mr. Charlie Joseph based on Rule 23 of the Rules of Integration and Management of the Utah State Bar and the case of In Re: Kline D. Strong 616 P.2d, 583 (Utah 1980).

The Respondent then examined Mr. Joseph. After examination by the Respondent, the witness was cross-examined by counsel for the Bar and after cross-examination by Counsel for the Bar, the Respondent examined Mr. Joseph based on issues raised during the cross-examination by Bar counsel. The Panel directed certain questions to the witness and the Respondent moved that the testimony elicited by the Panel be stricken or in the alternative, that he be given an opportunity to further examine the witness. The Respondent received assurance from the Panel that the entire transcript would be read and reviewed before a decision is rendered. The Panel allowed the Respondent to re-examine Mr. Joseph. Thereafter Mr. Joseph was excused from the proceedings.

The Respondent indicated that he intended to introduce one more document which counsel for the Bar stipulated could be admitted. The document is a pre-sentence report prepared for the Fourth District Court by the Division of Adult Probation and Parole.

The Respondent indicated that his version of the incident was adequately explained in the report of the Division of Adult Probation and Parole and therefore he would not testify. After admission of the stipulated exhibit, the Respondent rested.

Counsel for the Bar made a closing statement, citing certain cases and providing copies of the cases to members of the Panel. Upon the conclusion of the closing statement of Counsel for the

Bar, Mr. Davis was invited to make a closing statement. During the closing statement by Mr. Davis, certain questions were asked by the Panel to clarify the issues Mr. Davis felt were relevant for the Panel's consideration.

The Respondent was permitted to introduce certain additional illustrative exhibits which were prepared by him, subject to the objection of Bar Counsel as to the foundation for the exhibits.

After the closing statements of the parties, a spontaneous statement was made on the record by Carol B. Davis, the wife of the Respondent over the objection of Bar Counsel. Mrs. Davis was not sworn, however, the Panel permitted the statement by Mrs. Davis.

At 6:56 p.m. the record was closed after having received all exhibits, evidence and statements of counsel.

Based upon the exhibits, testimony and all of the evidence, the Panel makes the following:

FINDINGS OF FACT

1. The Respondent is a member of the Utah State Bar and is the same person as the Defendant in the case of The State of Utah vs. John Shepard Davis, 689 P.2d 5 (Utah 1984).

2. The Respondent was convicted of the crime of theft, a felony in the second degree and sentenced by the Court pursuant to the discretion of the District Court, to a sentence for theft, a felony in the third degree.

3. The sentence and conviction of the Respondent were appealed to the Supreme Court of Utah and the decision of the jury and trial court were affirmed.

4. The Respondent engaged in conduct which was dishonest and deceitful by appropriating funds to his own use, which were the property of clients without their consent, by failing to disclose to the client the disbursement of the client's funds and attempting to prevent the client from the discovery of the disbursement of funds and by the use of such funds for personal expenditures.

5. The Respondent introduced no evidence in mitigation of the conviction of theft or to be considered for the purpose of these proceedings and the claims in the complaints herein.

Based on the foregoing Findings of Fact, the Panel makes the following Conclusions and Recommendation:

1. The crime of theft and the circumstances of the conviction of the Respondent constitute conduct involving moral turpitude and therefore the Respondent violated Rule 2, Section 4 (1) of the Revised Rules of Professional Conduct of the Utah State Bar.

2. The conviction of the Defendant of the crime of theft constitutes a violation of Rule 2(a) of the Rules of Discipline of the Utah State Bar in that the crime was a crime involving moral turpitude.

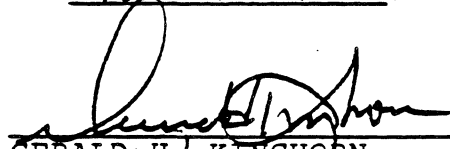
3. The Respondent is subject to a judgment of disbarment pursuant to Paragraph 23 of the Rules for Integration and Manage-

ment of the Utah State Bar having been convicted of a crime involving moral turpitude.

4. The Respondent should be disbarred and his name stricken from the register of attorneys in the State of Utah.

5. No mitigating circumstances exist to provide a basis for any sanction other than disbarment.

DATED this 18 day of November, 1986.


GERALD H. KINGHORN


RANDON W. WILSON


E. ALLAN HUNTER

ADDENDUM K

(b) A complainant shall have the right to appear before the disciplinary panel personally or through a designated representative to make a statement in support of his or her complaint or in opposition to the matters presented by the attorney against whom complaint has been made. This shall not include direct confrontation of the parties unless specifically authorized by the panel.

RULE VII

DISCIPLINE AND SANCTIONS

(a) **Disbarment.** Disbarment shall result in the revocation of an attorney's license to practice law, and in the removal of the disbarred attorney from the roll of attorneys of the Supreme Court authorized to engage in the practice of law in the State of Utah. The Supreme Court has exclusive power to order disbarment.

(b) **Suspension.** Suspension of an attorney shall remove said individual as a member of the Bar of the Supreme Court in good standing and shall render him or her incapable and unqualified to practice law in the State of Utah during the period of suspension. The period of suspension may be of any time frame less than two years duration. The Supreme Court has exclusive powers to order suspension. Any term of suspension may be stayed by the Supreme Court conditioned on the suspended attorney's compliance with certain terms and conditions of the stayed suspension. An active member of the Utah State Bar who is in good standing may be appointed by the Board to supervise the suspended attorney and to assure that the suspended attorney complies with the terms and conditions of the stayed suspension.

(1) **Temporary Suspension.** Upon petition of the Board, or of the Committee (with the consent of the Board) filed with the

Supreme Court, or on its own motion, the Supreme Court may issue an interim order suspending an attorney from the practice of law or imposing temporary conditions of probation pending a final determination in any disciplinary proceeding. The Supreme Court shall have exclusive power to place an attorney on interim suspension. If such a petition of the Board is filed prior to, concurrently with, or subsequent to the filing of its Findings, Conclusions, and Recommendation with the Supreme Court in a disciplinary case, such petition shall be supported by affidavits and exhibits demonstrating that the attorney has been convicted of a crime involving moral turpitude, or is causing great harm to the public and/or a client or clients pending final disposition of the disciplinary proceeding.

(2) In the event of a petition for interim suspension, the Board shall have the burden of proof that the relief sought should be granted in whole or in part.

(3) Any order of temporary suspension shall preclude the attorney from accepting new cases, but shall not preclude him from continuing to represent existing clients during the first 30 days after the effective date of the temporary order; provided that any fees tendered to such attorney for services performed during the 30-day period shall be deposited in a trust fund from which withdrawals may be made only in accordance with restrictions imposed by the Supreme Court.

(4) A temporary suspension order which restricts the attorney from maintaining an account against which the attorney may make withdrawals, shall serve as an injunction to prevent the

bank from making further payments thereon except in accordance with restrictions imposed by the Supreme Court.

(5) The Supreme Court shall have exclusive power to terminate an interim suspension.

(c) Probation. Probation may be imposed only in those cases in which there is little likelihood that the attorney on probation will harm the public during the period of probation and the conditions of probation can be adequately supervised. The Board may appoint an active member of the Utah State Bar who is in good standing to supervise the attorney and to assure that the attorney fulfills the conditions of the probation.

Probation shall be imposed for a specified period not in excess of two years and may be renewed for an additional two year period. The conditions of the probation shall be stipulated in writing and may only be imposed by the Supreme Court.

Probation may be terminated upon the filing of an affidavit by the respondent that he has complied with the conditions of probation and an affidavit by the probations supervisor that probation is no longer necessary.

If the probation supervisor fails to file an affidavit, Bar Counsel should investigate to determine whether the respondent should be fully reinstated. Bar Counsel may recommend that the respondent be fully reinstated, that the period of probation be extended for a period not to exceed two years or that other discipline be imposed.

(d) Public Reprimand. For unprofessional conduct, an attorney may be publicly reprimanded. The Supreme Court has exclusive power to impose the reprimand. Such shall be accomplished in writing with the

ADDENDUM L

RULE XII

DISCIPLINARY HEARING BEFORE BOARD

(b) Evidence. The rules of evidence and procedure applicable to the conduct of non-jury civil trials in the District Courts of the State of Utah shall govern the hearing on a Formal Committee Complaint. A verbatim recording shall be maintained by electronic and/or stenographic means.