

1989

J. Richard Calder v. : Brief of Appellant

Utah Supreme Court

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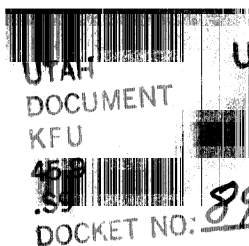
John T. Anderson; Parsons, Behle, & Latimer; attorney for appellant.

Christine A. Burdick.

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

In Re:

J. RICHARD CALDER,

Appellant.

)
) APPELLANT'S BRIEF
)
) F-253 and F-274
) (Consolidated)
)
) No. 890113
)

* * * * *

Appeal From a Recommendation of Discipline by the Board
of Bar Commissioners of the Utah State Bar

* * * * *

John T. Anderson, Esq. (0094)
PARSONS, BEHLE & LATIMER
Attorneys for Appellant
185 South State Street,
Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898

Christine A. Burdick, Esq.
Attorney for Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

AUG 15 1989

Clerk, Supreme Ct

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John T. Anderson, Esq. (0094)
PARSONS, BEHLE & LATIMER
Attorneys for Appellant
185 South State Street,
Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898

Christine A. Burdick, Esq.
Attorney for Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES.....	v
JURISDICTION	2
STATEMENT OF ISSUES PRESENTED FOR REVIEW	2
1. Whether many of the factual findings upon which the Bar's disciplinary hearing panel (the "Panel") based its recommendation that appellant, J. Richard Calder ("Calder") be disbarred exceeded the express or implied scope of conduct outlined by the Bar's two complaints against Calder.	2
2. Whether in investigating and deciding one of the two disciplinary complaints, the Panel misapprehended applicable substantive law, thereby inducing it to enter a number of clearly erroneous factual findings.....	2
3. Whether many of the findings of fact upon which the Panel concluded that Calder should be disbarred were either not established with the clear and convincing evidence required by Rule XII(c) of the Bar's Procedures of Discipline (the "Procedures") and/or are so clearly erroneous as to require that they be overturned.	2
4. Whether the Panel improperly failed to consider several mitigating factors in electing to recommend the draconian remedy of disbarment.....	2
5. Whether the recommendation of disbarment is so completely disproportionate to the conduct found by the Panel to	

	<u>Page</u>
constitute ethical violations as to be arbitrary, capricious and unreasonable.....	2
DETERMINATIVE STATUTES, ORDINANCES OR RULES	3
STATEMENT OF THE CASE	
(1) Nature of Case, Course of Proceedings and Disposition by the Panel and the Board	3
A. Procedural Background	4
B. Bailey Complaint and Disposition	5
C. Job Complaint and Disposition.	11
D. Calder Bankruptcy Petitions.	15
SUMMARY OF ARGUMENTS	18
ARGUMENT I	
THE PANEL IMPROPERLY AND PREJUDICIALLY CONSIDERED ISSUES FAR BEYOND THE EXPRESS OR IMPLIED SCOPE OF ITS COMPLAINTS AGAINST CALDER	21
ARGUMENT II	
THE PANEL'S TOTAL MISAPPREHENSION OF THE 1979 VERSION OF § 41-12-15 OF THE UTAH MOTOR VEHICLE ACT INDUCED A SERIES OF CLEARLY ERRONEOUS FACTUAL FINDINGS. THEREFORE, THESE FINDINGS MUST BE VACATED	27
ARGUMENT III	
BECAUSE IT IS THE SOLE AND ULTIMATE RESPONSIBILITY OF THIS COURT TO IMPOSE DISCIPLINE ON CALDER, THIS RESPONSIBILITY CANNOT BE DELEGATED UNQUALIFIEDLY TO THE BAR. AS SUCH, THE BAR'S FINDINGS, CONCLUSIONS AND RECOMMENDATION ARE ADVISORY IN NATURE AND ARE ENTITLED TO LITTLE OF THE	

	<u>Page</u>
DEFERENCE CUSTOMARILY ACCORDED FACTUAL FINDINGS	28

ARGUMENT IV

MANY OF THE FINDINGS OF FACT UPON WHICH THE PANEL CONCLUDED THAT CALDER SHOULD BE DISBARRED WERE EITHER NOT ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE AND/OR ARE SO CLEARLY ERRONEOUS AS TO REQUIRE THAT THEY BE VACATED.....	32
--	----

A. Many of the Findings are Unsupported by Clear and Convincing Evidence.....	32
---	----

B. Many of The Findings Are Clearly Erroneus	34
--	----

1. Finding No. 1(a):.....	35
2. Finding No. 1(b):.....	36
3. Finding No. 1(c):.....	37
4. Finding No. 1(d):.....	39
5. Finding No. 1(e):.....	41
6. Finding No. 1(g):.....	42
7. Finding No. 1(h):.....	42
8. Finding No. 1(i):.....	43
9. Finding No. 1(j):.....	43
10. Finding No. 1(k):.....	45
11. Finding No. 1(m):.....	47
12. Finding No. 1(o):.....	49
13. Finding No. 1(p):.....	50
14. Finding No. 2(b):.....	50
15. Finding No. 2(c):.....	53
16. Finding No. 2(d):.....	54
17. Finding No. 2(e):.....	58
18. Finding No. 2(g):.....	61
19. Finding No. 2(h):.....	61
20. Finding No. 2(j):.....	63
21. Finding No. 2(k):.....	64
22. Finding No. 2(m):.....	65
23. Finding No. 2(n):.....	67
24. Finding No. 2(o):.....	68
25. Finding No. 3:.....	69
26. Finding No. 4:.....	70
27. Finding No. 5:.....	70
28. Finding No. 6:.....	71

	<u>Page</u>
29. Finding No. 7:.....	73
30. Finding No. 8:.....	73
31. Finding No. 10:.....	73
 C. Summary	 75
ARGUMENT V.....	75
THE PANEL IMPROPERLY FAILED TO CONSIDER OR FIND ANY MITIGATING FACTORS DURING THE PENALTY PHASE OF THE PROCEEDING.....	 75
ARGUMENT VI.....	76
THE PANEL'S RECOMMENDATION OF DISBARMENT IS SO DISPROPORTIONATE TO THE CONDUCT THAT IT FOUND CONSTITUTED ETHICAL VIOLATIONS AS TO BE ARBITRARY, CAPRICIOUS AND UNREASONABLE.....	 76
CONCLUSION.....	77

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>In Re Blackham,</u> 588 P.2d 694, 696 (Utah 1978).....	30
<u>In Re Bridwell,</u> 25 Utah 2d 1, 474 P.2d 116 (1970).....	29
<u>Child v. Child,</u> 8 Utah 2d 261, 332 P.2d 981, 986 (Utah 1958).....	32
<u>Committee on Children's Television, Inc. v. General Foods Corp.,</u> 673 P.2d 660, 672 (Cal. 1983).....	27
<u>In Re Fullmer,</u> 17 Utah 2d 121, 405 P.2d 343, 344 (1965).....	29
<u>In Re Robert B. Hansen,</u> 584 P.2d 805 (Utah 1978).....	30
<u>In Re Phil L. Hansen,</u> 586 P.2d 413, 417 (Utah 1978).....	30
<u>Harline v. Campbell,</u> 720 P.2d 980, 982 (Utah 1986).....	35
<u>In Re Hughes,</u> 534 P.2d 892 (Utah 1975).....	29
<u>In Re Judd,</u> 629 P.2d 437, 438 (Utah 1981).....	30
<u>In Re MacFarlane,</u> 10 Utah 2d 217, 350 P.2d 61, 633 (1960).....	29
<u>McCleod v. Stevens,</u> 617 F.2d 1038 (4th Cir. 1980).....	24
<u>In Re McCune,</u> 717 P.2d 701 (Utah 1986).....	31
<u>Paulsen v. Coombs,</u> 254 P.2d 621, 624 (Utah 1953).....	32

	<u>Page</u>
<u>People v. White,</u> 59 Ill. 2d 416, 322 N.E. 2d 1,3 (1974).....	67
<u>Southwestern Stationery and Bank Supply, Inc. v. Harris Corp.,</u> 624 F.2d 168 (10th Cir. 1980).....	24
<u>State v. Sibert,</u> 6 Utah 2d 198, 310 P.2d 388, 390 (1957).....	34
<u>State v. Walker,</u> 743 P.2d 191, 193 (Utah 1987).....	28
<u>In Re Strong,</u> 616 P.2d 583, 586 (Utah 1980).....	22

Statutes

Rule XII(b) of the Utah State Bar Procedures of Discipline.....	26
Section 9.2 of the ABA Standards for Imposing Lawyer Sanction.....	75
Section 9.32 of the ABA Standards for Imposing Lawyer Sanctions.....	75
<u>Utah Code Ann., Section 41-12-15 (1979)</u> of the Utah Motor Vehicle Act.....	2,6, 19,27
<u>Utah Code Ann.,</u> Section 78-2-2(3)(c) (1988).....	3

Textual Authorities

60 Am. Jur. 2d, Perjury, § 8 (1972).....	67
McCormick, <u>Handbook of the Law of Evidence</u> at 796 (1972).....	32

<u>Other</u>	<u>Page</u>
Article VIII, Section 3 of the Utah Constitution.....	3

JURISDICTION

The authority believed to confer jurisdiction on the Supreme Court of the State of Utah to hear this appeal from a recommendation of discipline by the Board of Bar Commissioners (the "Board") of the Utah State Bar (the "Bar") is Article VIII, Section 3 of the Utah Constitution and Utah Code Ann. § 78-2-2(3)(c) (1988).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review in this case:

1. Whether many of the factual findings upon which the Bar's disciplinary hearing panel (the "Panel") based its recommendation that appellant, J. Richard Calder ("Calder") be disbarred exceeded the express or implied scope of conduct outlined by the Bar's two complaints against Calder.

2. Whether in investigating and deciding one of the two disciplinary complaints, the Panel misapprehended applicable substantive law, thereby inducing it to enter a number of clearly erroneous factual findings.

3. Whether many of the findings of fact upon which the Panel concluded that Calder should be disbarred were either not established with the clear and convincing evidence required by Rule XII(c) of the Bar's Procedures of Discipline (the

"Procedures") and/or are so clearly erroneous as to require that they be overturned.

4. Whether the Panel improperly failed to consider several mitigating factors in electing to recommend the draconian remedy of disbarment.

5. Whether the recommendation of disbarment is so completely disproportionate to the conduct found by the Panel to constitute ethical violations as to be arbitrary, capricious and unreasonable.

DETERMINATIVE STATUTES, ORDINANCES OR RULES

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is believed to be solely determinative of the outcome of this case. However, many provisions of the Bar's Rules of Professional Conduct and the Procedures are relevant to the disposition of this appeal.

STATEMENT OF THE CASE

(1) Nature of Case, Course of Proceedings and Disposition by the Panel and the Board. This is a disciplinary proceeding instituted by the Bar's counsel pursuant to Rule VIII(e) of the Procedures. After its formal complaints (the "Complaints") were consolidated, the Panel conducted an evidentiary hearing both on the Complaints and on issues not raised by the Complaints. On February 16, 1989, the Panel made and entered its

Findings of Fact, (the "Findings") Conclusions of Law (the "Conclusions") and Recommendation of Discipline (the "Recommendation") which were adopted by the Board on March 24, 1989. (See App. i). Calder timely objected to the Findings, Conclusions and Recommendation. (R. 141-55). After considering the objections, a three member hearing panel of the Board perfunctorily denied them by order dated May 24, 1989. (R. 195-6). It is that determination, together with the underlying Findings, Conclusions and Recommendations, from which this appeal is taken.

A. Procedural Background.

Calder has been licensed to practice law in the State of Utah since August, 1974. (Tr. 275).¹ Since 1981, Calder's primary area of practice has been bankruptcy. (Tr. 279.) He serviced approximately 700 to 800 bankruptcy cases per year during 1985, 1986 and 1987, see Tr. 283-85, and a substantial number of additional bankruptcy cases before 1985. (Tr. 279). Of the several thousand clients Calder represented between 1974 and the present, only two of them -- Larry Bailey ("Bailey") and

¹ All references to the trial transcript will be to the original page number assigned by the reporter, and not to the pagination scheme employed by the Bar.

Dennis Job ("Job") -- filed written complaints against Calder with the Bar.²

The Bar's formal complaint in the Bailey matter was filed on October 23, 1987. (Trial Ex. B-1 attached hereto as App. ii). The Bar's formal amended complaint in the Job matter was filed on June 2, 1987. (Trial Ex. B-27 attached hereto as App. iii). Neither of the Complaints made any mention of the Bar's intent to scrutinize Calder's conduct for any period after 1986. Id.

B. Bailey Complaint and Disposition.

Bailey retained Calder in 1978 to file a Chapter 7 bankruptcy petition for him. (Tr. 28). Bailey claimed, and the Panel so found, that Bailey informed Calder of the existence of a judgment in the amount of \$1,400.00 arising from an automobile accident in which Bailey was involved; that Calder inadvertently

² While it is true that in 1983 a clerk of the United States Bankruptcy Court for the District of Utah referred to the Bar 20 separate alleged deficiencies that the clerk discerned in Calder's representation of clients, the Bar's investigation was concluded by a private reprimand. Notably, none of those clients ever made any complaint to the Bar regarding any aspect of Calder's representation of their interests. The private reprimand, obviously, is relevant only to the issue of the sanction, if any, to be imposed against Calder. It is not relevant to the issue of whether Calder breached any of the ethical and professional obligations alleged by the Bar's Complaints in his representation of Messers. Bailey and Job.

failed to list the judgment on Bailey's bankruptcy schedule; that as a result of that omission, Bailey was precluded from obtaining a Utah driver's license necessary for his employment as an erstwhile truck driver; and, that as a result of that omission, Bailey was unable to obtain employment for an unspecified period of time. (Findings Nos. 1(a) and (p); R. 121, 151).

The "evidence" supporting the finding that the omission of the judgment debt precluded Bailey from obtaining a Utah driver's license consists solely of hearsay i.e., what an unspecified representative of the Utah Department of Motor Vehicles allegedly told Bailey the consequences of his failure to have the judgment satisfied or discharged would be. (See Tr. 35, 76). The record is devoid of any copy of the alleged judgment, any official records maintained by the Utah Department of Motor Vehicles even hinting at the existence of the alleged judgment, or any proof that during 1979 (the year in which Bailey claimed he was denied a new driver's license) Utah law provided that a judgment debtor's discharge in bankruptcy could facilitate the issuance of a renewed license.³

³ Indeed, as demonstrated in Argument II infra, Utah law in 1979 provided just the opposite. Utah Code Ann., § 41-12-15 (1979) provided in pertinent part that "[a] discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this act."

In 1983, Bailey complained to the Bar about Calder's omission of the alleged judgment. His complaint was dismissed by the Bar's screening panel which determined that ". . . the complaint was not timely filed . . . and, therefore, determined that it would be dismissed for that reason." (Tr. 122). After that determination was made, however, Calder unilaterally volunteered (with no pressure from the Bar's counsel or the Board) to ". . . proceed with amending the schedules and getting the matter taken care of." Id.

Based on his then-existing understanding that effecting an amendment to Bailey's bankruptcy schedules was a simple, ministerial task for which the bankruptcy court would charge only a \$10.00 amendment fee, Calder agreed to solve the problem through Bailey's payment of that fee. (Tr. 123). However, unbeknownst to Calder, Bailey's bankruptcy case had been closed by the court and the files had been shipped to a central filing office in Denver, Colorado. (Tr. 329). The additional fee to reopen the case would be \$50.00. (Id.; Trial Exs. B-15 and B-16).

During his telephone conversations with the Bar's counsel, Jeffery C. Paoletti, Calder expressly stated his position that he was entitled to payment of an additional attorney's fee to cover the ". . . additional work that he was doing."

(Tr. 125). While ". . . the resolution at the end of that conversation was that [Calder] was to take an additional \$15.00," the issue of the additional attorney's fees quoted by Calder was unresolved inasmuch as Paoletti understood that Calder was not prepared to waive any of his attorney's fees to solve the problem. Id. Unfortunately, Paoletti never provided Calder with any writing memorializing his perception of Calder's voluntarily assumed commitment to amend Bailey's bankruptcy schedules. (Tr. 137, 138).⁴

In Finding No. 1(g), the Panel found that:

Though [Calder] presented conflicting evidence as to the agreement, the Panel accepted [Paoletti's] testimony as the most credible evidence of [Calder's] agreement to represent Mr. Bailey in amending his Bankruptcy."

However, Paoletti himself frankly acknowledged in his testimony that ". . . I don't have a clear recollection of all of the events." (Tr. 121).

In any event, by letter dated December 16, 1983, Calder informed Bailey that Calder's net charges for effecting the amendment would be \$120.00 -- \$70.00 for attorney's fees and

⁴ Paoletti's confirming letter was sent only to Bailey. (Trial Ex. B-12).

\$50.00 for filing fees. (Trial Ex. B-16). As noted above, Bailey paid only \$15.00 of the quoted charges. (Tr. 51). In January, 1984, Calder filed a motion to reopen Bailey's bankruptcy proceeding so that the purported judgment could be discharged. (Trial Ex. B-18). Calder admitted that the motion was incomplete and would need to be supplemented. (Tr. 530). However, because Bailey refused to pay any more than \$15.00 of the charges quoted by Calder, Calder refrained from noticing up for hearing the motion to reopen. (Tr. 330, 529). On February 15, 1984, the bankruptcy court sua sponte denied the motion without prejudice. (Trial Ex. B-19). Its order explicitly stated that the motion could be later renewed. Id.⁵

Upon learning of the court's action, Bailey berated Calder's office staff. (Trial Ex. B-20; Tr. 356). Calder accordingly informed Bailey by letter dated February 16, 1984 that he should find new counsel. (Trial Ex. B-20). With that letter, Calder enclosed the entire contents of Bailey's file and a check in the amount of \$15.00 as a voluntary refund of the monies Bailey had previously paid. Id.

⁵ Indeed, two months later, Bailey hired new counsel who did just that and succeeded in having the allegedly omitted judgment lien discharged. (Trial Ex. B-22; Tr. 101).

In its Findings, the Panel cast these events in the following terms:

[1]b. In or about October 1983, [Calder] entered into an engagement with Mr. Bailey, arranged through Bar Counsel, C. Jeffrey Paoletti, to resolve an investigation of a disciplinary complaint filed by Mr. Bailey against [Calder]. By this engagement, [Calder] agreed that he would obtain an amendment to Mr. Bailey's bankruptcy schedules and obtain a discharge for Mr. Bailey of a judgment debt owed by Mr. Bailey to Richard D. and Morren C. Harris in the sum of about \$1,400.00.

c. [Calder] agreed to complete the engagement and achieve the objective upon Mr. Bailey's paying \$10.00 for additional attorney's fees; Mr. Bailey made said payment of \$10.00 to [Calder].

d. After accepting the engagement and agreeing upon the fee to be charged, [Calder] demanded additional money from Mr. Bailey, in the amount of \$120.00, in order to initiate the engagement. Mr. Bailey complained to Mr. Paelotti [sic] about this additional fee.

e. Subsequent to the October 1983 engagement, numerous communications were exchanged between Mr. Bailey and [Calder], and between [Calder] and Bar Counsel which concluded with [Calder] reaffirming his agreement to continue representing Mr. Bailey in amending the bankruptcy schedules. Mr. Bailey paid an additional \$15.00 to [Calder], at [Calder]'s request, in furtherance of the engagement.

f. After reaffirming the engagement, [Calder] filed documents with the Bankruptcy Court on behalf of Mr. Bailey as Mr. Bailey's counsel.

g. Though [Calder] presented conflicting evidence as to the agreement, the Panel accepted former Bar Counsel C. Jeffrey Paelotti's [sic] testimony as the most credible evidence of [Calder]'s agreement to represent Mr. Bailey in amending his Bankruptcy.

h. [Calder] filed a Motion to Reopen Mr. Bailey's case, but the Motion was inadequate on its face.

i. After filing the Motion with the Bankruptcy Court, [Calder] failed to follow through with his representation of Mr. Bailey by failing to schedule the Motion to Reopen for hearing and by failing to present the Motion to the judge for consideration.

j. The Motion to reopen was denied, and, immediately upon learning of the Court's order, [Calder] withdrew from representing Mr. Bailey. At no time after February 16, 1984, did [Calder] make any effort to obtain substitute counsel for Bailey, return the \$10.00 paid by Bailey, refund any portion of the original attorney's fees and costs paid by Bailey for the Chapter 7, take any steps with the Department of Motor Vehicles to assist Bailey obtain a driver's license or, in any other way, assist Bailey in achieving the desired objective."

A year later, in 1985, Bailey filed a civil complaint against Calder for malpractice. That complaint was dismissed with prejudice at the conclusion of Bailey's case in chief at trial. (Tr. 7). Before Bailey's complaint was dismissed, however, Calder prepared, signed and filed an affidavit in the malpractice case. (Trial Ex. B-26). Calder admitted at the

bar trial that several of the statements in the affidavit were false. He insisted, however, that the misstatements were inadvertent. (Tr. 337-39, 355, 483, 531). The Panel, in Finding No. 1(k), determined that the misstatements were made "knowingly and intentionally." (R. 123-4).

C. Job Complaint and Disposition.

In representing Job, Calder omitted from Job's bankruptcy schedules the existence of a lawsuit in which Job had an interest. (Finding No. 2(b); R. 151-2). The suit was entitled Job, et al. v. Pocklington, et al., United States District Court for the District of Utah, Civil No. C82-1085C (the "Pocklington Case"). Calder readily admits that he did not "take reasonable steps and precautions to ensure that this cause of action was properly scheduled and listed in Job's Chapter 7 case." (Finding No. 2(b); R. 151-2). He does, however, deny that Job ever mentioned that the Pocklington Case had in fact been filed; that he was ever informed of the amount of damages sought in the Pocklington Case; that he was ever provided with any papers generated in the Pocklington Case; or, that he was ever informed of the identity of any counsel in the Pocklington Case. (Tr. 196, 199, 200). Indeed, the only information Job gave to Calder about the Pocklington case was that it was a "possible claim

against Pacific Coast League for defamation of Peter Pocklington, value undetermined." (Tr. 196, 406).

Several months after filing the Chapter 7 petition for Job, Calder suggested and Job agreed that a Chapter 13 petition be filed on the heels of the Chapter 7 for the dual purposes of administering and preserving the Pocklington Case and forestalling Job's mortgage lender from foreclosing its mortgage against Job's home. (Tr. 151- 52). After the Chapter 13 petition was filed, Job failed to attend the first meeting of creditors. (Tr. 235, 504). Both Calder and his secretary testified that before the meeting Calder repeatedly and heatedly urged Job to be in attendance. (Tr. 506, 703). When Job failed to do so, Calder filed with the bankruptcy court a motion for leave to withdraw as Job's counsel. (Tr. 238-39, 432). Job received a copy of that motion shortly after it was mailed on July 3, 1984. (Tr. 160, 238-39). Court hearing on the motion was conducted more than one month later on August 6, 1984, at which time the motion was granted. (Tr. 239). In the face of those facts, however, the Bar found that:

"[Calder] withdrew from representing Mr. Job in July, 1984, without Mr. Job's consent or knowledge. At the time of his withdrawal [Calder] knew that it would be difficult for Mr. Job to obtain substitute counsel to resist the Chapter 13 trustee's pending motion for dismissal." (Finding No. 2(e)).

At a hearing on August 8, 1984, Job's Chapter 13 petition was dismissed and his previous Chapter 7 discharge was revoked, with the result that Job admittedly did not obtain any final relief in bankruptcy. (Finding No. 2(g)). However, according to Bankruptcy Judge, Judith A. Boulden, Job consented to that action: the court inquired ". . . if that's what he wanted done and he [Job] said 'yes'." (Tr. 634).

Job subsequently sought to retain new counsel to file a Chapter 11 petition to forestall an impending trustee's sale on his house. (Tr. 169). After engaging new counsel, he was informed by that counsel on the very morning of the sale that counsel would not file the Chapter 11 petition unless and until certain additional attorney's fees were paid. Id. Job was unable to timely pay the required fees. Id. As a result, his Chapter 11 petition was filed several minutes after the trustee's sale was conducted. (Tr. 169-70). There is no evidence that Job's successor counsel ever sought to vacate the trustee's sale as a violation of the automatic stay by arguing that the filing of his Chapter 11 petition occurred before the trustee's deed was delivered.

In September, 1984, Job filed a malpractice action against Calder. (Finding No. 2(i)). Although Calder had already filed and was operating under his own Chapter 13 plan, Calder

neglected to list Job as a creditor. (Finding No. 2(j)). However, according to Calder, that failure was attributable to his misapprehension that Job's claim constituted a post-petition debt which could not be discharged in bankruptcy. (Tr. 442-45, 512, 779-81). Accordingly, Calder refrained from informing the state court of the imposition of the automatic stay until February, 1986. Id.

On July 16, 1985, Calder filed a motion to reopen Job's Chapter 11 proceeding. (Finding No. 2(k)). The Panel determined that the motion was filed "solely with the intent to harass, injure and annoy Mr. Job." Id. That finding, however, ignores any mention of the justification advanced by Calder for the filing of the affidavit: to discharge his obligation as an officer of the court to inform the court that false or otherwise improper disclosures were being made by a debtor seeking its protection. (Tr. 450).

On July 18, 1985, Calder filed an affidavit in Job's state court case. (Finding No. 2(m)). In that affidavit, Calder set forth possible explanations that he had for the omission of the Pocklington Case as an asset on Job's bankruptcy schedules. Those explanations were found by the Panel to be lacking in factual basis and ". . . indicative of an attitude of bad faith which pervades [Calder's] conduct in connection with the Utah

State Bar disciplinary proceedings and the court proceedings." (Finding No. 2(n)).

D. Calder Bankruptcy Petitions.

Just before the court entered a judgment against Calder in Job's state court action, Calder transferred an allegedly ". . . substantial portion of his property to his wife and brother." (Finding No. 2(o)). Calder testified that the purpose for the transfers was two-fold: to designate his wife as a joint tenant with rights of survivorship for estate planning purposes and to secure a loan obligation that he had just incurred to his brother in the amount of \$40,000.00 to pay the IRS for back taxes. (Tr. 512-16, 544, 755-57). In addition, a review of Calder's bankruptcy schedules discloses that the value of assets transferred to his wife was insubstantial. (Compare Trial Exs. B-32 and B-33; Tr. 605, 389-402). The validity and legality of those transfers are ". . . the subject of pending adversary proceedings" by Calder's Chapter 7 trustee. (Finding No. 2(o)) (Emphasis added). According to the trustee, those proceedings have not yet been resolved. (Tr. 565).

One of Calder's Chapter 13 petitions was dismissed in 1986 on the basis that it was filed in bad faith. (Finding No. 3). The Panel determined that Calder's intent in filing the Chapter 13 was ". . . to frustrate the claims of Job and Bailey."

Id. In determining that intent, however, the Panel ignored Calder's explanation that his purpose for filing the 1984 petition was to save his house from an IRS sale and his purpose for filing the 1986 petition was to keep the assets of his law practice from being levied upon and dismembered by Job to the ultimate detriment of both Calder and his other creditors. In addition, that finding fails to reflect that in November, 1988, Calder posted a cash supersedeas bond in the amount of \$55,000.00 to fully satisfy Job's judgment (Tr. 790, 793-94). It also fails to reflect that Bailey's state court claim was dismissed with prejudice, no cause of action. (Tr. 7).

When Calder filed the statement of affairs in his 1986 Chapter 7 case, he utilized a pre-printed form statement for a debtor "not engaged in business," despite the fact that he was engaged in business. (Finding No. 4). However, Calder's trustee in bankruptcy acknowledged that he (the trustee) was not prejudiced or confused in any way by Calder's use of the technically incorrect form since the substance of required disclosures on both forms was substantially identical. (Tr. 598).

The Panel determined that Calder failed to fully and accurately disclose assets on his 1986 Chapter 7 bankruptcy schedules. (Finding No. 5). It held that the assets -- without identifying which ones and what they were worth -- listed on

those schedules were "substantially less" than those listed in either of Calder's 1984 or 1986 Chapter 13 schedules. A review of those schedules, however, belies this finding. (See Trial Exs. B-30, B-31, B-32 and B-33). The finding also ignores the fact that many of the so-called discrepancies were attributable to Calder's wife's interests being reflected on the 1984 filing and only his interests being reflected on the 1986 filing. (Tr. 394,515).

Despite the fact that the Bar's Complaints made no mention of the Bar's intent to impose sanctions against Calder for the bankruptcy court's denial of a general discharge in his own Chapter 7 case, and despite Calder's objection to the Panel's consideration of that issue, Tr. 179-83, the Panel made a specific finding that ". . . Calder's failure to list certain assets in his Chapter 7 bankruptcy was done 'knowingly and fraudulently'"⁶ (Finding No. 6). It is unclear what effect the Panel's unanticipated injection of this issue at trial had on its recommendation of disbarment.

⁶ Because the "undisclosed assets" consisted of two bank accounts having a balance of no more than \$5.00 and an undefined and completely worthless interest in an unspecified mineral claim, Calder has recently appealed this order to the United States Court of Appeals for the Tenth Circuit.

In similar fashion, the Panel made a specific finding -- although it never made the allegation in any of the Complaints -- that Calder was denied the absolute right to convert his Chapter 7 case to a Chapter 13 case "in order to prevent [an] abuse of the bankruptcy process." (Finding No. 7). That finding is devoid of any mention that Calder has timely appealed that decision to the federal court.

Based on the Findings, the Panel concluded that Calder breached several disciplinary rules for which he should be disbarred. (Conclusions of Law Nos. 1 and 2).

SUMMARY OF ARGUMENTS

1. The Complaint in the Bailey case was confined to the 1983 to 1985 time frame and the Complaint in the Job case was confined to the 1983 to 1986 time frame. Although both Complaints focused only on Calder's failure to adequately protect his clients' interests, and neither gave any hint of the Bar's intent to challenge the sufficiency of Calder's disclosure to the bankruptcy court in connection with his own personal bankruptcy filings, the Bar allowed the admission of substantial evidence on this issue. Its decision to do so unfairly prejudiced Calder in his ability to understand, respond to and rebut the only evidence that the Panel could find to support its finding of "dishonesty and fraud."

2. In deciding the Bailey Complaint, the Panel completely misapprehended the 1979 version of Section 41-12-15 of the Utah Motor Vehicle Act. By doing so, the Panel was induced to issue a series of clearly erroneous factual findings -- findings based on its mistaken view of the law. Each of these findings must be vacated.

3. Because it is the sole and ultimate responsibility of the Supreme Court to impose discipline on lawyers, this responsibility cannot be delegated unqualifiedly to the Bar. As such, the Bar's Findings, Conclusions and Recommendation are advisory in nature and are entitled to little of the deference customarily accorded lower court determinations. Under this standard of review, few of the Findings, Conclusions and Recommendations can be sustained.

4. Many of the Findings of fact upon which the Panel concluded that Calder should be disbarred were either not established by clear and convincing evidence and/or are so clearly erroneous as to require that they be vacated. If any of the Findings are so vacated, the resulting Conclusions and Recommendation cannot stand and must be reversed.

5. The Panel improperly failed to consider or find any mitigating factors during the penalty phase of the proceeding. Had it properly applied the applicable ABA Standards for

Imposing Lawyer Sanctions, the severity of the proposed Recommendation would have been considerably reduced. Accordingly, the case should be remanded to the Panel with instructions to reconsider the Recommendation in light of these mitigating factors.

6. In light of the extraordinary extent to which (i) neither the findings nor the Recommendation conform to the Bar's Complaints, (ii) the Findings are unsupported by the evidence and (iii) the Recommendation exceeds the scope of the Findings, the Panel's recommendation of disbarment is so flawed as to render the Panel's action arbitrary, capricious and unreasonable. On that basis, the Findings and Conclusions must be vacated and the Recommendation rejected.

ARGUMENT I

THE PANEL IMPROPERLY AND PREJUDICIALLY CONSIDERED ISSUES FAR BEYOND THE EXPRESS OR IMPLIED SCOPE OF ITS COMPLAINTS AGAINST CALDER.

A careful review of the Bar's formal Complaints in the Bailey and Job proceedings, see App. ii and iii infra, discloses that the conduct to be scrutinized by the Panel in the Bailey case was confined to the 1983 to 1985 time frame and the conduct to be scrutinized in the Job case was confined to the 1983 to 1986 time frame. Both Complaints focus only on Calder's failure to adequately protect his clients' interests. Neither Complaint

offers any real clue that the Bar intended to challenge the sufficiency of Calder's disclosures to the bankruptcy court in connection with his own personal bankruptcy filings.

At trial, however, the Bar allowed its own appointed prosecutor to introduce a multitude of such evidence. Specifically, it allowed the introduction of the bankruptcy schedules and statements of affairs which Calder filed in his personal bankruptcies. (See Trial Exs. B-30, B-31, B-32, B-33). It also allowed, over Calder's objection, see Tr. 179-83, the introduction of a memorandum decision and order dated September 27, 1988, in which the bankruptcy court denied Calder a general discharge in bankruptcy for his supposedly knowing and fraudulent omission of certain assets from his bankruptcy schedules. (See Trial Ex. B-39).⁷ In addition, the Panel allowed the introduction of an order dated November 18, 1988, in which the bankruptcy court denied Calder's motion to convert his Chapter 7 proceeding to a Chapter 13 proceeding.⁸

⁷ As indicated at n.6 supra, the "undisclosed assets" are de minimis and their non-disclosure as a basis for denying Calder a general discharge in bankruptcy is currently on appeal.

⁸ Calder has also appealed this decision to the United States District Court for the District of Utah in Case No. 89-C-59W. This appeal is still pending.

Utah law recognizes that "the attorney against whom the accusations [of unethical conduct] have been made is entitled to a fair hearing and an opportunity to know all that he must meet and the right to present such evidence as he may be able to produce, to rebut or overcome the allegation of misconduct." In re Strong, 616 P.2d 583, 586 (Utah 1980) (Emphasis added). Clearly, the Panel's decision, over Calder's objection, to allow the introduction of the non-dischargability decision prejudiced Calder by injecting 1988 issues into what the Bar represented were 1983 to 1986 Complaints. The admission into evidence of Calder's bankruptcy schedules and statements of affairs and the bankruptcy court's 1988 orders disposing of those filings was completely improper. It prejudicially expanded the scope of the allegations against Calder without any advance notice or meaningful opportunity to rebut the new charges. If ever there was a procedural ambush at the O.K. Corral, it is this case.

The Bar may well argue that because Calder's former counsel failed to object to some of the procedural action challenged by this appeal, Calder impliedly consented to an expansion of the issues originally articulated in the two Complaints. However, it is well recognized that the presence of unfair prejudice to the party against whom evidence on previously undisclosed issues is offered, precludes any finding that the

party impliedly consented to the trying of that issue. As Professor Moore has stated:

The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore an amendment after judgment which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried is not permissible, even though there is evidence in the record -- introduced as relevant to some other issue -- which would support the amendment. This principle is sound since it cannot be fairly said that there is any implied consent to try an issue if the parties do not squarely recognize it as an issue in the trial. The test should be whether the defendant would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory. In terms of the Rule, where such prejudice is found, it can be said that no implied consent exists."

3 Moore's Federal Practice ¶ 15.13[2] at 15-131 (1989). (Emphasis added).

Thus, in the case at hand, it can safely be said that Calder's understanding and expectation of the claims asserted against him was that they were defined and measured by the Complaints -- Complaints that nowhere mentioned or called into question the propriety of his conduct in his own personal bankruptcies. The justification advanced by the Bar's prosecutor for the admission of such evidence -- that proof of Calder's conduct

in his own bankruptcies was relevant to his state of mind, see Tr. 182 -- never put Calder on notice that his 1988 conduct was at issue and could form the basis for substantive findings of improper conduct for which he could be disbarred. As such, there is no way Calder could be deemed to have impliedly consented to an amendment of the Complaints.

Moreover, many courts have stated that failure to object alone does not constitute implied consent. Southwestern Stationery and Bank Supply, Inc. v. Harris Corp., 624 F.2d 168 (10th Cir. 1980) (when plaintiffs sought a Rule 15(b) amendment on the basis of evidence which was also relevant to the pleaded claim, there was no implied consent to the trial of the unpleaded claims even though the defendant made no objection to the evidence); McCleod v. Stevens, 617 F.2d 1038 (4th Cir. 1980) (since all evidence introduced was relevant to the pleaded equitable claim, failure of defendant to object to its admission was not an implied consent to trial of an unpleaded damages claim).

The applicability of this principle to Calder's appeal is obvious: while the Bar sought to justify the introduction of the 1988 conduct on the basis that it went to Calder's state of mind in his representation of Messrs. Bailey and Job, the Panel then used the 1988 conduct as substantive support for separate factual findings that Calder acted unethically. On that basis,

no fewer than five of the twelve separate Findings (Findings Nos. 3, 4, 5, 6 and 7) articulate various aspects of Calder's 1988 conduct. From those findings, the Panel then issued a multitude of conclusions of law reciting Calder's supposed "dishonesty and fraud." See e.g. Conclusions Nos. 1(b), (c), (d) and 2(b)).⁹ In other words, Calder never understood, nor could he reasonably have been required to understand, that the evidence of his 1988 conduct adduced by the Bar's prosecutor would be relied upon as an independent basis for the making of substantiative findings of fact on which the Bar would base its decision (at least in part) to disbar him. As such, it cannot be said that Calder impliedly consented to the introduction of such issues.

Finally, there is at least one additional reason militating against any finding that Calder impliedly consented to being tried for his 1988 conduct. Under Utah R. Civ. P. 9(b), the Bar would have been required to state with particularity the circumstances alleged to constitute the fraudulent or dishonest conduct of which it was complaining. (See Rule XII(b) of the

⁹ Interestingly, the Panel's only conclusions of "dishonesty and fraud" are those based upon Calder's 1988 conduct in his own bankruptcies -- conduct never disclosed by the Complaints. Take away that conduct and this proceeding presents, at best, little more than a lawyer's inadvertent neglect of his clients' interests, hardly a case justifying disbarment.

Procedures). Obviously, by refraining from making such allegations in the Complaints, and then springing those allegations on Calder for the first time at trial, the Bar deprived Calder of any opportunity to receive an advance itemization of the precise conduct deemed to be fraudulent; it deprived him of any opportunity to intelligently address those charges; and, it precluded him from taking any of the procedural steps contemplated by the rules to require the Bar, like any other litigant, to articulate with specificity the precise factual basis on which it was making allegations of fraudulent conduct. The need for such specificity has been aptly stated by one court as follows:

The pleading of fraud, however, is also the last remaining habitat of the common law notion that a complaint should be sufficiently specific that the court can weed out non-meritorious actions on the basis of the pleadings. Thus, the pleadings should be sufficient 'to enable the courts to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud.'" [Citation omitted.]

Committee on Children's Television, Inc. v. General Foods Corp.,
673 P.2d 660, 672 (Cal. 1983).

Because Calder was deprived of any opportunity to understand or respond to the allegations of fraud made against him for the first time at trial, the Panel's Findings and

Conclusions, particularly Findings Nos. 3, 4, 5, 6 and 7 and Conclusions Nos. 1(b), (c), (d) and 2(b) must be vacated.

ARGUMENT II

THE PANEL'S TOTAL MISAPPREHENSION OF THE 1979 VERSION OF § 41-12-15 OF THE UTAH MOTOR VEHICLE ACT INDUCED A SERIES OF CLEARLY ERRONEOUS FACTUAL FINDINGS. THEREFORE, THESE FINDINGS MUST BE VACATED.

The major assumption underlying the Board's Findings and Conclusions in the Bailey case is that but for Calder's omission of an alleged judgment lien from Bailey's bankruptcy schedules, Bailey would have been able to obtain an automatic renewal of his Utah driver's license and pursue certain undefined employment opportunities. (See Finding Nos. 1(a) and (j) and Conclusion Nos. 1(e) and (g)). However, this assumption is totally unsupported by Utah law in effect in 1979 -- the year in which Bailey claimed he was denied a renewed driver's license. (Tr. 35). Specifically, the 1979 version of § 41-12-15 of the Utah Motor Vehicle Act stated in pertinent part:

A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this act."

Therefore, even if the judgment allegedly rendered against Bailey had been discharged in bankruptcy, that discharge would not have relieved Bailey from satisfying the judgment

through payment as a pre-condition to renewal of his driver's license. His assertion and the Panel's assumption to the contrary constitute a misapprehension of law which fatally induced a serious of clearly erroneous factual findings. Obviously, this Court may regard a finding as clearly erroneous if it determines that it was induced by an erroneous view of the law. State v. Walker, 743 P.2d 191, 193 (Utah 1987). On that basis alone, the Court should vacate every factual finding made by the Panel in the Bailey proceeding.

ARGUMENT III

BECAUSE IT IS THE SOLE AND ULTIMATE RESPONSIBILITY OF THIS COURT TO IMPOSE DISCIPLINE ON CALDER, THIS RESPONSIBILITY CANNOT BE DELEGATED UNQUALIFIEDLY TO THE BAR. AS SUCH, THE BAR'S FINDINGS, CONCLUSIONS AND RECOMMENDATION ARE ADVISORY IN NATURE AND ARE ENTITLED TO LITTLE OF THE DEFERENCE CUSTOMARILY ACCORDED FACTUAL FINDINGS.

For more than forty years, this Court has made a number of pronouncements regarding the standard applicable to its review of findings, conclusions and recommendations regarding lawyer discipline. The Court has stated on various occasions that the Bar's findings and recommendations should be adopted absent some showing that they are arbitrary, capricious, unreasonable or otherwise not supported by substantial evidence. See, e.g., In re MacFarlane, 10 Utah 2d 217, 350 P.2d 61, 633 (1960) (" . . . we

deem it discreet and proper to indulge considerable latitude to the actions and judgment of the commission in such [disciplinary] matters and would not disregard its finding and recommendation in the absence of some persuasive reason for doing so."); In re Fullmer, 17 Utah 2d 121, 405 P.2d 343, 344 (1965) ("nevertheless this Court is disposed . . . to look upon the findings and the recommendations of the Bar Commission with indulgence; and not to disregard its action lightly, nor at all unless there is something to persuade this Court that the Commission has acted capriciously or arbitrarily or beyond the scope of its powers, or is plainly in error").

On the other hand, this Court has also stated that the Bar's recommendations are not ". . . to be in the same category . . ." as typical findings of fact ". . . because it is our responsibility to discipline an erring attorney and we cannot delegate that duty to others . . ." In re Bridwell, 25 Utah 2d 1, 474 P.2d 116 (1970). Accord, In re Hughes, 534 P.2d 892 (Utah 1975) (Court stated it was ". . . not bound to the recommendation of the Bar Commission . . ."). It was this seeming inconsistency in the applicable standard of review that prompted Justice Wilkins in a concurring decision in In re Robert B. Hansen, 584 P.2d 805 (Utah 1978), to state:

I respectfully suggest that this duality of standards (appearing both within a single

case and in cases compared one with the other) creates uncertainties and contradictions which now require analysis.

I believe for clarity and guidance, this Court should state unequivocally that the recommendations by the Bar are advisory only as ". . . we cannot delegate that duty [of disciplining attorneys] to others" (Footnote omitted) (Emphasis in original).

Shortly after Justice Wilkins made his plea for a clearly stated and consistently applied standard of review, the Court in In re Phil L. Hansen, 586 P.2d 413, 417 (Utah 1978) stated that ". . . the recommendation of the Bar is only advisory and . . . the sanction or penalty to be imposed is for this court to determine [numerous citations omitted]." However, no more than two months later, the Court appeared to revert to the principle that the Bar's findings must be upheld unless they are found to be arbitrary, capricious or unreasonable. In re Blackham, 588 P.2d 694, 696 (Utah 1978). Since that time, the Court has adhered to this principle on at least one occasion. In re Judd, 629 P.2d 437, 438 (Utah 1981) ("unless it appears that the Commission has acted arbitrarily or unreasonably, or unless those findings were not supported by substantial evidence," the findings will be upheld on appeal).

However, in In re McCune, 717 P.2d 701 (Utah 1986), the Court recently recognized and stated that the Bar's

recommendation of discipline " . . . may be reviewed by this Court which may then 'take any action agreeable to its judgment.'" Id. at 705. The rationale for this standard of review is that "only discipline which does not affect the lawyer's continued ability to practice is delegated to the Bar Commission. Suspension or disbarment can be authorized only by the Supreme Court." Id. at 709. Therefore, it now appears in Utah that factual findings underlying recommendations of disbarment are merely advisory in nature and not entitled to any particular deference.

As demonstrated below, application of this standard of review to the facts of this case mandates the Court's rejection of the Findings, Conclusions and Recommendation in their entirety.¹⁰

¹⁰ Moreover, even if the Court elects for whatever reason to apply a more stringent standard of review, many of the Findings and Conclusions and the entire Recommendation are so arbitrary and infused with plain error as to require their rejection. See Argument VI infra.

ARGUMENT IV

MANY OF THE FINDINGS OF FACT UPON WHICH THE PANEL CONCLUDED THAT CALDER SHOULD BE DISBARRED WERE EITHER NOT ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE AND/OR ARE SO CLEARLY ERRONEOUS AS TO REQUIRE THAT THEY BE VACATED.

A. Many of the Findings are Unsupported by Clear and Convincing Evidence.

Rule XII(c) of the Procedures states that "the burden of proof shall be on Bar counsel to sustain the formal committee complaint, or various counts thereof, by clear and convincing evidence." The term "clear and convincing evidence" has been defined to mean that ". . . the truth of the contention is 'highly probable.'" McCormick, Handbook of the Law of Evidence at 796 (1972). This Court has defined "clear and convincing evidence" to ". . . be such that there is no serious nor substantial doubt what [the proposition for which the proof is offered] is." Paulsen v. Coombs, 254 P.2d 621, 624 (Utah 1953). In other words, "clear and convincing evidence" implies something more than the usual requirement of a preponderance of the evidence, but something less than proof beyond a reasonable doubt. Child v. Child, 8 Utah 2d 261, 332 P.2d 981, 986 (Utah 1958).

In this case, there are at least two factors present in the Bailey proceeding that make it impossible for the clear and convincing standard to be met. First, the Panel explicitly

acknowledged that Calder's ethical culpability in the Bailey proceeding was determined in large part by balancing Calder's testimony (as to the terms and conditions of his voluntarily assumed commitment to assist Bailey) against that of the Bar's then-counsel, C. Jeffrey Paoletti. The Panel could not be clearer:

Though [Calder] presented conflicting evidence as to the agreement, the Panel accepted [Paoletti's] testimony as the most credible evidence of [Calder's] agreement to represent Mr. Bailey in amending his Bankruptcy.

However, Paoletti frankly acknowledged in his testimony that " . . . I don't have a clear recollection of all of the events." (Tr. 121). In the face of that admission, it is inconceivable that the Panel could determine that Paoletti's inherently hazy testimony could rise to the level of "clear and convincing" evidence, especially where Calder himself testified that his agreement with the Bar was far different than the one Paoletti was having trouble remembering. As a matter of law, Paoletti's testimony could never be deemed "clear and convincing."

Second, much of the "evidence" supporting the Panel's finding that Calder's omission of the judgment precluded Bailey from obtaining a Utah driver's license is comprised of hearsay, i.e., what an unspecified representative of the Utah Department of Motor Vehicles allegedly told Bailey the consequences of his

failure to have the judgment satisfied or discharged would be. (See Tr. 35, 76). Absent any copy of the alleged judgment or any official records maintained by the Utah Department of Motor Vehicles tending to corroborate the hearsay testimony, the quality of the evidence is singularly unsatisfactory. Indeed, if the rationale for excluding hearsay evidence is that such evidence is intrinsically untrustworthy, it clearly follows that once such evidence is admitted, it cannot alone constitute "clear and convincing" evidence. See State v. Sibert, 6 Utah 2d 198, 310 P.2d 388, 390 (1957) (Hearsay evidence is generally not admissible on the ground that it lacks trustworthiness for two basic reasons: (i) the person who purports to know the facts is not stating them under oath; (ii) that person is not present for cross-examination).

Accordingly, none of the findings in the Bailey proceeding have been established by the "clear and convincing" standard imposed by the Bar's own rules of procedure. As such, all of the Findings in this proceeding must be vacated.

B. Many of The Findings Are Clearly Erroneous.

In asking the Court to set aside a number of the Findings on the basis that they are clearly erroneous, Calder recognizes his obligation to:

[M]arshal all of the evidence in support of the trial court's findings and to then

demonstrate even when viewed in the light most favorable to the factual determinations made by the trial court, that the evidence is insufficient to support its findings.

Harline v. Campbell, 720 P.2d 980, 982 (Utah 1986). This burden is discharged below.

1. Finding No. 1(a):

Mr. Bailey originally retained [Calder] to file a bankruptcy in 1978. Problems arose in this bankruptcy respecting the discharge of a certain judgment debt which precluded Mr. Bailey from obtaining a Utah driver's license.

The only evidence in the record tending to support this Finding is as follows:

Q. I am sorry. Let me ask you to resume your testimony. Tell us the circumstances under which you sought to renew your driver's license. What happened?

A. I went down to the Driver's Bureau on my birthday, took the test and eye test and was just about given my license when a lady punched the computer and said I had a financial judgment against me.

(Tr. 35, lines 16-22).

After Bailey informed Calder of his conversation with the unspecified "lady" at the Driver's Bureau, Calder wrote a letter to the Bureau informing it of his recollection that the purported judgment debt had been discharged in bankruptcy. (Trial Ex. B-4). An additional reference to the purported judgment is found

at Tr. 307-311. However, it is devoid of any additional testimony tending to corroborate even remotely the accuracy of the hearsay evidence.¹¹

Thus, Finding No. 1(a) is founded solely on hearsay evidence, far short of being "clear and convincing." If the Court determines to strike it for that reason, there is no further evidentiary support for it. As such the finding is clearly erroneous and cannot be sustained.

2. Finding No. 1(b):

In or about October 1983, [Calder] entered into an engagement with Mr. Bailey, arranged through Bar Counsel, C. Jeffrey Paoletti, to resolve an investigation of a disciplinary complaint filed by Mr. Bailey against [Calder]. By this engagement, [Calder] agreed that he would obtain an amendment to Mr. Bailey's bankruptcy schedule and obtain a discharge for Mr. Bailey of a judgment debt owed by Mr. Bailey to Richard D. and Morren C. Harris in the sum of about \$1,400.

The only evidence even remotely tending to support this Finding is found at Tr. 122-25. However, that testimony nowhere establishes that Calder ever entered into an engagement with Bailey. Rather, the evidence establishes Paoletti's impression that

¹¹ And, as demonstrated in Argument II supra, even if the purported judgment had been listed on Bailey's bankruptcy schedule and thereby been discharged, that fact alone would not have permitted Bailey to obtain a Utah driver's license as this Finding seems to suggest.

Calder would obtain an amendment to Bailey's bankruptcy schedules for a fee of \$10.00 and that Paoletti would write a letter to Bailey reflecting Paoletti's understanding. (Id.; Trial Ex. B-12). Notably, however, the record is devoid of any evidence that Paoletti ever provided Calder with a copy of the letter reflecting Paoletti's understanding of the agreement. The record establishes only an agreement between Paoletti and Bailey to which Calder was never privy.

In addition, the Finding inaccurately recites that it was Paoletti who "arranged" the so-called "engagement." Indeed, the evidence establishes that it was Calder who volunteered, with no pressure from the Bar, to attempt to resolve the problem:

At that time the screening panel determined that the [Bailey] complaint was not timely filed, based on the statute of limitations and, therefore, determined that it would be dismissed for that reason. But in the hearing, when Mr. Calder appeared, Mr. Calder volunteered, said that he would proceed with amending the schedules and getting the matter taken care of.

(Tr. 122). The Panel's omission of this fact appears calculated to give the inaccurate impression that the impetus for the engagement came from the Bar's counsel and not Calder.

3. Finding No. 1(c):

"[Calder] agreed to complete the engagement and achieve the objective upon Mr. Bailey's paying \$10.00 for additional attorney's fees;

Mr. Bailey made said payment of \$10.00 to
[Calder]."

The only evidence tending to support this finding is again found at pages 122-24 of Mr. Paelotti's testimony. Interestingly, Paoletti starts his testimony by indicating that Calder informed him that "we need \$10.00 to cover the costs." (Tr. 122) (Emphasis added). On the following page, however, Paoletti states his understanding that the \$10.00 was the total "fee" for the service (Tr. 123). Then, several pages later, Paoletti confesses that he really doesn't know whether the \$10.00 was required as a filing fee or as an attorney's fee:

I recall when Mr. Calder was in, that he said--that he basically proposed that for a \$10.00 fee, for whatever reason he needed the \$10.00 for filing fee or whatever, that he would resolve this matter.

(Tr. 130)(Emphasis added). Paoletti's inability to recall the precise charges for which Calder was willing to complete the "engagement" is consistent with his earlier admission that he did not " . . . have a clear recollection of all of the events." (Tr. 121). Finally, Paoletti's obvious confusion is highlighted by the fact that at page 125 of his testimony, he states that " . . . the resolution at the end of that conversation was that he [Calder] was to take an additional \$15," for costs but that he was not prepared to waive any attorney's fees to solve the problem.

These inconsistencies in Paoletti's testimony are neither hypertechnical nor academic. For the Panel is seeking to sanction Calder in part for his failure to adhere to the terms of the "engagement." If the contours of the "engagement" were unclear or confusing to Paoletti, it hardly seems appropriate to sanction Calder for his failure to understand or follow its terms, especially where Paoletti never provided Calder with a copy of the confirming letter Paoletti sent to Bailey.

Viewed in the light most favorable to Finding No. 1(c), the evidence underlying the Finding can stand for no more than the proposition that Paoletti and Calder never had a clear, common understanding regarding the terms and conditions on which the "engagement" would go forward. By determining (or at least certainly implying) that the "engagement" was cast in reasonably and clear and intelligible terms which Calder should have understood, Finding No. 1(c) takes indecent liberties with the evidence.

4. Finding No. 1(d).

"After accepting the engagement and agreeing upon the fee to be charged, [Calder] demanded additional money from Mr. Bailey, in the amount of \$120.00, in order to initiate the engagement. Mr. Bailey complained to Mr. Paoletti about this additional fee."

The record establishes that after the initial "agreement" for Calder to take the engagement for \$10.00 as a "filing fee or whatever," see Tr. 130, Calder discovered that Bailey's bankruptcy files had been closed by the court clerk and shipped to a central filing office in Denver, Colorado. (Tr. 124-5, 329). The additional court imposed cost to reopen the case would be \$50.00. (Tr. 329; Trial Ex. B-15). The remaining \$70.00 of the \$120.00 amount Calder quoted was for his attorney's fees, see Trial Ex. B-15, -- fees which Paoletti himself conceded were never waived by Calder. (Tr. 125). Paoletti's testimony on this point could not be clearer:

Q. Did Mr. Calder during this telephone conversation tell you that he would take care of the problem for an additional \$15?

A. That's my recollection.

Q. Did he mention anything to you at that time about a fee of \$100?

A. Well I remember--yes. We talked about a fee. Whether it was \$100 specifically or not, I don't remember. But I do remember he talked about a fee that he thought he should be paid for the additional work that he was doing. But the resolution at the end of that conversation was that he was to take an additional \$15.00.

Q. Did you understand that he was prepared to waive any such fees to get the problem done?

A. Well, that wasn't my understanding."

(Tr. 125, lines 5-19)(Emphasis added).

Therefore, contrary to the Panel's finding that Calder "agreed upon the [lesser] fee [of \$15.00] to be charged," the testimony of the Bar's own former counsel is that Calder never agreed to waive the fee and thereby confine it to \$15.00. Accordingly, there is no support for the Finding's apparent implication that Calder acted improperly in "demanding additional money from Mr. Bailey."

5. Finding No. 1(e):

"Subsequent to the October 1983 engagement, numerous communications were exchanged between Mr. Bailey and [Calder], and between [Calder] and Bar Counsel which concluded with [Calder's] reaffirming his agreement to continue representing Mr. Bailey in amending the bankruptcy schedules. Mr. Bailey paid an additional \$15.00 to [Calder], at [Calder's] request in furtherance of the engagement."

This finding is misleading insofar as it omits any mention of Mr. Paoletti's recollection that Calder was not " . . . prepared to waive any such fees to get the problem done." (Tr. 125). Therefore, while there is certainly some evidence that Calder reaffirmed his agreement to continue representing Bailey in amending his bankruptcy schedules, there is no support for the Panel's apparent assumption that Calder ever agreed to do so by waiving his attorney's fees or that he later acted improperly in withdrawing from the case when those fees were not paid.

6. Finding No. 1(q):

"Though [Calder] presented conflicting evidence as to the agreement, the Panel accepted former Bar Counsel C. Jeffrey Paoletti's testimony as the most credible evidence of [Calder's] agreement to represent Mr. Bailey in amending his bankruptcy."

This finding suffers from the obvious, previously discussed defects that Paoletti confessed to the sketchy nature of his recollection of the "agreement" and that his testimony as to what the "agreement" was is hopelessly contradictory. (See pp. 30, 31 above).

7. Finding No. 1(h):

[Calder] filed a Motion to Reopen Mr. Bailey's case, but the Motion was inadequate on its face."

Calder frankly acknowledged at trial that the Motion to Reopen was not complete and would need to be supplemented. (Tr. 529-30). Calder's explanation for filing the motion in that form was that "we had to put [in] a lot of other things and we had to get the file from Denver." (Tr. 529) The Bar's finding, however, omits any mention of the justification advanced by Calder and seeks to create the impression that Calder recklessly and heedlessly filed papers calculated to injure his own clients. Thus, when properly reviewed in context, this Finding cannot support the imposition of disciplinary sanctions.

8. Finding No. 1(i):

"After filing the Motion [to Reopen Bailey's bankruptcy case] with the Bankruptcy Court, [Calder] failed to follow through with his representation of Mr. Bailey by failing to schedule the Motion to Reopen for hearing and by failing to present the Motion to the judge for consideration."

The record reflects that after Calder filed the motion to reopen in January, 1984 -- a motion which he knew would have to be supplemented with information that he had ordered from the Bankruptcy Court's central filing office in Denver, Colorado -- Calder refrained from noticing it up for hearing. (Tr. 529). Before this information was received from the Denver office and incorporated in the motion then on file, the bankruptcy court sua sponte denied the motion without prejudice. (Trial Ex. B-19). Moreover, what the Finding fails to reflect is that after the court denied the motion, Bailey's successor counsel was successful in having the purportedly omitted debt discharged in bankruptcy. (Tr. 57).

9. Finding No. 1(j):

"The Motion to Reopen was denied, and, immediately upon learning of the court's order, [Calder] withdrew from representing Mr. Bailey. At no time after February 16, 1984, did [Calder] make any effort to obtain substitute counsel for Bailey, return the \$10.00 paid by Bailey, refund any portion of the original attorney's fees and costs paid by Bailey for the Chapter 7, take any steps with the Department of Motor Vehicles to

assist Bailey to obtain a driver's license or, in any other way, assist Bailey in achieving the desired objective."

There are several evidentiary deficiencies in this Finding. First, the Finding fails to mention the reason why Calder withdrew as Bailey's counsel, namely, that upon learning of the court's action, Bailey berated Calder's office staff. (Tr. 356; Trial Ex. B-20).¹² Second, the evidence is devoid of any indication that Bailey ever asked Calder to assist him in obtaining substitute counsel. Indeed, the record does reflect that shortly after the motion to reopen was denied without prejudice, Bailey's new counsel obtained the requested relief. (Trial Exhibit B-22; Tr. 57). Third, the only evidence in the record regarding whether Bailey's \$10.00 payment was refunded is inconclusive. The only testimony on that issue is as follows:

Q. And that money has never been tendered back to Mr. Bailey, has it?

A. I've been thinking about that for the last six or seven months. To be honest with you, I don't know whether it was tendered back. I don't know where the money is now. I can't really remember the \$10. I could have sent it back to him. I just don't really know."

¹² Bailey did deny that he ever became agitated at Calder's secretary. (Tr. 99). However, there is no evidence that he ever took issue with, or otherwise responded to, Calder's claim in the letter of February 16, 1984 (Trial Ex. B-20) that his behavior was " . . . too offensive for my secretaries and myself.

(Tr. 326, lines 13-19). Notably, the record is devoid of any testimony by Mr. Bailey regarding whether this fee was ever refunded.

Fourth, while it is true that Calder never refunded any portion of the original attorney's fees and costs which Bailey paid to him in 1978--some six years before Calder ultimately withdrew--it is difficult to understand how the Panel could believe such an obligation existed in light of the Bar's decision in 1983 to dismiss Bailey's complaint as being barred by the statute of limitations. It is only because Calder unilaterally volunteered to assist Bailey in amending his schedules to reflect the allegedly omitted judgment debt that any duty to refund attorney's fees could even arguably arise. Clearly, this duty could be no broader than the scope of legal services that Calder was performing after he assumed the obligation to amend Bailey's bankruptcy schedules; it could not extend to legal services performed before that voluntary commitment was made.

10. Finding No. 1(k):

On or about April 16, 1984, [Calder], being under oath, prepared, signed and filed an affidavit in the case of Bailey v. Calder, Civil No. C85-800, then pending in the Third Judicial District Court of Salt Lake County, State of Utah, wherein [Calder] knowingly and intentionally made the following misrepresentations and false statements:

1) That after Judge Mabey had originally granted an application to reopen Mr. Bailey's case, the client was "to pay a \$60.00 filing fee to the court and also a \$10.00 fee to add the creditor that he had omitted, when, in fact, there was no such financial arrangement at that time;

2) That after 1979, [Calder] had not had any contact with Bailey until 1982 when, in fact Bailey had contacted [Calder] on several occasions prior to that date;

3) That [Calder] did not represent Bailey as his attorney in 1982 inasmuch as Bailey had refused to pay anything to [Calder] as requested, when, in fact, [Calder] had written to Bailey in 1982 advising Bailey that [Calder] was proceeding with this case;

4) That he had agreed to help Mr. Bailey in 1983 at the request of the Utah State Bar but that nothing more was done because Bailey refused to pay money when, in fact, Bailey had paid, in full, all the money requested pursuant to the agreement;

5) That in 1983 he was not representing Mr. Bailey because Bailey had not paid his retainer fee and had "paid no money to [him]" when, in fact, Bailey had paid all fees required under the agreement; and

6) That at no time after 1978 had [Calder] represented Bailey in any bankruptcy matters, when, in fact, he had represented Bailey, had advised Bailey about bankruptcy matters, and had filed motions for Bailey as Bailey's attorney both in 1979 and in 1984.

(a) Finding No. 1(k)(3). Calder's statement in

the affidavit that he did not represent Bailey in 1982 is factually incorrect.

However, there is no evidence that the inaccurate statement was made "knowingly and intentionally," as found by the Panel.

(b) Finding No. 1(k)(4). In light of the discussion at pages 36-45 supra, Calder's statement in the affidavit that Calder refrained from taking further action pending Bailey's payment of additional attorney's fees is factually accurate.

(c) Finding No. 1(k)(5). While Calder was mistaken in asserting that he did not represent Bailey in 1983, Calder's statement in the affidavit that Bailey had not paid his retainer fee is, in light of the discussion at pages 36-45 supra, correct.

11. Finding No. 1(m):

"When [Calder] filed a personal Chapter 13 on February 23, 1984, he did not list Bailey as a creditor even though, at that time, [Calder] knew that he was required to list all known and contingent liabilities and also knew that Bailey probably had a claim against him for his failure to comply with the terms of the agreement to achieve the desired objective. [Calder] did not seek to amend his 1984 Chapter 13 to add Bailey as a creditor until January 31, 1986 even though, as early as February 1985 [Calder] knew that Bailey had filed a malpractice action against

him in the Third Judicial District Court,
Civil No. C85-800."

The only direct evidence regarding whether Calder knew or should have known that Bailey had a claim against him in his own Chapter 13 contradicts this finding. The record is as follows:

Q. Did you think he [Bailey] had any claim against you or any cause to be concerned about your services?

A. No, did not.

Q. You did not?

A. Did not.

(Tr. 358, lines 3-9). In addition, Calder, like any debtor in bankruptcy, had an incentive to list the greatest number of possible claimants so that any conceivable debt would be discharged or paid on a compromised basis in his Chapter 13 plan. It would make no sense for Calder to knowingly refrain from enumerating all possible claims if the effect of the omission was to prevent the claim from being discharged in bankruptcy. As a corollary to this proposition, it is impossible for Bailey to validly contend that he was prejudiced in any way by Calder's omission of him as a creditor or potential creditor, because so long as the purported debt was omitted, it remained in full force and effect for Bailey's benefit.

Finally, the Finding is devoid of any mention that Bailey's malpractice action against Calder was dismissed with prejudice at the conclusion of Bailey's case in chief at trial. (Tr. 7).

12. Finding No. 1(o):

[Calder's] 1984 Chapter 13 case was dismissed by Judge Allen on July 31, 1986, as having been filed in bad faith. The court's order of dismissal is final and non-appealable. No credible evidence was presented to indicate that the dismissal of [Calder's] 1984 Chapter 13 was for reasons other than that it was filed in bad faith or that the Bankruptcy Court had any reason to dismiss the case other than on the merits as set forth in Judge Allen's ruling of July 30, 1986.

The obvious problem with this Finding is that it is based on the transcript of Judge Allen's five-page ruling from the bench. (See Trial Ex. B-37). Significantly, the Finding is not based upon any of the underlying evidence supposedly relied upon by Judge Allen to support the ruling. As such, the Finding violates the salutary principle of In Re Strong supra, 616 P.2d at 583 that the Bar must do more than simply . . . adopt the findings of some other tribunal . . .," and must introduce the evidentiary record generated in the prior proceeding. Id. at 587. Accordingly, this finding must be set aside and the issues remanded to the Panel with instructions to adduce the underlying transcript

and afford Calder an opportunity to explain and rebut the testimony contained in the transcript.

13. Finding No. 1(p):

Mr. Bailey was unable to obtain employment for a substantial period of time due to his inability to obtain a driver's license.

As demonstrated in Argument II supra, this finding appears to be based upon the erroneous premise that obtaining a discharge of the judgment would automatically have allowed Bailey to obtain a renewed driver's license. The Panel's misapprehension of the substantive law governing this issue improperly induced an erroneous factual finding.

14. Finding No. 2(b):

At the time [Calder] agreed to file a Chapter 7 case for Mr. and Mrs. Job, [Calder] knew that (1) Mr. Job was a plaintiff in a lawsuit entitled Job, et al. v. Pocklington, et al., which was then pending in the United States District Court for the District of Utah, Civil No. C82-1085C, (2) Mr. Job was seeking a substantial amount of money and damages, in excess of \$1,000,000 in such suit, (3) the cause of action had to be listed as an asset in Job's Chapter 7 case, and (4) Job wanted the asset listed in his Chapter 7 case. Notwithstanding this knowledge, [Calder] did not take reasonable steps and precautions to insure that this cause of action was properly scheduled and listed in Job's Chapter 7 case.

The evidence supporting this finding consists primarily of Job's testimony at pages 138-149 of the trial transcript. On page 145,

Job testifies that he " . . . talked to [Calder] about [the Pocklington case], and he wrote it down on a piece of paper" and that " . . . there was documentation there in his handwriting that I gave the asset to him." And, on page 146 of the transcript, Job stated that "he [Calder] made sure that he wrote a note and was going to take care of that situation." Job's testimony establishes, therefore, that he provided Calder with some information regarding his claim against Pocklington.

However, Calder's testimony was that "the way Job gave it to me he had a possible claim against the Pacific Coast League for defamation of Peter Pocklington. The value undetermined." (Tr. 196, 406). It is difficult to imagine why Calder would have characterized the claim as a "possible" claim whose value was "undetermined" if Job had actually informed him that the claim was embodied by a lawsuit for which specified damages were being sought. Indeed, under cross examination, Job acknowledged that he refrained from providing "many details" to Calder. That testimony is as follows:

Q.: "All right. You indicated that you, I believe, in your previous testimony, that you had gotten that [a copy of Job's bankruptcy schedule] from going to Mr. Calder's and getting a copy of that document; is that correct?

A.: Yes, I did.

Q.: Does that fairly reflect what you told Mr. Calder about the Peter Pocklington matter?

A.: Well, there was more. I told him I was a stockholder in the Great Northern Baseball Corporation. I told him I was one of the major stockholders of the Ogden A's Baseball Club.

Q.: All right. The item in [Calder's handwritten note of his first meeting with Job] as it reads is: "As a possible claim of the Pacific Coast League for defamation of Peter Pocklington, value undetermined." What did you tell him about the details of that claim?

A.: I didn't go into that many details, Mr. Boone.

(Tr. page 195, lines 17-25, page 196, lines 1-7).

At the very most, therefore, the record establishes only that Job provided Calder with some information regarding a possible claim that he had against Pocklington. It nowhere establishes that Job ever mentioned that the Pocklington Case was in fact in litigation; that Calder was ever informed of the amount of damages sought in the Pocklington Case; that Calder was ever provided with any papers generated in the Pocklington Case; or, that Calder was ever informed of the identity of any counsel in the Pocklington Case. (Tr. 196, 199, 200). The Panel took a quantum leap in converting that testimony into a formal finding

that Calder knew that the claim was embodied by a formal lawsuit and was worth in excess of \$1,000,000.

Viewing the evidence in the light most favorable to affirmance of the Finding, the most that can be said for it is that Calder was inattentive to the actual dimensions of the claim and should not have accepted at face value Job's description of the claim. The evidence falls far short of establishing Calder's actual knowledge of the structure and value of the claim and his willful nondisclosure of that knowledge, as suggested by Finding No. 2(b).

15. Finding No. 2(c):

At the time [Calder] recommended that Job file a Chapter 7, he did not discuss with Job the option of filing under Chapter 13, and did not mention any additional advantages which Job might realize if he elected to proceed under Chapter 13.

The only evidence in the record pertaining to this issue directly contradicts this finding. Calder testified as follows:

Q.: Did you discuss with him [Job] . . .

A.: On April 25th --

Q.: -- the possibilities of filing a Chapter 13 on October 19, 1983 when he came in to see you?

A.: There had been some discussions in 1983 when he came in with the Chapter 7 at that time. He had wanted to know -- if he was behind in his house payments. He had problems with that and he wanted to know what

would happen in the future if he filed the Chapter 7 now, and later on he had problems with his house if he could file a Chapter 13. There had been a discussion on Chapter 13 in the future, sometime in the future.

(Tr. 428 lines 6-17). Job's own testimony on that point is something less than a resounding contradiction of Calder's:

Q.: Did he [Calder] mention Chapter 13 as a possible source of relief?

A.: Not at the time that I filed my Chapter 7; or at least I don't recall that he did.

The foregoing evidence falls far short of clearly and convincingly establishing that Calder never mentioned to Job the option of filing a Chapter 13 at the time he was initially retained. As such, this finding must be stricken.

16. Finding No. 2(d):

Subsequently, on or about April 27, 1984, [Calder] rather than seeking to amend the Chapter 7 schedules, filed a Chapter 13 proceeding, for which Mr. Job paid [Calder] an additional \$150.00, even though, in giving this advice, [Calder] knew or should have known, that:

1. The Chapter 13 was likely to be dismissed as a "bad faith filing" in light of Job's previous discharge under Chapter 7;
2. Job could not "save his home" under the Chapter 13 unless he had regular income for which to make payments;
3. The Chapter 13 would be ineffective unless the previous discharge of

the Chapter 7 was revoked or vacated; and

4. Job would not obtain a discharge under his Chapter 13 case until he had successfully completed all payments under the plan.

To understand the fallacies of this Finding, it is important to note that in the Chapter 13 plan that Calder proposed for Job, Calder specifically stated that Job's previous Chapter 7 discharge was to be revoked. (Tr. 423-24). As such, the proposed filing of the Chapter 13 plan on the heels of the earlier Chapter 7 plan was not " . . . likely to be dismissed as a "bad faith filing". Bankruptcy Judge Judith A. Boulden's testimony on that point could not be clearer:

Q.: At the time that the 13 was filed, do you recall if there was problem with 13 being filed on the heels of a 7?

A.: Yes, I do recall there was a problem.

Q.: Okay. What was that problem?

A.: There is no specific statutory prohibition to what we term in the trade as Chapter 20. That means that a person can go through a Chapter 7 and obtain a discharge and turn around on the heels of that 7 and file a Chapter 13 in order to deal with those kinds of debts that may not be dischargeable under Chapter 7 - student loans, child support, alimony, perhaps mortgage arrearages, or some unsecured debt that may - the debtor may wish to reaffirm.

It at this time was an important issue nationwide because there was no statutory

prohibition against it except to the extent that a debtor is required to file a plan in good faith and there was case law coming down at that time indicating that that change of events, if it were intentional and if it was a design or an artifice to avoid paying unsecured creditors, would render a plan non-confirmable because it was filed in good faith and that was an issue at that time, and still an issue probably.

Q.: Was there a way around that problem if you did certain things?

A.: Yes. There are a number of ways that the -- evil could be remedied. You could request to have the Chapter 7 discharge revoked, thus, legally reinstating all the debt that had been discharged, bringing all the debt into the Chapter 13 case and then pay it, pay a portion or all of it.

Legally that is certainly the preferable way to do it, because it legally reinstates all the debt."

(Tr. page 635, line 6-25, page 636 lines 1-14). Thus, so long as the previous Chapter 7 discharge was revoked (as Calder's Chapter 13 plan for Job so provided), the subsequent Chapter 13 filing was never likely to be dismissed as a "bad faith filing," as suggested in Finding No. 2(d).

Next, there is no evidence in the record that a precondition to the filing of a Chapter 13 was the debtor's receipt of a "regular income with which to make payments." Indeed, Judge Boulden testified just the opposite:

Q.: You in testimony spoke about the funding of plans and looking for regular income. Is

it possible to file a Chapter 13 proceeding without at the time of filing having regular income?

A.: Well, there is a legal issue as to whether or not the original filing the debtor has income at that time or whether its income as of the confirmation of the plan. There is a split of opinion regarding that.

Q.: Okay. If -- for a hypothetical assuming that a debtor knew he was going to work next week, had a guaranteed job, would it be possible to file a 13 based on that prospective income?

A.: Well, it's often done and there may be other parties who pay the Chapter 13 payment even.

Q.: Have you seen plans confirmed where they were initially filed on a prospective [income] basis?

A.: Yes.

(Tr. 690, lines 13-25, page 691, lines 1-4). In the face of this testimony, the Panel explicitly announced during its decision that it could not sanction Calder on this issue. It recognized that:

There are two areas where the Panel was not convinced by the appropriate standard that in fact there were problems. One of those was the filings for Mr. Job of a Chapter 13. The allegation of the Bar being that there was no source of income by which one could appropriately make that kind of a filing. There was some testimony that there could be a prospective income. The Panel was just not convinced that that was, by the appropriate standard, improper.

(Tr. 1061). Accordingly, the Panel's inclusion of Finding No. 2(d)(2) was improper.

Finally, there is no evidence in the record supporting the Panel's finding that Calder failed to inform Job that he would not obtain a discharge under his Chapter 13 case until he had successfully completed all payments under the plan. Moreover, this finding is completely irrelevant to any evidence in the record because the bankruptcy court's ultimate decision to dismiss the Chapter 13 case was in no way predicated on Job's inability to complete all required payments; rather, it was predicated on the fact that Job failed and refused -- over the concerns and objections of Calder -- to attend the first meeting of creditors (Tr. 506, 703).

17. Finding No. 2(e):

[Calder] withdrew from representing Mr. Job in July 1984, without Mr. Job's consent and knowledge. At the time of his withdrawal [Calder] knew that it would be difficult for Mr. Job to obtain substitute counsel to resist the Chapter 13 Trustee's pending motion for dismissal.

More than any other of the Panel's determinations, this finding so grossly mischaracterizes the underlying evidence as to call into question the competence of the Panel. Under questioning by the Bar's prosecutor, Job initially testified that Calder's motion to withdraw was dated July 3, 1984 (Tr. 161). At that

point, the prosecutor leadingly asked "Isn't it the 31st day of July?" Id. In response to that suggestion, Job changed his testimony by stating "Yes. 31st day. Excuse me. I can't tell whether the last one is a one or what it is." Id. Then, apparently recognizing that the date reflected on the mailing certificate was actually July 3, the Bar's prosecutor stated "It does state -- the mailing certificate indicates it's dated July 3." Id. Obviously confused by this point, Job then opines "All I know is that it says July 30, 1984 and it was mailed that day, I guess." (Id.) This is the only "evidence" in the record that Calder's motion to withdraw was mailed on any date after July 3, 1984. The evidence that it was actually mailed on July 3, 1984 is overwhelming:

Q.: When did you become aware of the fact that Mr. Calder desired to withdraw from your case, then?

A.: I don't know whether it was this document [the motion to withdraw] or whether it was -- I really don't know. I must have received it in the mail, but I am just not familiar with the document. I see what it says there. I see what I had --

Q.: Was that your address at the time, 4046 West Lake --

A.: Yes, it was.

Q.: And the mailing on that is on the 3rd of July; is that correct?

A.: Yes.

(Tr. 238).

Q.: Did he tell you prior to that [the trustee's motion to dismiss the Chapter 13 case] that he was going to withdraw?

A.: No, he did not. He just -- I got that in the mail.

Q.: When was the first time you found out he was withdrawing as your lawyer?

A.: I don't know. I really can't remember the dates, Mr. Leta. I know the dates are there, but I can't remember the exact dates.

(Tr. 160).

Q.: Okay. Now had you made a determination about whether or not you were going to continue to represent Mr. Job at that time?

A.: I can't remember the exact precise date when I decided, but I remember sitting down thinking for about an hour and a half and decided -- that I did not want to represent him because he would not do what I told him to do, so I filed that Motion dated July 3rd and the hearing was set for August 6th.

Q.: Okay. Did you circulate the motion on Mr. Job and Ms. Boulden?

A.: Yes, I did.

Q.: The motion to withdraw?

A.: Yes, I did.

Q.: Was he -- were you allowed to withdraw by the Judge?

A.: Yes. Judge Allen allowed me to withdraw because he [Job] wouldn't do what I told him to do.

(Tr. 508-9).

Therefore, the record clearly establishes that Job received Calder's motion to withdraw at least one month before the scheduled hearing on the trustee's motion to dismiss the Chapter 13 petition. Notably, at the August 8, 1984 hearing on whether that petition should be dismissed, Job's trustee vividly recalls that Job consented to that action. The court inquired " . . . if that's what he wanted done and he [Job] said, 'Yes.'" (Tr. 634).

Finally, there is no evidence to support the Finding that Calder knew that it would be difficult for Job to obtain substitute counsel. Therefore, this Finding must be vacated in its entirety.¹³

18. Finding No. 2(q):

On or about August 8, 1984, the Chapter 13 was dismissed and the Chapter 7 vacated, with a result that Mr. Job did not obtain any relief under any Bankruptcy Chapter. (Emphasis added.)

This Finding is misleading insofar as it states that Job obtained no relief under any bankruptcy chapter. For it completely ignores the obvious fact that during the time period the Chapter

¹³ For that reason, Finding No. 2(f) to the effect that Calder made no effort to assist Job in obtaining substitute counsel is similarly without merit.

7 petition was in effect--October 1983 to August 1984--Job undeniably obtained relief. This Finding's suggestion that he did not is clearly erroneous.

19. Finding No. 2(h):

Thereafter, unable to afford new bankruptcy counsel, Mr. Job filed a Chapter 11 bankruptcy, pro se, in an attempt to prevent foreclosure proceedings on the Jobs' home; the Chapter 11 filing was late and the home was lost.

This Finding is clearly erroneous insofar as it seeks to impose on Calder responsibility for the loss of the Jobs' home. The record reflects that after engaging new counsel, Job was informed by that counsel on the very morning of the trustee's sale that the Chapter 11 petition would not be filed unless and until certain additional attorneys' fees were paid. (Tr. 169). Job was unable to timely pay the quoted fees. Id. As a result, his Chapter 11 petition was filed several minutes after the trustee's sale was conducted. (Tr. 169-70). Mr. Job's testimony could not be clearer:

Q.: Did you attempt to retain counsel [to file a Chapter 11 bankruptcy petition]?

A.: Yes, I did.

Q.: Did you have any luck?

A.: I talked to an attorney, Mr. Charles Brown. Mr. Brown said that he would file a Chapter 11 bankruptcy for me and told me to come to his office at a certain date. It was

the date that the filing had to be done. It was something like ten in the morning or eleven in the morning -- ten something in the morning and when I got to Mr. Brown's office, Mr. Brown said that he decided that I would have to have \$300 to \$500 before he would go ahead and take the bankruptcy on, but he said that he would prepare the initial papers that I would need at that time to file a Chapter 11 bankruptcy. But, by the time Mr. Brown got the papers ready, and they weren't ready when I got there in the morning -- I had to go to the bank and cash a check that I was to give Mr. Brown.

By that time I was a certain amount of minutes late in filing the bankruptcy, because they were going to have a sale on our home.

(Tr. 169).

Therefore the Panel's effort to attribute to Calder responsibility for the loss of Job's home -- a loss that occurred month after Calder withdrew as Job's counsel -- is clearly erroneous.

20. Finding No. 2(j):

At no time after July 1984, did [Calder] seek to amend his 1984 personal Chapter 13 case to list Job as a creditor even though he knew Job had claims against him for malpractice and had filed a lawsuit on September 11, 1984 in the Third Judicial District Court, Civil No. C84-5436, asserting such claims.

Calder admitted at the Bar trial that he never amended his 1984 personal Chapter 13 case to list Job as a creditor. The only direct evidence regarding the reason for that failure was

Calder's testimony that he mistakenly thought that Job's claim constituted a post-petition debt which could not be discharged in bankruptcy. (Tr. 442-45, 512, 779-81).

Accordingly, Calder refrained from informing the state court of the imposition of the automatic stay until February, 1986. The Finding, however, fails to address the obvious issue of why a debtor operating under a confirmed plan would have any incentive not to disclose the existence of all creditors of which he was aware, since that failure would preclude the debtor from obtaining any relief from the debt owed to the creditor.

21. Finding No. 2(k):

On or about July 16, 1985, at a time Mr. Job was moving for Summary Judgment in the pending malpractice action, [Calder] filed a Motion to Reopen Job's Chapter 11 proceeding, solely with the intent to harass, injure and annoy Mr. Job; no valid basis existed for filing the motion and the motion asserted matters upon which [Calder] had no basis to make such allegations; in that respect, [Calder] knowingly and intentionally made the following false or misleading statements:

(1) That he was a creditor of Job when, in fact, he had never submitted a bill, previously demanded payment, or counterclaimed in the civil action for the payment of any attorney's fees;

(2) That the Jobs had intentionally omitted creditors from their Chapter 11 case when, in fact, [Calder] knew that the claims of such creditors were contingent and disputed by the debtors;

(3) That the Jobs had omitted a debt to a family member in the amount of \$35,000 when, in fact, [Calder] had no reasonable basis for asserting such omission'

(4) That the debtor's Chapter 7 schedules filed in 1983 had shown a gross income in 1982 of \$30,000 when, in fact, the income had been earned in 1981; and

(5) That the Jobs had omitted a substantial claim to the Internal Revenue Service in the amount of \$5,000-\$10,000 when, in fact, [Calder] had no reasonable basis for making this assertion.

The difficulty with this Finding is that it ignores any mention of the justification advanced by Calder for the filing of the affidavit: To discharge his obligation as an officer of the court to inform the court that false or otherwise improper disclosures were being made by a debtor seeking its protection. (Tr. 450). Had Calder failed to bring the issues contained in the affidavit to the attention of the court, he would have arguably violated the Rules of Professional Conduct. The Panel's obvious insensitivity to Calder's reason for filing the affidavit and its failure to appreciate the ethical mandates imposed upon Calder to take the action he did, requires that this Finding be vacated and remanded to the Panel with instructions to rewrite it with proper reference to these issues.

22. Finding No. 2(m):

In connection with the civil action entitled Job v. Calder, Civil No. C84-5436, filed in

the Third Judicial District Court of Salt Lake County, State of Utah, [Calder] filed an affidavit on about July 18, 1985 wherein [Calder] knowingly and intentionally made the following misstatements and accusations:

(1) That Job was responsible for failing to list the lawsuit in his schedules when, in fact, [Calder] admits that Job signed the schedules the lawsuit was listed as an asset.

Although Calder implies in the affidavit that Job was responsible for failing to list the Pocklington Case in his bankruptcy schedules, Calder also frankly acknowledged in the affidavit Job's position that Job . . . signed a copy [of the schedules] that contained the lawsuit." (Trial Ex. B-50, paragraphs 1,2,6 and 9; R. 1613-16). Because Calder acknowledged that fact in the affidavit, the Finding's apparent implication that Calder impeached himself during the bar trial by admitting that the lawsuit was listed as an asset unfairly portrays Calder's role in preparing the affidavit. As such, the Finding is clearly erroneous.

Finding No. 2(m) further provides:

(2) That there was "some reason to think that the debtor may have stolen a key from the attorney's desk drawer while he was alone in the office and entered the office at night and effected certain changes [sic.] original document that was to be filed with the court" when, in fact, [Calder] had no facts upon which to base this accusation. [Calder] also stated: "Another theory is Mr. Job had access to [Calder's] office and

perpetrated a fraud upon everybody by substituting a false paper in the papers to be filed with the Court."

While it is admittedly irresponsible to set forth in an affidavit speculative musings as to what may or may not have happened in a transaction, it is equally clear that under the applicable rules of civil procedure, see Utah R. Civ. P. 56(e), speculation cannot be relied upon by the Court to establish or resolve a genuinely disputed material issue of fact. As such, the trial court undoubtedly attached the weight appropriate to such speculation--zero.

Perhaps most importantly, because Calder frankly couched his hypotheses in terms of speculation, and not in terms of absolute fact, there is no way he can be found to have knowingly and intentionally made misstatements of fact, as suggested by this Finding. The law is settled that " . . . the alleged false statement must be a statement of fact and not a conclusion, opinion or deduction drawn from given facts. That the conclusion, opinion or deduction is erroneous, or is not a correct construction or a logical deduction from the facts cannot constitute a false swearing." People v. White, 59 Ill. 2d 416, 322 N.E. 2d 1,3 (1974). Accord, 60 Am. Jur. 2d, Perjury, § 8 (1972). For this reason alone, the Panel's reliance on the speculative

statements in the affidavit is misplaced. The Finding on which it is based must be vacated.

23. Finding No. 2(n):

The Panel finds those defenses, accusations and insinuations made by [Calder] against Job to be spurious and indicative of an attitude of bad faith which pervades [Calder's] conduct in connection with the Utah State Bar disciplinary proceedings and the court proceedings.

It is clearly improper for the Panel to generalize about the character of Calder's conduct from a specific factual finding regarding a discreet transaction or occurrence. The Bar simply cannot be permitted to paint with such a broad brush. This gratuitous Finding must be stricken.

24. Finding No. 2(o):

After Judge Frederick orally rendered his judgment in the Job malpractice action in favor of Mr. Job, and before the formal judgment was entered on February 24, 1986, [Calder] transferred a substantial portion of his properties to his wife and brother. Such transfers are the subject of pending adversary proceedings by [Calder's] Chapter 7 trustee to set aside such transfers as fraudulent transfers under the Bankruptcy Code.

Wholly aside from the glaring absence in the record of any evidence remotely hinting at the value of the assets allegedly transferred to his wife and brother, this finding is, by definition, preliminary and tentative in that it acknowledges that the

transfers are the subject of pending adversary proceedings. The fact that Calder's trustee has failed to obtain a resolution of the cases in the three years now available to him speaks loud and clear about the merits of his case and his ability to have the transfers declared fraudulent. Unless and until the litigation is resolved, the Panel should be precluded from using the mere pendency of the suits as even a partial basis for Calder's disbarment.

25. Finding No. 3:

[Calder] filed a second Chapter 13 bankruptcy proceeding in 1986 in bad faith and it was dismissed by the ruling of Judge Allen made on May 12, 1986, which ruling is now final and non-appealable. [Calder] did not file his 1986 Chapter 13 case until March 12, 1986 after entry of the judgment in favor of Job in the civil case and after [Calder] failed to post a supersedes bond to stay enforcement of the judgment during the pendency of his appeal. [Calder's] interest in filing the Chapter 13 also was to frustrate the claims of Job and Bailey.

This Finding is clearly erroneous for several reasons. First, the Finding purports to rely upon Judge Allen's bench ruling dated May 12, 1986. While a copy of the ruling was introduced into evidence as Trial Ex. B-37, the Bar's prosecutor failed to adduce any copy of the underlying evidentiary hearing on which Judge Allen made his decision. This omission runs afoul of In Re Strong supra, 616 P.2d at 583.

Next, there is no evidence in the record that Calder's intent in filing the Chapter 13 was " . . . to frustrate the claims of Job and Bailey." In purporting to determine that intent, the Panel ignored Calder's explanation that his purpose for filing his 1984 petition was to save his house from an IRS sale and his purpose for filing the 1986 petition was to keep the assets of his law practice from being levied upon and dismembered by Job to the ultimate detriment of Calder and his other creditors. (Tr. 653, 734, 740-41).

Finally, the Finding fails to reflect that in November, 1988, Calder posted a cash supersedeas bond in the amount of \$55,000 to fully satisfy Job's judgment (Tr. 790, 793-94). It also fails to reflect that Bailey's state court claim was dismissed with prejudice, no cause of action (Tr. 7).

26. Finding No. 4:

When [Calder] filed his statement of affairs in his 1986 Chapter 7 case, he knowingly and intentionally filed a statement for a debtor "not engaged in business" when, in fact, [Calder] knew, at such time, that he was engaged in business.

While Calder admitted at the Bar trial that he utilized a preprinted form statement for a debtor "not engaged in business" despite the fact that he was engaged in business, Calder's trustee in bankruptcy acknowledged that he (the trustee) was not

prejudiced or confused in any way by Calder's use of the technically incorrect form since the substance of required disclosure in both forms are substantially identical (Tr. 598).¹⁴

27. Finding No. 5:

[Calder] also filed in 1986 a Chapter 7 bankruptcy action wherein the assets listed are substantially less than those assets listed in either [Calder's] 1984 or 1986 Chapter 13 schedules. [Calder] had not made any significant transfers of assets between the filing of his 1986 Chapter 13 and his 1986 Chapter 7.

This finding highlights the enormous prejudice imposed upon Calder by the Bar's failure to set forth even generally, let alone with particularity, the facts alleged to constitute fraudulent misconduct. For the finding neglects to identify even one specific asset or any dollar amount for any asset deemed to have been fraudulently concealed. Moreover, even if Calder is forced into the untenable position of seeking to prove a negative i.e. that he did not conceal assets that the Bar has failed to identify, a careful review of his bankruptcy schedules belies the Bar's Finding. (Compare Trial Exs. B-30, B-31, B-32 and B-33). The Finding also ignores the fact that many of the so-called

¹⁴ Moreover, the bankruptcy statements of affairs (as distinguished from the bankruptcy schedules) are identical for debtors engaged in business and debtors not engaged in business. (Tr. 373-74).

discrepancies were attributable to Calder's wife's interests being reflected in the 1984 filing and only his interest being reflected in the 1986 filing. (Tr. 394, 515).

28. Finding No. 6:

[Calder] was denied a general discharge in his Chapter 7 case by the Memorandum Decision of Judge Allen entered on or about September 27, 1988, wherein the court found, by clear and convincing evidence, that [Calder's] failure to list assets in his Chapter 7 bankruptcy was 'knowing and fraudulent'.

Just like the other Findings rubber stamping another court's rulings on the basis of mere introduction of the written ruling, this Finding is devoid of any of the evidentiary predicates underlying the ruling. For this reason, it ignores the lesson of In Re Strong supra, 616 P.2d at 583 and must be vacated.

In addition, as noted in Argument I above, the Bar's Complaints made no mention of the Bar's intent to impose sanctions against Calder for the bankruptcy court's denial of a general discharge his own Chapter 7 case. Despite Calder's objection to the Panel's consideration of that issue, Tr. 179-83, the Panel made a specific finding that " . . . Calder's failure to list certain assets in his Chapter 7 bankruptcy was done 'knowingly and fraudulently'." The Panel's decision to admit evidence of Calder's denial of discharge on the issue of his "state of mind," see Tr. 182, cannot now be relied upon as a

substantive basis to support the Panel's recommendation of disbarment. Nor can this finding be relied upon so long as Calder's appeal of the decision is progressing through the Federal system.¹⁵

29. Finding No. 7:

By an order entered on or about November 18, 1988, [Calder] was denied the right to convert his Chapter 7 case to a Chapter 13 case 'in order to prevent [an] abuse of the bankruptcy process.'

The Bar's intent to make Calder's 1988 conduct a part of the disciplinary proceedings was never disclosed in either of the Complaints. (See Argument I above). As such, this Finding must be vacated in its entirety.

30. Finding No. 8:

Considering the time frame of [Calder's] several bankruptcies and the great disparity in assets between filings and considering the fact that [Calder's] primary creditor in 1986 was Dennis Job with his malpractice judgment of approximately \$55,000 plus interest, [Calder] was engaged in either actual fraud or an attempt to defraud creditors.

In response to Calder's objections to this Finding, the Bar stated that the Finding was an "inference" drawn from Findings

¹⁵ Moreover, the Bar's apparent obsession with attacking Calder for his conduct in his personal bankruptcies violates § 525(a) of the Bankruptcy Code which prohibits governmental units from revoking a debtor's license solely because the debtor sought bankruptcy relief. 11 U.S.C. § 525(a).

No. 3, 5, 6 and 7. Therefore, if the Court modifies any of those Findings, Finding No. 8 must be correspondingly vacated or modified.

31. Finding No. 10:

[Calder] stipulated to a private reprimand in 1983 in a matter involving approximately 20 different client matters.

In response to Calder's objection to this Finding, the Bar's Counsel stated that Exhibit B-52 supported it. However, even a cursory review of that exhibit discloses that it stands for no such thing. In addition, the only other piece of evidence tending to support the Finding is Exhibit B-40 which is simply a copy of the complaint on which the stipulation reflected in Exhibit B-52 was based. Significantly, Calder objected to the admission of Exhibit B-40 on several grounds:

(i) As mere unsubstantiated allegations, the complaint could not be received as evidence of the truth of the allegations;

(ii) The attempted admission of the complaint was foundationally deficient;

(iii) The twenty prior complaints were beyond the scope of issues framed by the Complaints at issue in this proceeding. (R. 1066-70).

Like every other objection Calder made in the proceeding, the Panel overruled it and allowed the introduction of the complaint. In doing so, it relieved the Bar's prosecutor of the burden imposed on any other prosecutor to establish the underlying merits, if any, of the allegations of the complaint, instead of relying upon a mere copy of the resulting stipulation.

C. Summary.

The foregoing analysis of the Panel's Findings establishes that they are hopelessly, clearly erroneous. To revert to the vernacular, the Findings are in a very real sense akin to cold fusion; they presume to create legal consequences far in excess of the evidence that went into them. Appellate correction of the process is required to insure that the litigant, Calder, is not professionally killed.

ARGUMENT V

THE PANEL IMPROPERLY FAILED TO CONSIDER OR
FIND ANY MITIGATING FACTORS DURING THE
PENALTY PHASE OF THE PROCEEDING.

In its recommendation of discipline, the Panel found absolutely no mitigating factors. In reaching that determination, the Panel purported to consider each of the factors outlined in § 9.2 of the ABA Standards for Imposing Lawyer Sanctions. (Recommendation at 20.) However, that section relates solely to aggravating circumstances to be considered in deciding

what sanction to impose. It is § 9.32 of the ABA Standards that sets forth mitigating factors. Notably, the Board's recommendation is devoid of any indication that it even considered any of those mitigating factors. If it had, it could consider § 9.32(d) which provides that a "timely good faith effort to make restitution or to rectify consequences of misconduct" is a mitigating factor relevant to fashioning a fair sanction.

In this case, the Panel should have, but failed, to consider the following evidence on this issue:

a) The extraordinary and unsolicited offer by Calder to the Bar in 1983 to attempt to resolve Bailey's first claim despite the Board's conclusion that the claim was time barred;

b) Calder's posting of a cash supersedeas bond in the amount of \$55,000 to ensure the satisfaction of Job's judgment in the event it is affirmed on appeal; and

c) The tenuous nature of the Findings.

The Panel's inexplicable failure to properly apply (or, perhaps, even to consider) the standards which it deemed to control its determination, requires those determinations to be vacated.

ARGUMENT VI

THE PANEL'S RECOMMENDATION OF DISBARMENT IS
SO DISPROPORTIONATE TO THE CONDUCT THAT IT
FOUND CONSTITUTED ETHICAL VIOLATIONS AS TO BE
ARBITRARY, CAPRICIOUS AND UNREASONABLE.

Given the almost incredible extent to which (i) the Findings are unsupported by the evidence, (ii) the Recommendation exceeds the scope of the Findings, and (iii) neither the Findings nor the Recommendation conform to the Bar's Complaints, the Recommendation must be rejected on the grounds that it is arbitrary, capricious and unreasonable.

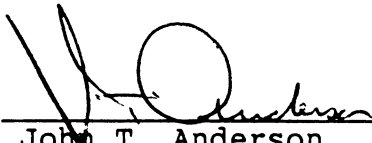
CONCLUSION

For the forgoing reasons, the court should vacate or modify the Findings and Conclusions and should reject the Recommendation.

DATED this 15 day of August, 1989.

PARSONS, BEHLE & LATIMER

By

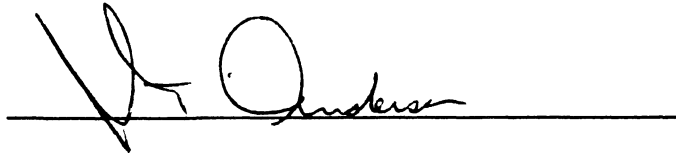


John T. Anderson
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that on the 15 day of August, 1989, four true and correct copies of the foregoing instrument were sent, postage prepaid in the United States mail, to the following:

Christine Burdick, Bar Counsel
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

A handwritten signature, appearing to read "J. H. Andersen", is written over a horizontal line.

382:070389D

A P P E N D I X 1

BEFORE THE DISCIPLINARY HEARING PANEL
OF THE UTAH STATE BAR

Hearing Panel:
Robert J. Stansfield, Chairman
Richard P. Makoff
Molly P. Sumner

In Re:)	
)	FINDINGS OF FACT,
RICHARD J. CALDER)	CONCLUSIONS OF LAW AND
)	RECOMMENDATION OF
DOB: 6-14-30)	DISCIPLINE
Admitted: 11-5-59)	
)	F-253 and F-274
)	(Consolidated)

This matter, having been previously consolidated by Order dated October 4, 1988, came on for disciplinary trial on November 14-15, 1988, December 2, 3 and 20, 1988, and January 23, 1989, before a Disciplinary Hearing Panel of the Utah State Bar comprised of Robert J. Stansfield, Chair, Richard P. Makoff, and Molly Sumner. Special Bar Counsel, David E. Leta, Esq., appeared on behalf of the Utah State Bar and Richard J. Calder appeared in person and through counsel, Daniel R. Boone, Esq. The Panel having taken testimony and having admitted Exhibits R-1 and B1-B52, as shown by the record, and having heard argument of counsel and being otherwise fully advised in the premises, makes its Findings, Conclusions, and Recommendation as follows:

FINDINGS OF FACT

1. The Panel makes the following findings, based upon clear and convincing evidence in the record, with respect to F-274, involving Larry Bailey.

a. Mr. Bailey originally retained Respondent to file a bankruptcy in 1978. Problems arose in this bankruptcy respecting the discharge of a certain judgment debt which precluded Mr. Bailey from obtaining a Utah driver's license.

b. In or about October 1983, Respondent entered into an engagement with Mr. Bailey, arranged through Bar Counsel, C. Jeffrey Paoletti, to resolve an investigation of a disciplinary complaint filed by Mr. Bailey against Respondent. By this engagement, Respondent agreed that he would obtain an amendment to Mr. Bailey's bankruptcy schedules and obtain a discharge for Mr. Bailey of a judgment debt owed by Mr. Bailey to Richard D. and Morren C. Harris in the sum of about \$1,400.00.

c. Respondent agreed to complete the engagement and achieve the objective upon Mr. Bailey's paying \$10.00 for additional attorney's fees; Mr. Bailey made said payment of \$10.00 to Respondent.

d. After accepting the engagement and agreeing upon the fee to be charged, Respondent demanded additional money from Mr. Bailey, in the amount of

\$120.00, in order to initiate the engagement. Mr. Bailey complained to Mr. Paelotti about this additional fee.

e. Subsequent to the October 1983 engagement, numerous communications were exchanged between Mr. Bailey and Respondent, and between Respondent and Bar Counsel which concluded with Respondent reaffirming his agreement to continue representing Mr. Bailey in amending the bankruptcy schedules. Mr. Bailey paid an additional \$15.00 to Respondent, at Respondent's request, in furtherance of the engagement.

f. After reaffirming the engagement, Respondent filed documents with the Bankruptcy Court on behalf of Mr. Bailey as Mr. Bailey's counsel.

g. Though Respondent presented conflicting evidence as to the agreement, the Panel accepted former Bar Counsel C. Jeffrey Paelotti's testimony as the most credible evidence of Respondent's agreement to represent Mr. Bailey in amending his Bankruptcy.

h. Respondent filed a Motion to Reopen Mr. Bailey's case, but the Motion was inadequate on its face.

i. After filing the Motion with the Bankruptcy Court, Respondent failed to follow through with his representation of Mr. Bailey by failing to schedule

there was no such financial arrangement at that time;

2) That after 1979, Respondent had not had any contact with Bailey until 1982 when, in fact Bailey had contacted Respondent on several occasions prior to that date;

3) That Respondent did not represent Bailey as his attorney in 1982 inasmuch as Bailey had refused to pay anything to Respondent as requested, when, in fact, Respondent had written to Bailey in 1982 advising Bailey that Respondent was proceeding with his case;

4) That he had agreed to help Mr. Bailey in 1983 at the request of the Utah State Bar but that nothing more was done because Bailey refused to pay money when, in fact, Bailey had paid, in full, all the money requested pursuant to the agreement;

5) That in 1983 he was not representing Mr. Bailey because Bailey had not paid his retainer fee and had "paid no money to [him]" when, in fact, Bailey had paid all fees required under the agreement; and

6) That at no time after 1978 had Respondent represented Bailey in any bankruptcy matters, when, in fact, he had represented

Bailey, had advised Bailey about bankruptcy matters, and had filed motions for Bailey as Bailey's attorney both in 1979 and in 1984.

1. In submitting the above-mentioned affidavit, Respondent knew that the affidavit was submitted under oath and that it would be relied upon by a judge in adjudicating a legal matter pending before the court.

m. When Respondent filed a personal Chapter 13 on February 23, 1984, he did not list Bailey as a creditor even though, at that time, Respondent knew that he was required to list all known and contingent liabilities and also knew that Bailey probably had a claim against him for his failure to comply with the terms of his agreement to achieve the desired objective. Respondent did not seek to amend his 1984 Chapter 13 to add Bailey as a creditor until January 31, 1986 even though, as early as February 1985 Respondent knew that Bailey had filed a malpractice action against him in the Third Judicial District Court, Civil No. C85-800.

n. Respondent did not attempt to give Mr. Bailey notice of his 1984 Chapter 13 bankruptcy at any time until after January 31, 1986.

o. Respondent's 1984 Chapter 13 case was dismissed by Judge Allen's on July 31, 1986, as having been filed in bad faith. The court's order of

dismissal is final and non-appealable. No credible evidence was presented to indicate that the dismissal of Respondent's 1984 Chapter 13 was for reasons other than that it was filed in bad faith or that the Bankruptcy Court had any reason to dismiss the case other than on the merits as set forth in Judge Allen's ruling of July 30, 1986.

p. Mr. Bailey was unable to obtain employment for a substantial period of time due to his inability to obtain a driver's license.

2. The Panel made the following findings, based on clear and convincing evidence in the record, with respect to F-253 involving Dennis Job.

a. In or about October 1983, Dennis and Reta Job retained Respondent to file a Chapter 7 bankruptcy on their behalf.

b. At the time Respondent agreed to file a Chapter 7 case for Mr. and Mrs. Job, Respondent knew that (1) Mr. Job was a plaintiff in a lawsuit entitled Job, et al. v. Pocklington, et al. which was then pending in the United States District Court for the District of Utah, Civil No. C82-1085C, (2) Mr. Job was seeking a substantial amount of money and damages, in excess of \$1,000,000 in such suit, (3) the cause of action had to be listed as an asset in Job's Chapter 7 case, and (4) Job wanted the asset listed in his

Chapter 7 case. Notwithstanding this knowledge, Respondent did not take reasonable steps and precautions to insure that this cause of action was properly scheduled and listed in Job's Chapter 7 case.

c. At the time Respondent recommended that Job file a Chapter 7, he did not discuss with Job the option of filing under Chapter 13, and did not mention any additional advantages which Job might realize if he elected to proceed under Chapter 13.

d. Subsequently, on or about April 27, 1984, Respondent, rather than seeking to amend the Chapter 7 schedules, filed a Chapter 13 proceeding, for which Mr. Job paid Respondent an additional \$150.00, even though, in giving this advice, Respondent knew, or should have known, that:

- 1) The Chapter 13 was likely to be dismissed as a "bad faith filing" in light of Job's previous discharge under Chapter 7;
- 2) Job could not "save his home" under the Chapter 13 unless he had regular income with which to make payments;
- 3) The Chapter 13 would be ineffective unless the previous discharge in the Chapter 7 were revoked or vacated; and

4) Job would not obtain a discharge under his Chapter 13 case until he had successfully completed all payments under the plan.

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e. Respondent withdrew from representing Mr. Job in July 1984, without Mr. Job's consent and knowledge. At the time of his withdrawal Respondent knew that it would be difficult for Mr. Job to obtain substitute counsel to resist the Chapter 13 trustee's pending Motion for Dismissal.

f. Respondent made no effort to assist Mr. Job in obtaining substitute counsel to represent him in the Chapter 13 proceeding.

g. On or about August 8, 1984, the Chapter 13 was dismissed and the Chapter 7 vacated, with the result that Mr. Job did not obtain any relief under either bankruptcy chapter.

h. Thereafter, unable to afford new bankruptcy counsel, Mr. Job filed a Chapter 11 bankruptcy, pro se, in an attempt to prevent foreclosure proceedings on the Jobs' home; the Chapter 11 filing was late and the home was lost.

i. On or about September 11, 1984, Dennis and Reta Job filed a malpractice action against Respondent in the Third Judicial District Court, Civil No. C84-5436.

j. At no time after July 1984, did Respondent seek to amend his 1984 personal Chapter 13 case to list Job as a creditor even though he knew that Job had claims against him for malpractice and had filed a lawsuit on September 11, 1984 in the Third Judicial District Court, Civil NO. C84-5436, asserting such claims.

k. On or about July 16, 1985, at a time Mr. Job was moving for Summary Judgment in the pending malpractice action, Respondent filed a Motion to Reopen Job's Chapter 11 proceeding, solely with the intent to harass, injure and annoy Mr. Job; no valid basis existed for filing the motion and the motion asserted matters upon which Respondent had no basis to make such allegations; in that respect, Respondent knowingly and intentionally made the following false or misleading statements:

(1) That he was a creditor of Job when, in fact, he had never submitted a bill, previously demanded payment, or counterclaimed in the civil action for the payment of any attorney's fees;

(2) That the Jobs had intentionally omitted creditors from their Chapter 11 case when, in fact, Respondent knew that the claims of

such creditors were contingent and disputed
by the debtors;

(3) That the Jobs had omitted a debt to a family member in the amount of \$35,000 when, in fact, Respondent had no reasonable basis for asserting such omission;

(4) That the debtor's Chapter 7 schedules filed in 1983 had shown a gross income in 1982 of \$30,000 when, in fact, the income had been earned in 1981; and

(5) That the Jobs had omitted a substantial claim to the Internal Revenue Service in the amount of \$5,000-\$10,000 when, in fact, Respondent had no reasonable basis for making this assertion.

1. At no time at or prior to filing his motion to reopen, did Respondent file, or attempt to file, a proof of claim in Job's Chapter 11 case.

m. In connection with the civil action entitled Job v. Calder, Civil No. C84-5436, filed in the Third Judicial District Court of Salt Lake County, State of Utah, Respondent filed an Affidavit on or about July 18, 1985 wherein Respondent knowingly and intentionally made the following misstatements and accusations:

1) That Job was responsible for failing to list the lawsuit in his schedules when, in fact, Respondent admits that when Job signed the schedules, the lawsuit was listed as an asset;

2) That there was "some reason to think that the debtor may have stolen a key from the attorney's desk drawer while he was alone in the office and entered the office at night and effected certain changes [sic] original document that was to be filed with the Court" when, in fact, Respondent had no facts upon which to base this accusation. Respondent also stated:

"Another theory is Mr. Job had access to defendant's office and perpetrated a fraud upon everybody by substituting a false paper in the papers to be filed with the Court"; and

3) That, by insinuation and implication, Job had tampered with the official files maintained by the Bankruptcy Court when, in fact, Respondent had no basis in fact to make any such insinuation or accusation.

n. The Panel finds those defenses, accusation, and insinuations made by Respondent against Job to be spurious and indicative of an attitude of bad faith which pervades Respondent's conduct in connection with

the Utah State Bar disciplinary proceedings and the court proceedings.

o. After Judge Frederick orally rendered his judgment in the Job malpractice action in favor of Mr. Job, and before the formal judgment was entered on February 24, 1986, Respondent transferred a substantial portion of his property to his wife and brother. Such transfers are the subject of pending adversary proceedings by Respondent's Chapter 7 trustee to set aside such transfers as fraudulent transfers under the Bankruptcy Code.

3. Respondent filed a second Chapter 13 bankruptcy proceeding in 1986 in bad faith and it was dismissed by the ruling of Judge Allen made on May 12, 1986, which ruling is now final and non-appealable. Respondent did not file his 1986 Chapter 13 case until March 12, 1986 after entry of the judgment in favor of Job in the civil case and after Respondent failed to post a supersedeas bond to stay enforcement of the judgment during the pendency of his appeal. Respondent's interest in filing the Chapter 13 also was to frustrate the claims of Job and Bailey.

4. When Respondent filed his statement of affairs in his 1986 Chapter 7 case, he knowingly and intentionally filed a statement for a debtor "not engaged in business" when, in fact, Respondent knew, at such time, that he was engaged in business.

5. Respondent also filed in 1986 a Chapter 7 bankruptcy action wherein the assets listed are substantially less than those assets listed in either Respondent's 1984 or 1986 Chapter 13 schedules. Respondent had not made any significant transfers of assets between the filing of his 1986 Chapter 13 and his 1986 Chapter 7.

6. Respondent was denied a general discharge in his Chapter 7 case by the Memorandum Decision of Judge Allen entered on or about September 27, 1988, wherein the court found, by clear and convincing evidence, that Respondent's failure to list certain assets in his Chapter 7 bankruptcy was "knowing and fraudulent."

7. By an order entered on or about November 18, 1988, Respondent was denied the right to convert his Chapter 7 case to a Chapter 13 case "in order to prevent [an] abuse of the bankruptcy process."

8. Considering the time frame of Respondent's several bankruptcies and the great disparity in assets between filings and considering the fact that Respondent's primary creditor in 1986 was Dennis Job with his malpractice judgment of approximately \$55,000 + interest, Respondent was engaged either in actual fraud or an attempt to defraud creditors.

9. Though Respondent testified and presented defenses to the charges of ethical violations, the Panel does not find that testimony credible; Respondent had an excellent

memory of details which served his purpose and failed to remember any detail which might be construed against him; further, when the production of certain files would have been helpful to his defenses if they contained what he represented, such files conveniently appeared to be lost or unavailable.

10. Respondent stipulated to a private reprimand in 1983 in a matter involving approximately 20 different client matters.

11. Mr. Job and Mr. Bailey retained Respondent relying upon his substantial experience as a bankruptcy attorney and relied on his advice in signing and submitting documents in connection with their bankruptcy proceedings and relied on Respondent to forthrightly and timely correct any problem with their bankruptcies that may have arisen.

12. At the outset, in handling the errors made in the Bailey and Job bankruptcies, the corrections could have been handled without a great expenditure of time or resources on the part of Respondent; Respondent failed to follow through on the steps he himself ultimately initiated in assisting Mr. Job and Mr. Bailey.

Based on the foregoing Findings, the Panel makes the following:

CONCLUSIONS OF LAW

1. With respect to F-274, involving Larry Bailey, the Panel concludes as follows:

a. Respondent had an attorney-client relationship with Larry Bailey at various times from 1978 through at least 1983; Respondent's representations in his affidavit filed in the Bailey malpractice lawsuit as outlines in Finding K 1) through 6) constitutes misrepresentations in violation of Canon 1, DR1-102(A)(4) of the Revised Rules of Professional Conduct of the Utah State Bar.

b. ~~Respondent's filing of his personal~~ bankruptcy in 1984 and 1986 in an attempt to defeat the claims of Mr. Bailey by filing false affidavits constitutes dishonesty and fraud in violation of Canon 1, DR1-102(A)(4) of the Revised Rules of Professional Conduct of the Utah State Bar.

c. Respondent's filing of significantly disparate schedules of assets in his personal Chapter 13 bankruptcy in 1986 and the 1986 Chapter 7 in such a short time span constitutes dishonesty and fraud in violation of Canon 1, DR1-102(A)(4) of the Revised Rules of Professional Conduct of the Utah State Bar.

d. Respondent's bad faith filing of his personal bankruptcies in 1984 and 1986, was for the primary purpose of harassing and avoiding the claims of Mr. Bailey, and constitutes conduct adversely reflecting on his fitness to practice law in violation of Canon

1, DR1-102(A)(6) of the Revised Rules of Professional Conduct of the Utah State Bar.

e. Respondent's initial failure to file a Motion to Amend on behalf of Mr. Bailey as agreed upon between former Bar Counsel, Respondent and Mr. Bailey constitutes neglect of a legal matter in violation of Canon 6, DR6-101(A)(3) of the Revised Rules of Professional Conduct of the Utah State Bar.

f. Respondent's failure to follow through with the Motion to Amend once it was filed was knowing and resulted in dismissal of the Motion and constitutes an intentional failure to carry out a contract of employment for professional services in violation of Canon 7, DR7-101(A)(2) of the Revised Rules of Professional Conduct of the Utah State Bar.

g. Respondent's failure to notify Mr. Bailey of the dismissal of his Motion to Amend combined with Respondent's subsequent withdrawal of counsel without notice to Mr. Bailey resulted in harm to Mr. Bailey's ability to have the Harris debt discharged and ability to obtain a Utah driver's license and constitutes an intentional prejudicing of a client's interests during the course of a professional relationship in violation of Canon 7, DR 7-101(A)(3) of the Revised Rules of Professional Conduct of the Utah State Bar.

h. Respondent's submission of a knowingly false affidavit in the malpractice action styled Bailey v. Calder constitutes conduct prejudicial to the administration of justice in violation of Canon 1, DR1-102(A)(5) of the Revised Rules of Professional Conduct of the Utah State Bar.

i. Respondent's failure to timely notify Mr. Bailey of his personal bankruptcy when he knew Mr. Bailey was a potential creditor constitutes conduct prejudicial to the administration of justice in violation of Canon 1, DR 1-102(A)(5) of the Revised Rules of Professional Conduct of the Utah State Bar.

2. With respect to F-253, involving Dennis Job, the Panel concludes as follows:

a. Respondent's failure to list Mr. Job's Federal Court cause of action as an asset in the Jobs' bankruptcy constitutes neglect of a legal matter in violation of Canon 6, DR 6-101(A)(3) of the Revised Rules of Professional Conduct of the Utah State Bar.

b. Respondent's filing of his personal bankruptcies in 1984 and 1986 was for the primary purpose to harass or maliciously injure Mr. Job in light of the malpractice action styled Job v. Calder and constitutes taking an action in representing himself which Respondent knew would serve merely to harass or maliciously injure another in violation of

Canon 7, DR 7-102(A)(1) of the Revised Rules of Professional Conduct of the Utah State Bar.

c. Respondent's filing a Chapter 13 on behalf of Mr. Job and then failing to respond to the Chapter 13 trustee's Motion for Dismissal, resulting in a dismissal with prejudice of Mr. Job's Chapter 13 proceeding constitutes intentional prejudice and damage to the client during the course of the professional relationship in violation of Canon 7, DR 7-101(A)(3) of the Revised Rules of Professional Conduct of the Utah State Bar.

d. Respondent's withdrawal from representing Mr. Job without notice to Mr. Job while the Chapter 13 trustee's Motion to Dismiss was pending constitutes intentional prejudice to a client during the course of a professional relationship in violation of Canon 7, DR 7-101(A)(3) of the Revised Rules of Professional Conduct of the Utah State Bar.

e. Respondent's filing of his affidavit containing false and spurious representations in the malpractice action styled Job v. Calder constitutes dishonesty, misrepresentation and conduct prejudicial to the administration of justice in violation of Canon 1, DR 1-102(A)(4) and Canon 1, DR1-102(A)(5) of the Revised Rules of Professional Conduct of the Utah State Bar.

f. Respondent's filing the Motion to Reopen upon a large number of Mr. Job's creditors in Job's Chapter 11 was without foundation or basis and constitutes taking action merely intended to harass another and conduct adversely reflecting on his fitness to practice law in violation of Canon 7, DR 7-102(A)(1) and Canon 1, DR 1-102(A)(6) of the Revised Rules of Professional Conduct of the Utah State Bar.

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

RECOMMENDATION OF DISCIPLINE

The Panel relied on the guidelines of the ABA in determining a sanction, considering each of the factors outlined in Section 9.2 of the ABA Standards for Imposing Lawyer Sanctions, particularly noting that aggravating and mitigating circumstances may relate to the offenses at issue, matters independent of the specific offense but relevant to fitness to practice, or matters arising incident to the disciplinary proceeding.

MITIGATION: None.

AGGRAVATION:

1. Respondent has a prior disciplinary history involving a stipulated private reprimand in 1983 entered into to resolve approximately 20 separate client matters; the Panel took into consideration the time period in which the prior discipline was imposed.

2. Respondent displayed a dishonest and selfish motive in his attempts to cover his inappropriate handling of both the Job and Bailey bankruptcies by filing several personal bankruptcies in bad faith, filing false affidavits in the malpractice actions filed by both Mr. Bailey and Mr. Job, and by filing inappropriate asset schedules, and in doing so perpetrated fraud, engaged in misrepresentations and in misleading conduct with the courts and his clients.

3. Respondent's actions display a pattern of misconduct that have exceeded a decade beginning with the representation of Mr. Bailey in 1978 and the subsequent representation of Mr. Job in 1983 and Mr. Bailey since 1983.

4. Respondent has committed multiple disciplinary offenses with respect to both Mr. Job and Mr. Bailey as outlined in the Conclusions of Law and which taken together constitute egregious misconduct.

5. Respondent has failed to recognize that he has engaged in any misconduct and displays a total lack of remorse and has contradicted on many occasions his own testimony in order to avoid any responsibility; that attitude continued even after this Panel announced its findings with respect to the disciplinary rules violated.

6. The clients in this case were particularly vulnerable since the assistance they sought was in a highly specialized area of law in which Respondent purported to be

one of the foremost experts, at least by implication in that he claims to file more bankruptcy cases than any practitioner in the State.

7. Respondent has substantial experience in the practice of law, having filed thousands upon thousands of matters in Bankruptcy Court and could have easily, and without great expense, addressed his clients' problems at the outset but intentionally refused and failed to do so.

8. Respondent has shown an indifference to making restitution from the beginning when he could have handled the clients' problems with relatively little consumption of time and expense; he failed and refused to timely and professionally act on those problems even when the concerns were specifically addressed by the Bar and the clients.

Relying on the above factors, and the egregious nature of the totality of the misconduct, the Disciplinary Hearing Panel hereby recommends that the Respondent be disbarred from the practice of law in the State of Utah and that prior to any reinstatement the Respondent show that he has satisfied the malpractice judgment obtained against him by Mr. Job and that Respondent pay the costs incurred by the Utah State Bar in prosecuting this action; said costs shall be established by affidavit to be submitted by the Office of Bar Counsel.

Dated this 10th day of February, 1989.

THE DISCIPLINARY HEARING PANEL

By: 

Robert J. Stansfield, Chair

CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that a true and correct copy of the foregoing Findings of Fact was hand delivered to Daniel R. Boone, Esq., 8 East 300 South, #735, Salt Lake City, Utah 84111 this 17 day of February, 1989.

DAN COE

A P P E N D I X 2

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In Re:

RICHARD CALDER
DOB: 11/04/32
Admitted: 09/05/74

)
) FORMAL COMPLAINT
)

) No. F-274
)
)
)

I

The attorney charged with unprofessional conduct in this complaint is Richard Calder, who is an Attorney and Counselor in the State of Utah, and a member of the Utah State Bar, residing at Salt Lake City, in the County of Salt Lake, State of Utah, and whose address, according to the records of the Executive Director of the Utah State Bar, is 2480 South Main Street #109, Salt Lake City, Utah 84115.

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 ethical violations and the factual basis in support thereof are alleged as follows:

Ethical Allegations

1. That Richard Calder has violated Canon 1, DR 1-102(A)(4) of the Revised Rules of Professional Conduct of the Utah State Bar by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation;

2. That Richard Calder has violated Canon 1, DR 1-102(A)(5) of the Revised Rules of Professional Conduct of the Utah State Bar by engaging in conduct that is prejudicial to the administration of justice; and/or

3. That Richard Calder has violated Canon 1, DR 1-102(A)(6) of the Revised Rules of Professional Conduct of the Utah State Bar by engaging in any other conduct that adversely reflects on his fitness to practice law; and

4. That Richard Calder has violated Canon 6, DR 6-101(A)(2) of the Revised Rules of Professional Conduct of the Utah State Bar by handling a legal matter with preparation adequate in the circumstances; or

5. Canon 6, DR 6-101(A)(3) of the Revised Rules of Professional Conduct of the Utah State Bar by neglecting a legal matter entrusted to him;

6. That Richard Calder has violated Canon 7, DR 7-101(A)(2) of the Revised Rules of Professional Conduct of the Utah State Bar by intentionally failing to carry out a contract of employment for professional services;

7. That Richard Calder has violated Canon 7, DR 7-101(A)(3) of the Revised Rules of Professional Conduct of

the Utah State Bar by intentionally prejudicing or damaging his client's interest during the course of the relationship.

Factual Allegations

1. In October 1983 a complaint by Larry Bailey against Respondent was dismissed as the statute of limitations barred any action.

2. Respondent indicated to the Screening Panel and Bar Counsel Jeff Paoletti during the proceedings on that matter that he would amend the bankruptcy schedules of Mr. Bailey to include the names of creditors Richard D. and Morena C. Harris in an amount of \$1,399.00 and finally resolve the bankruptcy that Respondent had filed on behalf of Mr. Bailey in 1978. The only requirement was that Mr. Bailey pay Respondent \$10.00.

3. Mr. Bailey paid \$10.00 to Respondent in November 1983.

4. In December 1983 Respondent notified Mr. Bailey by letter that the Bankruptcy Court would require that his case be reopened before the omitted debt could be added. Respondent stated that there would be a \$50.00 filing fee and a \$70.00 attorney fee.

5. Mr. Bailey contacted Mr. Paoletti by telephone and complained that Respondent was not keeping the agreement he had made with the Bar.

6. Respondent agreed to complete the work for only \$15.00 more.

7. On December 29, 1983, Mr. Bailey paid the \$15.00.

8. In January 1984 Respondent filed a "Motion to Reopen Chapter 7 to Add A-3 Claims".

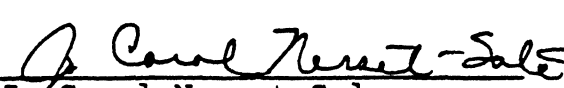
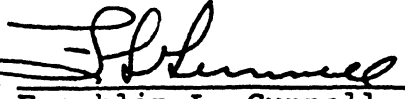
9. The court denied the motion without prejudice to its renewal, because of the lack of specificity in the motion, which did not name the specific creditors to be added or give a basis for reopening the case.

10. Immediately thereafter Respondent notified Mr. Bailey by letter that he was returning \$15.00 to him and that he would not handle the case further.

11. In an affidavit submitted by Respondent in Bailey v. Calder, Civil No. C85-800, in The Third District Court, dated April 16, 1985, Respondent falsely stated: "At no time since 1978 have I represented Ernest L. Bailey in any bankruptcy matters."

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

DATED this 23 day of Oct., 1987.

 Jo Carol Nasset-Sale Bar Counsel	 Franklin L. Gunnell Chairman, Ethics and Discipline Committee
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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Formal Complaint and Summons was mailed certified mail return receipt requested to Richard Calder, Attorney at Law, 2480 South Main Street #109, Salt Lake City, Utah 84115 and to Daniel Boone, Attorney for Respondent, 8 East 300 South #735, Salt Lake City, Utah 84111 this ^{27th} day of October, 1987.



A P P E N D I X 3

JUN 10 1987

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

IN RE:)	AMENDED FORMAL
)	COMPLAINT
)	
J. RICHARD CALDER)	No. F-253
)	

I

The attorney charged with unprofessional conduct in this complaint is J. Richard Calder, who is an Attorney and Counselor in the State of Utah, and a member of the Utah State Bar, residing at Salt Lake City, in the County of Salt Lake, in the State of Utah, and whose address, according to the records of the Executive Director of the Utah State Bar, is 2480 South Main Street, #109, Salt Lake City, Utah 84115.

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 violation of the Revised Rules of Professional Conduct of the Utah State Bar is alleged to be as follows, based upon allegations of fact set forth below:

1. That J. Richard Calder has violated Canon 1, DR 1-102(A)(4): engaging in conduct involving in dishonesty, fraud, deceit or misrepresentation;

2. That J. Richard Calder has violated DR 1-102(A)(6): engaging in any other conduct that adversely reflects on his fitness to practice law;

3. That J. Richard Calder has violated DR 1-102(A)(5): engaging in conduct that is prejudicial to the administration of justice;

4. That J. Richard Calder has violated Canon 6, DR 6-101(A)(2): handling a legal matter without preparation adequate in the circumstances;

5. That J. Richard Calder has violated DR 6-101(A)(3): neglecting a legal matter entrusted to him;

6. That J. Richard Calder has violated Canon 7, DR 7-101(A)(1): a lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means...;

7. That J. Richard Calder has violated DR 7-101(A)(3): a lawyer shall not intentionally prejudice or damage his client during the course of the professional relationship;

8. That J. Richard Calder has violated Canon 7, DR 7-102(A)(1): in his representation of a client, a lawyer shall not file a suit, assert a position... or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another;

9. That J. Richard Calder has violated Canon 9, :
avoiding the appearance of impropriety.

ALLEGATIONS OF FACT:

a. On January 9, 1986, Judge Frederick heard a case entitled Dennis R. Job and Reta Job v. Richard Calder, Civil No. C-84-5436 in the Third Judicial District Court.

b. The Findings of Fact and Conclusions of Law in that case state that:

1. In about October 1983 Plaintiffs retained Defendant as their counsel to advise them regarding the filing of a Chapter 7 bankruptcy.

2. Plaintiffs informed Defendant that Dennis Job owned stock and was plaintiff in a Federal District Court lawsuit, Job v. Pocklington, et. al., C82-1085C.

3. Defendant made a note of that lawsuit in his working papers to be listed as an asset.

4. Plaintiff signed schedules prepared by Defendant that included that lawsuit as an asset.

5. Plaintiffs Chapter 7 bankruptcy was filed on October 13, 1983, No. 83C-02769.

6. Defendant and/or his employee filed the schedules with the bankruptcy court but the schedules did not list the Federal District Court lawsuit or ownership of stock as asset.

7. The bankruptcy court entered a order of discharge on January 9, 1984, noting "the above matter has been closed as a 'no asset' case. The Defendants

in the Federal District Court lawsuit learned that Plaintiffs had filed the Chapter 7 bankruptcy and upon checking the court files that the lawsuit and ownership of stock were not listed as assets.

8. On about April 13, 1984, Defendants moved to reopen the Chapter 7 bankruptcy inferentially alleging bankruptcy, fraud and perjury for failure to list the assets.

9. Plaintiffs finally contacted Defendant, told him they were upset over his failure to list the assets and the allegations of fraud and perjury brought against them and asked him to oppose the motion to reopen, to which the Defendant responded he would take care of it.

10. Defendant failed to take appropriate corrective action when it became known the omission occurred.

11. Defendant determined, rather than seeking to amend the Chapter 7 schedules, to file a Chapter 13 proceeding, for which Plaintiffs paid him an additional \$150.00. The Chapter 13 proceeding was filed April 27, 1984.

12. Defendants' expert witness, Judith Boulden, the standing trustee for Chapter 13 bankruptcy, testified this procedure was an improper use of the bankruptcy law.

13. Defendant omitted Plaintiffs' stock ownership as an asset in the Chapter 13. Defendant also failed to oppose the motion to reopen or express to the bankruptcy court or Judith Boulden that the assets were revealed to him by the Plaintiffs or that the omission was his mistake. Defendant admitted that he did not think it was his duty to the Plaintiffs to acknowledge his mistake.

14. Defendant alleged in his Memorandum in Opposition to Plaintiffs Motion for Summary Judgment that Plaintiffs' had stolen a key to his office and tampered with the schedules, or substituted schedules in the bankruptcy courts file.

15. On May 15, 1984, Defendant stated during the hearing on the Motion to reopen, "Well, we don't oppose reopening the case" and the Motion was granted.

16. On June 12, 1984, a Motion to continue the Federal District Court lawsuit which had been filed earlier was granted. The grounds for that Motion were that the lawsuit, upon reopening the Chapter 7, would be in the control of the Chapter 7 trustee. Subsequently, Plaintiffs attorney, Dennis Olsen, moved to withdraw from that case on the grounds that the lawsuit was not in control of the Chapter 7 trustee, which motion was granted. Plaintiffs expended \$3,600.00 in costs and fees in preparing their Federal District Court lawsuit for trial.

17. On June 26, 1984, the standing trustee for the Chapter 13 bankruptcy moved to dismiss Plaintiffs' Chapter 13 with prejudice, or in the alternative, to reconvert to a Chapter 7. Defendant told Plaintiffs that he would handle the trustee's Motion. On July 3, 1984, Defendant moved to withdraw as counsel for Plaintiffs. On August 6, 1984, over Plaintiffs' objection, the Motion to withdraw was granted, just two days prior to the hearing on the trustee's Motion.

18. On August 8, 1984, a hearing was held on the trustee's Motion, and the court ordered the discharge previously granted under the Chapter 7 would be revoked and the Chapter 13 would be dismissed without prejudice.

19. Plaintiffs were unable to afford new bankruptcy counsel and filed a Chapter 11 bankruptcy pro se in an attempt to prevent foreclosure proceedings on their home. Plaintiffs were thirty-three minutes late in filing the chapter 11. A Motion was brought to determinate the automatic stay, which Motion was granted, and Plaintiffs lost their home in which they had lived for twenty-four years and had an equity in the amount of \$12,574.00.

20. Due to the emotional distress caused by the foul up in their bankruptcy, the allegations of fraud and perjury brought against them, the delay of the new defenses in their Federal District Court lawsuit, and

the loss of their home, Plaintiffs' daughter was obliged to move in with her sister, and subsequently Plaintiffs were separated for over three months.

21. On about December 7, 1984, Plaintiffs settled their Federal District Court lawsuit for \$15,000.00 and an Assignment of Rights, if any, that the Defendants in said lawsuit may have in the \$40,000.00 deposited with the bankruptcy court, pursuant to a plan of reorganization of Great Northern Baseball Corporation.

22. On July 16, 1985, just six days after Plaintiffs moved for summary judgment in their lawsuit against Defendant, Defendant moved to reopen Plaintiffs' Chapter 11 bankruptcy. Defendant alleged in his Motion to reopen that he was a creditor of Plaintiffs and that Plaintiffs had committed bankruptcy fraud and income tax evasion for failure to report \$30,000.00 in income. Defendant's Motion to reopen was summarily denied by the bankruptcy court.

23. The Federal District Court lawsuit, which was worth \$100,000.00, was diminished by 60% by reason of the fact that Plaintiffs' attorney, John McDonald, was told by Defendants' attorney that they would prepare a defense to detect the credibility of Dennis Job based upon his failure to list the lawsuit in the Chapter 7 bankruptcy.

C. The Conclusions of Law in the case entitled Dennis R. Job and Reta Job v. Richard Calder state that:

1. Defendant's conduct was intentional, malicious, without cause or basis in fact and in reckless disregard of Plaintiffs' rights.

2. Defendant's conduct represented an egregious violation of his legal and ethical obligations to the Plaintiffs.

3. Defendant was negligent in omitting assets in the schedules filed with the bankruptcy court.

4. Defendant was negligent in failing to take appropriate corrective action when it became known the omissions of assets occurred.

5. Defendant was negligent in failing to express to the bankruptcy court or to the standing trustee that the omission was his mistake.

6. Defendant's conduct in withdrawing as counsel was intentional and in reckless disregard of the rights of Plaintiffs.

7. Defendant's conduct in filing a Motion to Reopen Plaintiffs' Chapter 11 bankruptcy was intentional, malicious, and in reckless disregard of the rights of Plaintiffs.

8. Defendant's allegations were without any authority or basis in fact and it was no coincidence that Defendant filed said Motion just six days after Plaintiffs filed their Motion for partial summary judgment.

9. Plaintiffs were damaged and defendant is liable for diminution in value of the lawsuit calculated as follows:

\$100,000.00 less \$55,000.00 received for net of \$45,000.00, diminution of which 60% was attributable to the conduct of Defendant, which sum equals \$27,000.00 minus \$9,000.00 that would have been paid from the recovery, leaving a net of \$18,000.00.

10. Plaintiffs were damaged and Defendant is liable for \$240.00 in fees and costs for the Chapter 7 proceeding, \$150.00 fees and costs for the Chapter 13 proceeding and \$3,600.00 fees and costs for preparing the Federal District Court lawsuit for trial.

11. Plaintiffs were damaged and Defendant is liable for \$12,574.00 representing Plaintiffs' equity in their former home.

12. Plaintiffs were damaged and Defendant is liable for \$10,000.00 general damages for emotional distress and suffering inflicted by the reckless and/or intentional conduct of the Defendant.

13. Defendant is liable for \$10,000.00 general damages for his malicious and intentional conduct, and is liable for a total award of damages in the amount of \$54,564.00.

d. After the ruling of the court was rendered in Job v. Richard Calder, but before the Findings of Fact and Conclusions of Law were signed, Respondent, J. Richard Calder, transferred some of his assets to his brother in consideration of a loan. Respondent also transferred ownership in some of his property in Provo to his wife. Respondent did not obtain approval from the bankruptcy court

to transfer those assets despite the fact that his 1984 bankruptcy was still open.

e. One day before the Judgment was to be signed by Judge Dennis Frederick, Respondent sent a notice to the court stating that he had a 1984 bankruptcy which precluded the entry of the Judgment. Judge Dennis Frederick signed the Judgment despite Respondent's 1984 bankruptcy. Mr. and Mrs. Job's attorney, Peter Waldo, was unaware of Respondent's 1984 bankruptcy until Respondent filed the above mentioned notice with the court.

f. Peter Waldo then began executing on the Judgment. After Respondent was served but before the Sheriff's Sale was held, Respondent filed a 1986 bankruptcy. Peter Waldo filed a Motion to convert or dismiss or for relief from the automatic stay on behalf of the Jobs.


g. On May 12, 1986, a hearing was held on Mr. Waldo's Motion. Judge John H. Allen stated in his ruling, "I find under all of the circumstances, each of the factors which have been enumerated would not be sufficient in and of itself, but the totality of these factors leave me to conclude that the Chapter 13 proceeding, which was filed on March 12, 1986, No. 86A-01032, was filed in bad faith. This bad faith is cause, under Section 1307(C) for dismissal. I find it would be in the best interest of creditors to dismiss the case and deny relief from the stay, and the court will order the case dismissed."


h. Mr. Waldo filed a Motion to dismiss Respondent's 1984 bankruptcy. On August 22, 1986, Judge John E. Allen dismissed Respondent's 1984 bankruptcy for lack of good faith.

i. On August 19, 1986, Respondent filed a Chapter 7 bankruptcy. The 1986 Chapter 7 bankruptcy matrix lists approximately 900 of respondents clients as creditors. During the Screening Panel meeting, Respondent indicated that he was not sure whether or not he still represents the clients that were listed on the bankruptcy matrix.

WHEREFORE, the undersigned, on behalf of the UTAH STATE BAR prays that proceedings be taken herein against the attorney charged pursuant to the Procedures of Discipline of the Utah State Bar, and that restitution be provided to the Complainants if a final order of the appropriate court(s) affirms the judgment against Respondent and finds the judgment non-dischargable in bankruptcy, should Respondent challenge the judgment. The Utah State Bar also asks that it be awarded its costs in bringing this action.

DATED this 2nd day of June, 1987.


Jo Carol Nessel-Sale
Bar Counsel


Franklin L. Gunnell
Chairman, Ethics and
Discipline Committee