

2006

J. Keith Henderson v. State of Utah : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

**In the Matter of the
Discipline of:**

BRIEF OF THE PETITIONER/ APPELLANT

J. Keith Henderson, #1459

Respondent

Supreme Court No. ~~20060452~~

Appeal from the Third District Court, Salt Lake County

Judge Leon Dever

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Statement Showing the Jurisdiction of the Utah Supreme Court:

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Constitution article VIII, section 4, which provides that "The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law."

Statement of the Issues Presented for Review:

Issue One: Whether the district court erred in permitting an attorney who was suspended for intentionally and/or knowingly engaging in professional misconduct involving dishonesty, to petition to stay a portion of the suspension and instead submit to a period of probation. The standard of review for sanctions imposed for professional misconduct in attorney discipline actions is a correctness standard, but the Utah Supreme Court may make an independent judgment regarding the appropriate level of discipline if the evidence warrants it. See *In re Babilis*, 951 P.2d 207 (Utah 1997). This issue arose for the first time in the trial court's Ruling and Order re: Sanctions. (R. 245-258)

Issue Two: Whether the district court erred in permitting an attorney who was suspended for intentionally and/or knowingly engaging in professional misconduct involving dishonesty and there were substantial aggravating factors and no mitigating factors, to petition to stay a portion of the suspension and instead submit to a period of probation. The standard of review for sanctions imposed for professional misconduct in attorney discipline actions is a correctness standard, but the Utah Supreme Court may

make an independent judgment regarding the appropriate level of discipline if the evidence warrants it. See *In re Babilis*, 951 P.2d 207 (Utah 1997). The issue arose for the first time in the trial court's Ruling and Order re: Sanctions. (R. 245-258)

Determinative Constitutional Provisions, Statutes, Ordinances, and Rules

- Rule 2. Sanctions, Standards for Imposing Lawyer Sanctions.
- Rule 3. Factors to Be Considered in Imposing Sanctions, Standards for Imposing Lawyer Sanctions.
- Rule 4. Imposition of Sanctions, Standards for Imposing Lawyer Sanctions.
- Rule 6. Aggravation and Mitigation, Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE CASE

Nature of the Case: This is an attorney discipline case.

The Course of Proceedings: The case originated in a disciplinary action against J. Keith Henderson. (R. 1-12) On December 13, 2005, the court entered Findings of Fact and Conclusions of Law, and Summary Judgment against Henderson as to his violations of the Rules of Professional Conduct. (R. 191-194) The District Court entered its Ruling and Order Re: Sanctions on February 6, 2006. (R. 245-258) Pursuant to Rule 52(b) of the Utah Rules of Civil Procedure, the OPC filed a Motion to Amend Ruling and Order re: Sanctions on February 21, 2006. (R. 260-261) The court entered an Order Amending Ruling and Order Re: Sanctions on April 17, 2006. (290-292) This appeal ensued. (R. 294-295) This case was consolidated with *In re Crawley*.

Disposition in the Trial Court: The trial court suspended Henderson for a period of twelve months, with leave to petition the court to stay all but three months of the suspension upon certain conditions. (R. 258) The order amending the ruling changed the provision of the RLDD pursuant to which Henderson must apply for reinstatement, clarified that the suspension period would be one year, whether or not a portion of the actual suspension is stayed, and ordered Henderson to comply with Rule 26(b) of the RLDD with respect to winding up his practice. (R. 291)

STATEMENT OF THE RELEVANT FACTS

In September 1994, [William] Blakley was involved in an on-the-job accident when the truck he was driving overturned. (R. 192) Blakley retained Henderson to pursue unpaid worker's compensation claims Blakley had filed with the worker's compensation insurance carrier, American Insurance Company ("American Insurance"). (R. 192)

Henderson knew that Blakley was pursuing a personal injury claim against the other driver in the accident, but did not inform Blakley that a settlement in the personal injury case could affect his worker's compensation claim. (R. 192) Around January 2000, Blakley's personal injury attorney settled the personal injury claim against the third-party defendant in the accident. (R. 192)

Without determining the status of Blakley's personal injury case, in early February 2000, Henderson filed an Application for Hearing requesting a hearing before

the Labor Commission for the State of Utah ("Labor Commission") regarding Blakley's unpaid worker's compensation claims. (R. 192)

In mid-March 2000, American Insurance filed an Amended Response to Application for Hearing asserting a counterclaim for reimbursement for past payments and offset of future payments to Blakley because he had received settlement proceeds from the defendant in his personal injury case. (R. 192-193)

The Labor Commission set a June 2, 2000 hearing on Blakley's worker's compensation claim. (R. 193) Before the date of the hearing, Henderson did not give Blakley a copy of American Insurance's response or its amended response. (R. 193) Henderson met with Blakley just prior to the hearing and as they traveled to it. (R. 193) Before and after the hearing, Henderson did not fully explain to Blakley how the settlement in his personal injury case would affect his pending and future worker's compensation claims. (R. 193)

The Administrative Law Judge ("ALJ") continued the Labor Commission hearing without date to see if the parties could reach a settlement regarding the amount of compensation that American Insurance would receive. (R. 193)

After the June Labor Commission hearing, Blakley did not hear again from Henderson until he received a letter from Henderson dated November 30, 2000, which told him for the first time that American Insurance had a right to the third-party personal injury settlement and Blakley was not entitled to recover a worker's compensation award. (R. 193)

On November 9, 2000, Henderson had been suspended from the practice of law for two years, with all but six months stayed. (R. 194) Henderson failed to notify Blakley that Henderson had been suspended and could no longer represent Blakley. (R. 194) Henderson also failed to inform Blakley of the need to retain new counsel or represent himself pro se in the matter. (R. 194) Nor did Henderson provide Blakley with a copy of Blakley's file. (R. 194) Additionally, Henderson failed to notify Blakley that the next hearing in his case was set for February 27, 2001 and that Blakley should attend it. (R. 194)

On February 27, 2001, the ALJ conducted a status conference hearing in Blakley's case. (R. 194) When Henderson failed to appear for the hearing, the ALJ telephoned him. (R. 194) During the telephone conversation, Henderson informed the ALJ that he had withdrawn from the case because it had settled. (R. 194) As of that date, however, Blakley had not reached a settlement with American Insurance. (R. 194) The ALJ directed Henderson to file a withdrawal of counsel within ten days so the case could move forward. (R. 194) Henderson did not submit his withdrawal of counsel until October 15, 2002—more than eighteen months later. (R. 195)

Based upon these facts, the District Court in the case underlying this appeal found and concluded that Henderson violated Rules 1.1 (Competence), 1.4 (Communication), 1.16(d) (Declining or Terminating Representation), 3.3(a) (Candor to the Tribunal), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct as alleged in the OPC's Complaint. (R. 194)

The disciplinary matter against Henderson proceeded to a sanctions hearing on January 30, 2006. (R. 245) Each side briefed their positions in advance. (R. 199-226; R. 230-240) The District Court received testimony and exhibits, and on February 6, 2006, entered its Ruling and Order re: Sanctions ("Ruling"). (R. 245) The court subsequently entered an Order Amending Ruling and Order re: Sanctions that clarified portions of the order in respects not germane to this appeal. (R. 290-292)

The Ruling stated a number of findings and conclusions, summarized as follows. Henderson "violated numerous duties to his client, the Court and legal system, the public, and to the profession," and specified the respects in which Henderson violated each of these duties. (R. 246-247) Henderson's mental state was intentional with respect to his violation of the rule requiring candor towards tribunals. (R. 248) Henderson acted "intentionally, or at least knowingly, when he failed to comply with the tribunal's order to file a Withdrawal of Counsel." (R. 248) Henderson's failures of diligence and communication were knowing. (R. 249) Finally, Henderson caused potential harm to his client, and actual harm to the court and the legal system, and at least potential harm to the profession and the legal system. (R. 249-250)

Based upon the foregoing, the District Court determined that Henderson's misconduct—his failure to notify Blakley that he had been suspended; his failure to notify Blakley of a pending hearing; his failure to return the file at the termination of the representation; his withdrawal nearly 20 months after being directed to do so; his failure to comply with the previous suspension order despite filing an affidavit indicating he had

done so; his misrepresentation to a tribunal; and his failure to inform the court of his suspension—called for suspension as a presumptive sanction pursuant to Rule 4.3(a) of the Standards. (R. 250-251)

The Ruling also identified six aggravating factors. (R. 251-254) Henderson has a record of professional discipline: other discipline in 1988 and 1997, and a suspension in 2000 for similar rule violations including “failing to provide competent representation, failing to communicate with clients, missing a court hearing and filing a false Affidavit.” (R. 251) Henderson committed multiple offenses. (R. 252) Henderson obstructed the disciplinary proceedings by filing a late Answer, delaying in filing a discovery plan, failing to provide initial disclosures, and failing to respond in a timely fashion to discovery requests. (R. 252-253) Henderson failed to acknowledge the wrongful nature of his misconduct, arguing instead that he did nothing wrong. (R. 253) Henderson had substantial experience in the practice of law, having been admitted in April 1970. (R. 253) Henderson failed to make a good faith effort to rectify the consequences of his misconduct. (R. 254)

The Ruling noted, but did not make an explicit determination concerning the OPC’s argument that Henderson’s actions demonstrated a dishonest or selfish motive. (R. 252-253) The portion of the Ruling rejecting Henderson’s argument that nothing in the record established his dishonesty or selfishness, however, noted that Henderson “lied to the tribunal and deceived his client, the tribunal, and opposing attorney by omitting the fact of

his suspension. These actions are both dishonest and selfish.” (R. 255) The court thus rejected as a possible mitigating factor the absence of bad motive. (R. 255)

Similarly, the Ruling noted that Henderson presented evidence of good character, but also the OPC’s challenge of this evidence through a witness who reported Henderson because of his actions. (R. 255) Elsewhere, it stated that “there is no evidence before the Court to mitigate the presumptive sanction.” (R. 255)

After weighing these aggravating and mitigating circumstances, the court determined that “there is no basis for a lesser sanction than the suspension presumed by the Standards.” (R. 255) In addressing Henderson’s argument that he should receive a public reprimand, rather than a suspension, the Ruling stated “The fact that his previous suspension was for similar actions leads the Court to believe he has not learned from the minimum suspension.” (R. 255)

The District Court suspended Henderson for twelve months, but granted him leave to petition the court to stay all but three months of it upon specific conditions involving submitting his practice to supervision. (R. 256) If Henderson does not petition for a stay, he must serve the entire suspension. (R. 256-257) To date, Henderson has not petitioned the District Court to have his suspension stayed for a period of supervised probation.

SUMMARY OF THE ARGUMENT

In the OPC’s view, probation is not an appropriate sanction when an attorney knowingly, or knowingly and intentionally, engaged in professional misconduct involving

dishonesty, particularly when there were significant aggravating factors including prior discipline and obstruction of the disciplinary proceedings. Probation is a sanction that should be reserved for professional misconduct that lends itself to correction, with a respondent willing to cooperate, and not employed for conduct giving rise to questions about the attorney's fundamental integrity.

The Standards for Imposing Lawyer Sanctions ("Standards") identify and define probation as a sanction for professional misconduct, but do not provide guidance concerning when probation may or should be imposed. *Compare* Rule 2, Standards, *with* Rule 4, Standards. The OPC considers probation a useful tool for correcting practice errors that arise from ignorance or lack of diligence or communication. Conversely, the OPC views probation unsuitable as a sanction for conduct involving knowing or intentional dishonesty with clients or courts. Consistent with this approach, the OPC last year determined not to appeal a District Court decision imposing probation in a setting involving negligence.

Recently, however, two District Court decisions have imposed or permitted probation for severe breaches of the attorneys' duties of honesty in various aspects of their practices. Although they differ in their particulars, each of the cases involved the respondent's knowing and intentional dishonesty to clients, third-parties, or to a tribunal. Because of its serious concerns about fairness to respondents and the desirability of promoting consistency in the imposition of disciplinary sanctions for similar offenses, as well as its concerns about protecting the public and the administration of justice, the OPC

seeks review of the District Court decision in this case and in *In re Crawley*, which has been consolidated herewith. The OPC asks the Court to articulate criteria for the imposition of probations, thereby providing guidance to the OPC and the District Courts, and urges some particular standards for the Court's consideration. Finally, if the Court concludes that the District Court erred in permitting Henderson to petition to be placed on probation, it requests that the Court reverse that portion of the Order, and require Henderson to remain on suspension for the entire year-long period.

ARGUMENT

I. THE COURT'S GUIDANCE IS NEEDED CONCERNING CRITERIA FOR IMPOSING PROBATIONS

A. Appropriate Sanctions Are the Linchpins of an Effective Attorney Discipline System, and Probation Has Its Place

An effective attorney discipline system depends upon appropriate and consistently applied sanctions for professional misconduct. The American Bar Association's Joint Committee on Professional Sanctions stated it this way:

For lawyer discipline to be truly effective, sanctions must be based on clearly developed standards. Inappropriate sanctions can undermine the goals of lawyer discipline: sanctions which are too lenient fail to adequately deter misconduct and thus lower public confidence in the profession; sanctions which are too onerous may impair confidence in the system and deter lawyers from reporting ethical violations on the part of other lawyers. Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems.

I.A., Preface, ABA Standards for Imposing Lawyer Sanctions (as amended Feb. 1992).

In Utah, the explicit purpose of lawyer discipline proceedings "is to ensure and maintain the high standard of professional conduct required of those who undertake the discharge of professional responsibilities as lawyers and to protect the public and the administration of justice from those who have demonstrated by their conduct that they are unable or unlikely to properly discharge their professional responsibilities." Rule 1(a), Rules of Lawyer Discipline and Disability ("RLDD"); see also Rule 1.1, Standards. To this end, the Court adopted the Standards in 1993. See Compiler's Notes, Standards.

The Standards constitute a system "designed for use in imposing a sanction or sanctions following a determination that a member of the legal profession has violated a provision of the Rules of Professional Conduct." Rule 1.3, Standards. They allow for "flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct" and are designed to promote consideration of all relevant factors and their appropriate weight "in light of the stated goals of lawyer discipline." Rule 1.3, Standards.

B. The Standards Identify Probation as a Possible Sanction, But Provide No Framework Concerning the Circumstances Under Which Probation Is Appropriate

Rule 2 of the Standards is titled "Sanctions," and identifies discipline ranging from the most to the least severe: disbarments, suspensions, reprimands, admonitions. See Rule 2, Standards. The list of possible sanctions also includes resignation with discipline pending, reciprocal discipline, and probation. See *id.* Each sanction is defined in the rule, except for a short list of "Other sanctions and remedies" that includes restitution, the assessment of costs, and the like. See *id.* As defined in Rule 2, "Probation is a sanction

that allows a lawyer to practice law under specified conditions. Probation can be public or nonpublic, can be imposed alone or in conjunction with other sanctions, and can be imposed as a condition of readmission or reinstatement.” Rule 2.7, Standards.

Another rule in the Standards identifies the circumstances under which disbarments, suspensions, reprimands, and admonitions are the appropriate presumptive sanction. See Rule 4, Standards. Rule 4 does not offer guidance concerning when probation is an appropriate sanction, nor does it identify the circumstances under which the sanctions of resignation with discipline pending and reciprocal discipline should be imposed. See *id.* Procedures for seeking resignations with discipline pending and reciprocal discipline are identified by specific rules in the RLDD, but the RLDD do not address probation. See Rule 21 (Resignation with Discipline Pending), RLDD; Rule 22 (Reciprocal Discipline), RLDD. Thus, probation is the only sanction other than the list of “Other sanctions and remedies,” with no corresponding rule in the Standards identifying when it is appropriate, or a rule in the RLDD identifying how it may be imposed.

C. Although Probations or Their Equivalent Have Long Been Available in Utah, The Question of When to Impose Them Appears to Be a Matter of First Impression

Probations or their functional equivalent—stayed suspensions¹—were not explicitly identified among the sanctions noted in the body of rules that preceded today’s RLDD

¹ Because a stayed suspension with conditions which, if not met, would trigger reinstatement of the suspension, the OPC regards stayed suspensions as the functional equivalent of probations. Courts and other tribunals do not appear to draw a

and Standards, but were available under the Supreme Court's inherent powers. See e.g. Rules of Conduct and Discipline of the Utah State Bar, effective Nov. 1931 (Board of Bar Commissioners could recommend reprimand, suspension, or disbarment, and Supreme Court may exercise its inherent powers and "take any action agreeable to its judgment"); Rules V and VI, section 51, Revised Rules of Professional Conduct of the Utah State Bar, effective Mar. 1940.

The OPC's review of Supreme Court opinions concerning lawyer discipline revealed only a handful of cases in which probation was imposed or alluded to, but none in which the Court discussed criteria that would make probation an appropriate option. See e.g. *In re Stoddard*, 793 P.2d 373, 374-375, 377 (Utah 1990) (suspension stayed and probation imposed for unintentional lack of diligence, but attorney violated conditions and probation was revoked); *In re Knowlton*, 800 P.2d 806, 807, 809-810 (Utah 1990) (attorney intentionally converted funds belonging to one client as payment for a debt owed by another client; Court imposed six-month suspension, with five months stayed on condition of payment of restitution and costs);² *In re Johnson*, 830 P.2d 262, 262-263 (Utah 1992) (opinion alluded to attorney's probation by consent for what appear to have

more rigorous distinction between the two, and this Brief will not attempt to further distinguish them.

² Justice Stewart's opinion included a footnote stating that "a six-month suspension, even if five months is stayed, is oppressive and unreasonable." *Id.* at 810 n.5. He added, "Petitioner's conduct is not, in my view, that egregious." *Id.* He also cautioned that "it is ill-advised to impose an over long period of suspension and then stay part of it to gain leverage to compel an attorney to comply with other specific remedies. There are ample means to compel compliance short of that." *Id.*

been diligence and communication problems, but probation was revoked and this case involved allegations of attorney practicing while suspended); *In re Schwenke*, 849 P.2d 573, 575 (Utah 1993) (opinion noted Court's acceptance of Bar recommendation to place attorney on supervised probation for neglect of two matters; this case addressed allegations concerning attorney's failure to comply with Court orders); *In re Cassity*, 875 P.2d 548, 548 (Utah 1994) (public reprimand and six months' probation for case prosecuted as fee dispute).³

D. The American Bar Association's Standards for Imposing Lawyer Sanctions Include Probation as a Potential Discipline But Do Not Provide Criteria for Employing It

Utah's Standards are a substantially revised and streamlined version of the American Bar Association Standards for Imposing Lawyer Sanctions ("ABA's Standards"). See Summary, Standards; *In re Babilis*, 951 P.2d 207, 212. Their purposes "are nonetheless the same." *Babilis*, 951 P.2d at 212.

The ABA's Standards identify probation among the possible sanctions for professional misconduct. See Standard 2.7, ABA Standards for Imposing Lawyer Sanctions, as amended Feb. 1992. The language of the ABA's probation provision differs from the one employed in Utah, but its effect is similar: "Probation is a sanction that allows a lawyer to practice under specified conditions. Probation can be imposed alone or in conjunction with a reprimand, an admonition or immediately following a suspension. Probation can also be imposed as a condition of readmission or

³ This case is discussed in greater detail below.

reinstatement.” *Id.* Notably, the ABA Standards do not include a suggested framework for determining when probation is appropriate, nor do they offer guidance concerning how it should be imposed.

E. Probation Is Available In Most Other States, But the Criteria for Imposing It Vary

With some exceptions, the disciplinary rules of other states include probation among the range of sanctions available for attorney misconduct. The OPC has compiled summary information concerning these rules. See Summary Chart of State Rules Governing Probations and Stayed Suspensions, a copy of which is provided in the Addendum. Conceptually, the states may be divided into those in which probation is not provided for under the rules governing attorney discipline but the courts sometimes impose it pursuant to their inherent authority; those in which probation is available under conditions specified in the rules; and those, such as Utah, in which probation is explicitly provided for, but no criteria are identified in the rules.

1. Some Jurisdictions Have Rules Permitting Probation Only When Specified Conditions Have Been Satisfied

Jurisdictions with rules permitting probation often identify conditions that must be satisfied before probation can be imposed. These often include a proviso that probation may only be imposed if there is little likelihood of harm to the public. See e.g. Rule 8(h), Ala. R. of Disciplinary Pro. Others include a proviso that the conditions of probation must be adequately supervised. See e.g. Section 17E(7), Ark. Sup. Ct. Pro. of Regulating Conduct of Attorneys at Law.

Even where probation is permitted under certain conditions, the rules in other jurisdictions usually are silent concerning the underlying misconduct and mental state for which probation may be imposed. The exception is that a handful of rules in other jurisdictions expressly limit probations to conduct that would not warrant disbarment. See e.g. Rule 251.7, Colo. R. Civ. Pro. As far as the OPC can tell, Texas is the only state with more finely calibrated criteria related to the misconduct itself. See Rule 15.11, Texas R. of Disciplinary Pro. (probation cannot be used if respondent received public reprimand or fully probated suspension in last five years for same rule violations, or two fully probated suspensions in last five years, or received two public reprimands in last five years for conflict of interest, theft, or failure to return clearly unearned fee).

2. Reported Cases From Other Jurisdictions Sometimes Offer a Useful Perspective on Probation as a Disciplinary Sanction

The OPC's search for reported cases involving probation as a disciplinary sanction revealed numerous cases in which probation was employed without comment from the court concerning the underlying misconduct and attorney's mental state that might warrant such a sanction. Several cases were more helpful in articulating the courts' reasoning, however, and these are summarized here.

In its first such decision, *In re Jantz*, the Supreme Court of Kansas⁴ considered whether to stay the suspension of an attorney who converted client funds and lied to a judge about it. See *In re Jantz*, 763 P.2d 626, 772-773 (Kan. 1988) (noting that the

⁴ Kansas is a jurisdiction in which probation is not explicitly provided by rule.

court had "not used probation nor have we 'suspended' the execution of such suspension."). Pursuant to the Kansas Supreme Court Rules Relating to Discipline of Attorneys, which provide for disbarment, suspension, censure, or informal admonition, and "[a]ny other form of discipline or conditions separate from or connected to any type of discipline stated above, . . . which the Supreme Court deems appropriate,"⁵ the Kansas Supreme Court adopted the hearing panel's recommendation. See *id.* at 775-776. The court emphasized, however, that the case was "unique" because of the many mitigating circumstances,⁶ and noted that it had "rarely failed to disbar or suspend any attorney whose professional misconduct parallels that of the respondent." *Id.* at 775.

The unique circumstances were these:

The conduct complained of here took place within a very short period of time; there were no complaints against respondent prior to these incidents. These took place when respondent was under severe emotional distress, caused by the terminal illness of his father and his own financial problems. Mr. Jantz admitted his misconduct to the judge promptly. He has admitted the misconduct to his client and to the bar where he practices. He made prompt restitution of the funds, which were not at that time due the client but were paid by him into the hands of the clerk of the district court, to await further order of the court. By the time the disciplinary proceedings were underway, Jantz had already made restitution, had commenced professional counseling (which is continuing), and had prepared a plan for retirement of his debts and financial obligations. We were told at the time of oral argument that he has made a substantial reduction of his obligations since the panel hearing in March of this year. His practice is growing, indicating that he is accepted by the members of the bench and bar as well as the residents of the community where he resides and practices.

⁵ Rule 203(a)(5), Kan. Sup. Ct. R. Relating to Discipline of Attorneys.

⁶ Apparently there were no aggravating factors, either.

Id.

Since then, the Kansas Supreme Court has rejected other requests for probation, noting that “unique” circumstances are those “from which it reasonably could be inferred that the attorney’s misconduct was a one-time response to adversity and that it would be highly unlikely that he would repeat his mistake.” See e.g. *In re Scimeca*, 962 P.2d 1080, 1090 (Kan 1998) (indefinitely suspended respondent, among other things, for engaging in conduct prejudicial to the administration of justice and for misconduct in dealing with clients, notwithstanding his contention that he suffers from depression and is treating it, has filed personal and business bankruptcies, his son suffers from a head injury, he apologized to the judge, and the incident involving the judge was isolated).

In New Hampshire,⁷ the Supreme Court considered probation for an attorney’s trust account violations that involved among other things, commingling and failures to maintain proper trust account records. See *In re Morgan’s Case*, 727 A.2d 985, 987 (N.H. 1999). Although the attorney’s “apparent ignorance of the rules cannot justify their violation,” the court concluded that the mitigating factors included self-reporting, remedial efforts, stipulation to the facts, a lack of prior discipline, and absence of harm, warranted a conditionally delayed suspension. *Id.* The court observed: “It is significant that the respondent’s actions were not motivated by dishonesty, *for attorney misconduct*

⁷ New Hampshire is a jurisdiction without an explicit rule providing for probation.

involving dishonesty reflects most negatively on the legal profession and will not be tolerated." *Id.* (emphasis added).

In Oregon,⁸ the Supreme Court rejected probation for an attorney's intentional dishonesty with a client, noting that a condition of probation is only appropriate when there is a correlation between it and the ethical violation. *See e.g. In re Butler*, 921 P.2d 401, 404 (Ore. 1996). It concluded that "a lengthy suspension will provide greater protection to the public." *Id.* More recently, the Supreme Court of Oregon "advise[d] the Bar that we do not favor probationary terms unless they are the result of stipulation. When a lawyer's misconduct is sufficiently serious to warrant a lengthy probationary period, the uncertainties of the monitoring process lead us to prefer, when appropriate, imposition of a sanction involving a concrete period of time." *In re Obert*, 89 P.3d 1173, 1181 (Ore. 2004).

The Supreme Court of Minnesota⁹ may grant probation, but "only [in] the most extreme, extenuating circumstances," such as physical illness that precipitated a severe depressive reaction which was causally related to the misconduct and had been remedied; the misconduct had been rectified; there was no indication of fraud or deceit; the attorney had made significant community contributions, and had no disciplinary history. *See In re McCallum*, 289 N.W.2d 146, 147 (Minn. 1980).

⁸ Oregon has a rule providing for probation.

⁹ Minnesota's rules provide for probation.

Probation is imposed infrequently in the District of Columbia,¹⁰ and only when the respondent's conduct was influenced by a remediable disability. See e.g. *In re Bradbury*, 608 A.2d 1218, 1219 (D.C. 1992); see also *In re Stow*, 633 A.2d 782, (D.C. 1993) (probation appropriate for neglect of practice in light of respondent's acquiescence in sanction).

F. Probation Appears to Be Emerging As a Sanction Imposed Sua Sponte By the District Court

Last year, the District Court imposed a one-year suspension upon an attorney who violated various Rules of Professional Conduct in several client matters, but granted the attorney leave to petition the court to stay all but three months on condition that she undergo supervision for up to nine months. See Ruling and Order Re: Sanctions, *In re Lang*, Case Nos. 010910847 and 030908681, March 28, 2005, a copy of which is supplied in the Addendum. The attorney had violated Rules 1.3 (Diligence), 1.4(a) and (b) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(d) (Misconduct), and 8.4(a) (Misconduct). See *id.* at 1. With the exception of her failure to respond to the OPC, none of the violations were intentional; some violations were knowing, others were merely negligent. See *id.* at 5-9. There were aggravating factors in the form of dishonest and selfish motives as to some misconduct; a pattern of misconduct; multiple offenses; obstruction of the disciplinary process; refusal to acknowledge the wrongful nature of the misconduct; and substantial experience with

¹⁰ Minnesota's rules provide for probation.

respect to some matters. See *id.* at 9-12. Mitigating factors were: absence of a prior record (but this was accorded little weight); inexperience as to some of the matters; and interim reform. See *id.* at 12-15. The court found that suspension was the presumptive sanction, although it noted that disbarment might be justified and appropriate. See *id.* at 15.

The District Court “wrestled with its options,” in the face of “the recurring question [of] just what sanction might give [the attorney] the best possible chance to make fundamental changes that could substantially improve her prospects of practicing law until retirement without being plagued by continuing allegations of professional misconduct.” *Id.* at 15. The court explained its reasons for permitting the lawyer to petition for a stay:

The OPC argues for a suspension of at least six months and one day, but the preferred sanction is a one year suspension. As already indicated, this court does not believe that the presumption of suspension is overcome in this case in any way that would justify the lesser sanctions urged by [the attorney]. Accordingly, the sanction must include suspension, but the court firmly believes that a suspension of six months, or even one year, without a more proactive component, will do anything to change [the attorney's] professional conduct in the long term. There must be a term of actual suspension to bring home the seriousness of this lawyer's misconduct, but the court determines that there must also be a period of supervised practice to give [the attorney] a chance to see how family law can and should be practiced at the highest levels of professional responsibility, with due regard for clients, other counsel, and the courts.

Id. at 15-16. Ultimately, the attorney successfully petitioned for the stay of suspension. See Order Staying the Respondent's Suspension and Concerning the Respondent's

Reinstatement to the Practice of Law Upon Termination of the Period of Suspension, *In re Lang*, Civil No. 010910847, a copy of which is included in the Addendum.

Although it had urged a sanction other than probation, the OPC concluded the District Court had not erred in imposing the suspension plus probation in the foregoing case. Indeed, the OPC has sometimes stipulated to proposals for a respondent's probation when the misconduct originated from something that clearly could be remedied and the OPC is also persuaded of the attorney's commitment to change and to cooperate. For example, negligent conduct in violation of the rule requiring a lawyer to "provide competent representation to a client;"¹¹ negligent conduct in violation of the rule requiring lawyers to "act with reasonable diligence and promptness in representing a client;"¹² negligent conduct in violation of the rule requiring a lawyer to keep a client reasonably informed about the status of the matter.¹³ In such circumstances, where it appears that appropriate additional training or mentoring would eliminate the problems without further injury to any client, probation is arguably the most effective means of securing long-term protection of the public. Significantly, progress can be reported, measured, and verified if necessary, thereby adequately insuring protection of the public, the courts, and the profession.

¹¹ Rule 1.1, R. Pro. Con.

¹² Rule 1.3, R. Pro. Con.

¹³ Rule 1.4, R. Pro. Con.

G. The OPC Urges the Court to Exercise Its Special Role in Governing the Practice of Law By Providing the Guidance Requested

Pursuant to Utah Constitution, the Supreme Court "plays a special role in governing the practice of law," which "includes overseeing the discipline of persons admitted to practice law." *In re Ince*, 957 P.2d 1233, 1236 (Utah 1998). Trial court findings are reviewed under a clearly erroneous standard, but the Court "reserve[s] the right to draw different inferences from the facts than those drawn by the trial court." *Id.* Significantly, "[w]ith respect to the discipline actually imposed, our constitutional responsibility requires [the Court] to make an independent determination as to its correctness." *Id.* In one of the first cases brought under the new disciplinary scheme inaugurated in 1993, the Court said, "Although we recognize as a general proposition the district court's advantaged position in overall familiarity with the evidence and the context of the case, on appeal we must treat the ultimate determination of discipline as our responsibility." *Babilis*, 951 P.2d 207, 213.

The Court has exercised this role in the past by providing guidance concerning how the Standards should be applied. For example, in the *Ince* case, the Court noted that "Although the new Standards are intended to preserve a measure of flexibility in assigning sanctions, the whole basis for their adoption was to avoid the uncertainty that existed under the old rules. Therefore, we offer the following guidance as to the application of aggravating and mitigating circumstances under rule 6 [of the Standards]." *In re Ince*, 957 P.2d 1233, 1236 (Utah 1998) (aggravating and mitigating factors must be

significant to warrant departing from presumptive level of discipline set forth in Standards).

Justice Durham's concurring and dissenting opinion in another disciplinary matter, *In re Johnson*, elaborated upon the Court's role in attorney misconduct matters:

This court is charged by the Utah Constitution with the obligation to regulate the practice of law. We have delegated the screening, fact-finding, and initial judgment regarding discipline to the Utah State Bar and to the district courts, but we retain the final authority to oversee the system. When the prosecuting entity and the disciplined attorney accede to the appropriateness of the disciplinary sanction imposed by the trial courts, or at least fail to challenge it, we lend out constitutional authority to the finality of the determination. Such trial court decisions, of course, create no precedent for the disposition of other cases. Where a sanction is challenged, however, this court undertakes a function that goes beyond the review of an individual case. We arbitrate questions of proportionality, rules of law, and guidelines for the imposition of sanctions that have general application for the practice of law in Utah. Our decisions interpret the Rules of Professional Conduct and develop the principles of application that will guide lawyers, the Bar, and the trial courts.

In re Johnson, 2001 UT 110, ¶ 21 (Durham, J., concurring and dissenting). Justice Durham also noted the trial courts' "more limited perspective on the disciplinary system" and observed that "[i]t is not at all unexpected that a trial judge's best assessment of the trend of developing law turns out to be 'wrong' in the sense that this court will reject it and opt for a different interpretation or policy." *Id.* at ¶ 23.

It is in this spirit that the OPC seeks review of the Henderson case and its companion case, *In re Crawley*. The Court's decision here will have a significant bearing on future disciplinary cases, as well as the cases in issue here.

II. PROBATION SHOULD ONLY BE AVAILABLE FOR MISCONDUCT THAT IS AMENDABLE TO CORRECTION

A. Probation Is an Appropriate Sanction for Some Misconduct

Consistent with the goal of protecting the public and the administration of justice, probation is a means of ensuring that reform has occurred. Likewise, probation imposed in conjunction with other sanctions and remedies, such as a requirement that the lawyer attend continuing education courses, or work under the supervision of another lawyer,¹⁴ is a significant tool for ensuring and maintaining high standards of professional conduct.¹⁵

The factors for determining when to use probation are a more difficult question. Rule 4 of Utah's Standards identifies the presumptive sanctions for certain types of misconduct, but does not include probation as an appropriate presumptive sanction. See Rule 4, Standards. Accordingly, probation appears to be an appropriate final sanction—that is, a sanction ultimately imposed upon consideration of the factors identified in Rule 3 of the Standards, which include the duty violated, the lawyer's mental state, the potential or actual injury caused by the misconduct, and aggravating

¹⁴ Rule 2 of the Standards provides for the imposition of other sanctions and remedies, including "a requirement that a lawyer attend continuing education courses." Rule 2.9, Standards.

¹⁵ The American Bar Association's Standing Committee on Professional Discipline has observed that if probation is not available as a sanction for lawyers in need of supervision but who could "perform useful services," the only choices are "suspension, which involves an unnecessary deprivation of the lawyer's livelihood, or continuation of practice, which involves a possible threat to the public." *Louisiana State Bar Ass'n v. Longenecker*, 538 So.2d 156, 164 n.1 (La. 1989).

and mitigating factors—but not a presumptive sanction. See Rule 3.1, Standards. Probation, then, is a legitimate ultimate solution, but when should it be imposed?

B. The Factors Identified in Rule 3 of the Standards Should Be Considered in Imposing a Sanction of Probation

Although the Standards are brief, being comprised of just six rules, they are nevertheless loaded with the criteria necessary for promoting a rational and thorough consideration of all relevant factors. Rule 3 is the rule that explicitly draws together these factors:

The following factors should be considered in imposing a sanction after a finding of lawyer misconduct:

- (a) The duty violated;
- (b) The lawyer's mental state;
- (c) The potential or actual injury caused by the lawyer's misconduct;
and
- (d) The existence of aggravating or mitigating factors.

Rule 3.1, Standards. The sanctions of resignation with discipline pending and reciprocal discipline are not governed by Rule 3 because the factors are inapplicable, and they are addressed by explicit separate provisions of the RLDD. By contrast, the factors identified in Rule 3 are readily applicable in probation settings, and probation is not addressed by the RLDD. Accordingly, the Rule 3 factors should be considered in imposing the sanction of probation, and these are discussed below.

Lawyers owe duties to clients, tribunals, the public, and the profession. These are not set forth in the Standards, but are embedded in the Rules of Professional Conduct. For example, duties to clients are inherent in the rules requiring an attorney

to provide competent, diligent representation and adequate communication. See e.g. Rules 1.1, 1.3, and 1.4, R. Pro. Con. A lawyer has a duty to maintain the integrity of the profession. See e.g. Rules 8.1 and 8.3, R. Pro. Con. Of particular significance for this case, a lawyer also owes duties of honesty and candor to tribunals and opposing counsel, as well as a duty of fairness to opposing parties. See e.g. Rules 8.4, 4.1, 4.4, R. Pro. Con.

As to the relevant mental states, these are identified and defined in the Standards:

“Intent” is the conscious objective or purpose to accomplish a particular result.

“Knowledge is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

“Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

Definitions, Standards.

Injury may be actual or potential, and its level can range from “serious” to “little or no.” See Definitions, Standards. Injury and potential injury includes harm to clients, the public, the legal system, or the profession. See *id.*

The Standards set forth a non-exhaustive list of aggravating and mitigating circumstances in Rule 6, and this Court has provided guidance concerning their

existence and the weight they should be accorded. See Rule 6, Standards; see also e.g. *In re Ince*, 957 P.2d 1233 (Utah 1998).

C. In the OPC's View, Probation Is Not Appropriate When the Respondent Has Intentionally or Knowingly Violated Duties of Honesty and Candor

Employing the Rule 3 factors, the OPC has concluded that probation should not be available as a sanction when the duty violated was the duty to deal honestly with clients, tribunals, or third parties, and when the lawyer's mental state in committing the misconduct was knowing or intentional. Further, probation is not appropriate when certain aggravating factors are present, a point addressed later.

Any sanction should maintain respect for the profession and protect the public, and should be sufficient to prevent recurrence of the misconduct and deter others from engaging in similar misconduct. Moreover, the degree of discipline must correspond to the gravity of the misconduct. Collectively, the question is whether the discipline is appropriate in light of the nature of the misconduct, the cumulative weight of the disciplinary rule violations, the potential harm to the public, and the harm to the legal profession itself.

With these considerations in mind, probations in disciplinary matters involving an attorney's intentional or knowing dishonesty are inappropriate because the misconduct reflects an absence of integrity that cannot be remedied with further training or supervision. Moreover, a respondent's reform cannot be verified. Indeed, absent 24-

hour supervision, a supervising attorney cannot possibly know if there have been further misrepresentations or other lapses of integrity.

The OPC's position derives in part from the seriousness with which the Court has treated discipline matters involving an attorney's lack of integrity in a variety of settings. See e.g. *In re Norton*, 146 P.2d 899, 900-901 (Utah 1944) (attorney "charged with an attempt to deceive this court" by intentionally misrepresenting that an exhibit had been admitted in evidence; although attempt was unsuccessful, the Court imposed one-year suspension); *In re Bybee*, 629 P.2d 423, 425 (Utah 1988) (attorney's lack of truthfulness and candor to a court warranted a suspension; such conduct, "if allowed without proper restraint and punishment, would undermine our system of justice."); *In re Cassity*, 875 P.2d 548, 551 (Utah 1994) (had Cassity's misrepresentation to a court "been charged and prosecuted before the hearing as an independent act of professional misconduct, disbarment or suspension may have been appropriate, but that was not the case."). In his concurring opinion in *Cassity*, Chief Justice Zimmerman wrote,

Conduct such as Cassity's factual misrepresentation to the court strikes at the heart of the legitimacy of the adversary system. The importance of a lawyer's obligation of candor to the tribunal cannot be overstated. Lawyers have an ethical obligation to be advocates for their clients, not to be their co-conspirators. . . . It would ignore reality to recognize that at times, cultural and economic pressures cause some lawyers to forget the distinction. . . . But when such conduct comes to light, I think it should be punished harshly to serve as continuing notice on errant members of the profession that we will not tolerate it. Severe punishment also assures the public that, despite the cynical teachings of popular culture that lawyers are prostitutes in nice clothing fit only for dinosaur food, in fact, lawyers are bound by rigid ethical standards which are designed to preserve the integrity of the adversary system.

Cassity, 875 P.2d at 552 (citations omitted) (Zimmerman, J., concurring).

D. Probation Should Only Be Available When Certain Aggravating Factors Are Not Present

Additionally, even in cases not involving misconduct based upon an attorney's intentional or knowing violation of duties of honesty, probation would not be appropriate when aggravating factors suggest that the respondent is unlikely to cooperate with the OPC and has not demonstrated the self-awareness that is a necessary component of a true commitment to change. In other words, an attorney whose misconduct was dishonestly motivated,¹⁶ who denies responsibility,¹⁷ who engages in deceptive practices during the disciplinary proceeding,¹⁸ or who displays an uncooperative attitude toward the proceedings,¹⁹ is an unlikely candidate for the rehabilitative possibilities offered by probation.

III. HENDERSON SHOULD NOT HAVE BEEN PLACED ON PROBATION GIVEN THE NATURE OF THE DUTIES VIOLATED AND THE AGGRAVATING CIRCUMSTANCES

A. Henderson Intentionally Misled the Tribunal

Henderson's lack of candor to the ALJ was intentional: he told the ALJ he had withdrawn from the representation because his client's case had settled, but the case

¹⁶ Rule 6.2(b), Standards (dishonest motive is an aggravating circumstance).

¹⁷ Rule 6.2(f), Standards (refusal to acknowledge wrongful nature of misconduct is an aggravating circumstance).

¹⁸ Rule 6.2(f), Standards (submission of false statements or evidence, or other deceptive practices during disciplinary process is an aggravating circumstance).

had not settled. This violation of Rule 3.3 was a failure of his most fundamental duty to the tribunal and the profession.

B. The Aggravating Factors Suggest That Henderson Is a Poor Candidate for the Reform That Is the Goal of Probation

As the Ruling and Order Re: Sanctions noted among the aggravating circumstances, Henderson had prior discipline, and indeed had been suspended for similar violations of the Rules of Professional Conduct: "failing to provide competent representation, failing to communicate with clients, missing a court hearing and filing a false Affidavit." For this misconduct, Henderson was suspended for two years, with all but six months stayed. See Findings of Fact and Conclusions of Law and Order of Suspension and Probation, *In re Henderson*, Civil No. 990910496, offered and accepted as OPC Exhibit 1, a copy of which is reproduced in the Addendum. This was entitled to significant weight in determining the appropriate ultimate sanction, among other things because Henderson did not learn from it, and it is difficult to see how Henderson's practices might benefit from another period of probation. Moreover, Henderson was in violation of the previous order. See *In re Doncouse*, 2004 UT 77 ¶ 19 (to effectively deter future misconduct, penalty for violating order of suspension must be more severe than original suspension).

¹⁹ Rule 6.2(e), Standards (obstruction of disciplinary proceeding by intentionally failing to comply with rules or orders is an aggravating circumstance).

Henderson also obstructed the disciplinary proceedings in various ways and refused to acknowledge his wrongdoing. How can someone with so little regard for the system and so little self-reflection be a good candidate for a successful probation?

CONCLUSION

The ultimate responsibility for disciplinary cases lies with this Court, and in light of its unique role in regulating the profession, the OPC asks the Court for guidance concerning the underlying misconduct and attorney's mental state for which probation is appropriate. Such guidance will provide enormous assistance to the OPC, the District Court, and future respondents, because it will promote consistency in sanctions for similar types of misconduct.

If the OPC has correctly concluded that probation is inappropriate as a sanction for misconduct involving an attorney's breach of the fundamental duty of honesty to clients or the courts or third parties, particularly when there are significant aggravating factors suggesting that the respondent attorney is not amenable to reform, the OPC asks the Court to adopt this as a bright-line test for determining the availability of probation.

Additionally, if the Court concludes that the District Court erred in permitting Henderson to petition for probation after a period of actual suspension, the OPC requests

that the Court reverse that portion of the Ruling and Order Re: Sanctions and impose the full term of suspension upon Henderson.

DATED: August 25, 2006.

OFFICE OF PROFESSIONAL CONDUCT

Kate A. Toomey
Kate A. Toomey
Deputy Counsel

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of August, 2006, I caused to be mailed via United States first-class mail, postage pre-paid, two true and correct copies of the foregoing Brief of Appellant to: John T. Caine, counsel for the Respondent, J. Keith Henderson, at RICHARDS CAINE & ALLEN, PC, 2550 Washington Blvd., Suite 300, Ogden, Utah 84401; and Gregory Skordas, counsel for the Respondent, Steven Crawley at SKORDAS, CASTON & HYDE, Boston Bldg., Suite 1104, 9 Exchange Place, Salt Lake City, Utah 84111.

Kate A. Toomey

ADDENDUM

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Rules of Central Importance Cited in the Brief

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- Rule 3. Factors to Be Considered in Imposing Sanctions, Standards for Imposing Lawyer Sanctions.
- Rule 4. Imposition of Sanctions, Standards for Imposing Lawyer Sanctions.
- Rule 6. Aggravation and Mitigation, Standards for Imposing Lawyer Sanctions.

Findings of Fact and Conclusions of Law, and Summary Judgment, *In re Henderson*, Civil No. 040903585

Ruling and Order Re: Sanctions, *In re Henderson*, Civil No. 040903585

Findings of Facts and Conclusions of Law and Order of Suspension and Probation, *In re Henderson*, Civil No. 990910496, offered and accepted as OPC Exhibit 1

Ruling and Order Re: Sanctions, *In re Lang*, Civil Nos. 010910847 and 030908681

Order Staying the Respondent's Suspension and Concerning the Respondent's Reinstatement to the Practice of Law Upon Termination of the Period of Suspension, *In re Lang*, Civil Nos. 010910847 and 030908681

Summary Chart of State Rules Governing Probations and Stayed Suspensions

Rules of Central Importance Cited in the Brief

Rule 2. Sanctions, Standards for Imposing Lawyer Sanctions.

2.1. Scope. A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgement that the lawyer has engaged in professional misconduct.

2.2. Disbarment. Disbarment terminates the individual's status as a lawyer. A lawyer who has been disbarred may be readmitted as provided in Rule 25 of the Rules of Lawyer Discipline and Disability.

2.3. Suspension. Suspension is the removal of a lawyer from the practice of law for a specified minimum period of time. Generally, suspension should be imposed for a specific period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years.

(a) A lawyer who has been suspended for six months or less may be reinstated as set forth in Rule 24 of the Rules of Lawyer Discipline and Disability.

(b) A lawyer who has been suspended for more than six months may be reinstated as set forth in Rule 25 of the Rules of Lawyer Discipline and Disability.

2.4. Interim suspension. Interim suspension is the temporary suspension of a lawyer from the practice of law. Interim suspension may be imposed as set forth in Rules 18 and 19 of the Rules of Lawyer Discipline and Disability.

2.5. Reprimand. Reprimand is public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

2.6. Admonition. Admonition is nonpublic discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

2.7. Probation. Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be public or nonpublic, can be imposed alone or in conjunction with other sanctions, and can be imposed as a condition of readmission or reinstatement.

2.8. Resignation with discipline pending. Resignation with discipline pending is a form of public discipline which allows a respondent to resign from the practice of law while either an informal or formal complaint is pending against the respondent. Resignation with discipline pending may be imposed as set forth in Rule 21 of the Rules of Lawyer Discipline and Disability.

2.9. Other sanctions and remedies. Other sanctions and remedies which may be imposed include:

- (a) restitution;
- (b) assessment of costs;
- (c) limitation upon practice;
- (d) appointment of a receiver;
- (e) a requirement that the lawyer take the bar examination or professional responsibility examination; and
- (f) a requirement that the lawyer attend continuing education courses.

2.10. Reciprocal discipline. Reciprocal discipline is the imposition of a disciplinary sanction on a lawyer who has been disciplined in another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction.

Rule 3. Factors to Be Considered in Imposing Sanctions, Standards for Imposing Lawyer Sanctions.

3.1. Generally.

The following factors should be considered in imposing a sanction after a finding of lawyer misconduct:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors.

Rule 4. Imposition of Sanctions, Standards for Imposing Lawyer Sanctions.

4.1. Generally.

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.1, the following sanctions are generally appropriate.

4.2. Disbarment.

Disbarment is generally appropriate when a lawyer:

(a) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct with the intent to benefit the lawyer or another or to deceive the court, and causes serious or potentially serious injury to a party, the public, or the legal system, or causes serious or potentially serious interference with a legal proceeding; or

(b) engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution, or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(c) engages in any other intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.

4.3. Suspension.

Suspension is generally appropriate when a lawyer:

(a) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceeding; or

(b) engages in criminal conduct that does not contain the elements listed in Standard 4.2(b) but nevertheless seriously adversely reflects on the lawyer's fitness to practice law.

4.4. Reprimand.

Reprimand is generally appropriate when a lawyer:

(a) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional

Conduct and causes injury to a party, the public, or the legal system, or causes interference with a legal proceeding; or

(b) engages in any other misconduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

4.5. Admonition.

Admonition is generally appropriate when a lawyer:

(a) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes little or no injury to a party, the public, or the legal system or interference with a legal proceeding, but exposes a party, the public, or the legal system to potential injury or causes potential interference with a legal proceeding; or

(b) engages in any professional misconduct not otherwise identified in this Standard 4 that adversely reflects on the lawyer's fitness to practice law.

Rule 6. Aggravation and Mitigation, Standards for Imposing Lawyer Sanctions.

6.1. Generally.

After misconduct has been established, aggravating and mitigating circumstances may be considered and weighed in deciding what sanction to impose.

6.2. Aggravating circumstances.

Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Aggravating circumstances may include:

- (a) prior record of discipline;
- (b) dishonest or selfish motive;
- (c) a pattern of misconduct;
- (d) multiple offenses;
- (e) obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge the wrongful nature of the misconduct involved, either to the client or to the disciplinary authority;

- (h) vulnerability of victim;
- (i) substantial experience in the practice of law;
- (j) lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved; and
- (k) illegal conduct, including the use of controlled substances.

6.3. Mitigating circumstances.

Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Mitigating circumstances may include:

- (a) absence of a prior record of discipline;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify the consequences of the misconduct involved;
- (e) full and free disclosure to the client or the disciplinary authority prior to the discovery of any misconduct or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) good character or reputation;
- (h) physical disability;
- (i) mental disability or impairment, including substance abuse when:
 - (1) The respondent is affected by a substance abuse or mental disability; and
 - (2) The substance abuse or mental disability causally contributed to the misconduct; and
 - (3) The respondent's recovery from the substance abuse or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 - (4) The recovery arrested the misconduct and the recurrence of that misconduct is unlikely;
- (j) unreasonable delay in disciplinary proceedings, provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated prejudice resulting from the delay;
- (k) interim reform in circumstances not involving mental disability or impairment;
- (l) imposition of other penalties or sanctions;
- (m) remorse; and
- (n) remoteness of prior offenses.

6.4. Factors which are neither aggravating nor mitigating.

The following circumstances should not be considered as either aggravating or mitigating:

- (a) forced or compelled restitution;
- (b) withdrawal of complaint against the lawyer;
- (c) resignation prior to completion of disciplinary proceedings;
- (d) complainant's recommendation as to sanction; and
- (e) failure of injured client to complain.

FILED OCT 10 1965
THIRD DISTRICT COURT
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E-1

In the Matter of the)	FINDINGS OF FACT AND
Discipline of:)	CONCLUSIONS OF LAW,
)	AND SUMMARY JUDGMENT
)	
J. Keith Henderson, #01459)	Civil No. 040903585
)	
Respondent.)	Judge L. A. Dever

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Based on the foregoing the Court makes the following Findings of Fact and Conclusions of Law as to the misconduct phase of these proceedings.

FINDINGS OF FACT

1. On September 10, 1994, Mr. Blakley was involved in an on the job accident ("Accident") when the truck he was driving overturned.

2. Mr. Blakley retained Mr. Henderson to pursue unpaid worker's compensation claims that Mr. Blakley filed with the worker's compensation insurance carrier, American Insurance Company ("American Insurance").

3. Mr. Henderson knew that Mr. Blakley was pursuing a personal injury claim against the other driver in the Accident.

4. Mr. Henderson did not inform Mr. Blakley that a settlement in the personal injury case could affect Mr. Blakley's worker's compensation claim.

5. Around January 2000, Mr. Blakley's personal injury attorney settled the personal injury claim against the third party defendant in the Accident.

6. On or about February 3, 2000, Mr. Henderson filed an Application for Hearing requesting a hearing before the Labor Commission for the State of Utah ("Labor Commission") regarding Mr. Blakley's unpaid worker's compensation claims.

7. Prior to filing the Application for Hearing, Mr. Henderson failed to determine the status of Mr. Blakley's personal injury case.

8. On March 16, 2000, American Insurance filed an Amended Response to Application for Hearing asserting a counterclaim for reimbursement for past payments

and offset of future payments to Mr. Blakley because Mr. Blakley received settlement proceeds from the defendant in his personal injury case.

9. The Labor Commission set a hearing on Mr. Blakley's worker's compensation claim for June 2, 2000.

10. Mr. Henderson did not give Mr. Blakley a copy of the Response to Application Hearing or the Amended Response to Application for Hearing before June 2, 2000.

11. On June 2, 2000, Mr. Henderson met with Mr. Blakley just prior to the hearing and as they traveled to the hearing.

12. Prior to and after the June 2, 2000 hearing, Mr. Henderson failed to fully explain to Mr. Blakley how Mr. Blakley's settlement in his personal injury case would affect his pending and future worker's compensation claims.

13. At the June 2, 2000 hearing, Debbie L. Hann, the Administrative Law Judge ("ALJ") continued the hearing without date to see if the parties could reach a settlement regarding the amount of compensation that American Insurance would receive.

14. After the June 2, 2000 hearing, Mr. Blakley did not hear again from Mr. Henderson until he received Mr. Henderson's letter dated November 30, 2000, stating that American Insurance had a right to the third party personal injury settlement and Mr. Blakley was not entitled to recover a worker's compensation award.

15. On November 9, 2000, the Third District Court for the State of Utah entered an Order suspending Mr. Henderson from the practice of law for two years, with all but six months stayed.

16. Mr. Henderson did not notify Mr. Blakley that he was being suspended from the practice of law and could no longer represent Mr. Blakley.

17. Mr. Henderson did not inform Mr. Blakley that he needed to get another attorney or he would need to represent himself pro se in the matter.

18. Mr. Henderson did not provide Mr. Blakley with a copy of his file.

19. Mr. Henderson did not notify Mr. Blakley that the next hearing in his case was set for February 27, 2001 and that Mr. Blakley should attend the hearing.

20. On or about February 27, 2001, the ALJ conducted a status conference hearing in Mr. Blakley's case.

21. When Mr. Henderson did not appear at the February 27, 2001 hearing, the ALJ telephoned Mr. Henderson.

22. During the February 27, 2001 telephone conversation, Mr. Henderson informed the ALJ that he had withdrawn from the case because the case had settled.

23. As of February 27, 2001, Mr. Blakley had not reached a settlement with American Insurance.

24. During the February 27, 2001 telephone conversation, the ALJ directed Mr. Henderson to file a withdrawal of counsel within ten days so the case could be moved forward.

25. Mr. Henderson did not submit his withdrawal of counsel to the Labor Commission until October 15, 2002.

26. On December 27, 2004, the OPC served by mail discovery requests on Mr. Henderson, consisting of Interrogatories, Request for Admissions, and Request for Production of Documents.

27. On April 11, 2005, Mr. Henderson served by mail Respondent's Response to the Utah State Bar's OPC's Interrogatories, Response to Request for Production of Documents and Discovery Requests Requests for Admissions dated April 8, 2005.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

Mr. Henderson's Motion for Withdrawal of Admissions

Rule 36(b) of the Utah Rules of Civil Procedure says that any matter admitted under this Rule is conclusively established unless the court commits to withdrawal or amendment of the admission. The case *Langeland v. Monarch Motors* sets out the standard for determining whether or not it is proper to allow these matters to be withdrawn or amended. 952 P.2d 1058 (Utah, 1998). It says that Mr. Henderson must show: 1) That the matter deemed admitted against him is relevant to the merits of the underlying cause of action; and 2) Introduce some evidence by affidavit or otherwise of specific facts indicating that the matters deemed admitted are in fact untrue. The Court deduces the answers to the admissions are denied and that is all he says. The Court

reviewed the answers to the interrogatories. The vast majority of which says this is information that has previously been supplied. The Court believes Mr. Henderson has failed to meet the standard under Rule 36(b) of the Utah Rules of Civil Procedure and will not allow his submissions to be withdrawn.

OPC's Motion for Summary Judgment

Based upon the information before the Court and the admissions that have been deemed admitted by the Court, summary judgment will be granted to Bar counsel in this matter regarding rules 1.1, 1.4, 1.16(d), 3.3(a), 8.4(a) and 8.4(d) of the Rules of Professional Conduct as alleged by the OPC in its Complaint.

JUDGMENT

Based upon its Findings of Fact and Conclusions of Law, the Court hereby enters summary judgment against Mr. Henderson as to Counts One, Two, Three, Four, Five and Six of the OPC's Complaint. A sanction hearing will be held on January 30, 2006 beginning at 2:00 p.m.

Entered this 13 day of December 2005.

BY THE COURT:


Honorable L. A. Devera
Third Judicial District Judge



FILED 2006 FEB 13 10:08 AM
Third Judicial District

FEB 13 2006

By DF SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Discipline of:: RULING AND ORDER RE: SANCTIONS

J. KEITH HENDERSON, #01459, : CASE NO. 040903585

Respondent. :

The first part of this bifurcated matter was tried before the Court on November 25, 2005. The Office of Professional Conduct ("OPC") was represented by counsel, Diane K. Akiyama. The respondent was personally present and was represented by counsel, John T. Caine.

Findings of Fact and Conclusions of Law were entered on December 13, 2005.

The Court found that Mr. Henderson had violated several Rules of Professional Conduct, to wit: Rules 1.1 (Competence); 1.4 (Communication); 1.16(d) (Declining or Terminating Representation; 3.3 (Candor Toward the Tribunal); and 8.4 §§ (a) and (d) (Misconduct).

After the Court entered its Findings and Conclusions, the Court commenced the sanctions hearing on January 30, 2006, the date agreed to by the parties.

The respondent was present and represented by Mr. Caine and the OPC was represented by Ms. Akiyama.

Testimony was taken, with witnesses appearing for both sides. The Court having considered the testimony, exhibits, Memoranda and arguments,

now enters the following Ruling and Order imposing sanctions upon Mr. Henderson as a result of the violations previously adjudicated.

Pursuant to the Standards: "A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgment that the lawyer had engaged in professional misconduct." Rule 2.1. As indicated above, in this case the determination of violations is based on this Court's Findings and Conclusions, and not on any acknowledgment by Mr. Henderson.

The factors the Court must consider in imposing sanctions are set forth in Rule 3.1. They are: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors. The Court believes that these factors, in the order stated, are a useful framework for consideration of the appropriate sanction in this case:

DUTIES VIOLATED BY THE RESPONDENT

Mr. Henderson violated numerous duties to his client, the Court and legal system, the public, and to the profession.

Duties to clients: Mr. Henderson violated duties to his client with respect to competence, communication, and termination of representation. Mr. Henderson lacked the thoroughness reasonably necessary by filing a claim with the Labor Commission prior to ascertaining the status of Mr. Blakley's personal injury case.

Mr. Henderson also violated his duty to Mr. Blakley by failing to fully explain the impact of the personal injury settlement, his

suspension from practice on the worker's compensation matter and to protect the client's interests upon his withdrawal of the representation.

Duties to the Court and legal system: An attorney violates his duty to the Court and the legal system when he submits misleading information to a tribunal. Mr. Henderson violated his duty to the legal system by knowingly misrepresenting to the Administrative Law Judge that the worker's compensation case had settled when in fact it had not. He also violated his duty by failing to timely file his withdrawal with the Labor Commission and comply with the tribunal's orders.

Duties to the public: Mr. Henderson violated his duty to the public by failing to abide by the procedural requirements of withdrawing from the representation and by making a misrepresentation to the tribunal. These actions violated his duty to the public to maintain the standard of personal integrity.

Duties to the profession: His misrepresentation to the tribunal violated Mr. Henderson's duty to the profession. As noted in the trial brief of the OPC, truth and candor are synonymous with justice, and honesty is an implicit characteristic of the legal profession. Mr. Henderson's failure to promptly withdraw as required and later directed by the ALJ also violated his duty to the profession.

MENTAL STATE OF THE RESPONDENT

Three mental states (intent, knowledge, and negligence) may be considered pursuant to the Standards, and the determination of which

applies has a significant bearing on the presumptive sanction for the violation(s), as does the injury factor. The three mental states are defined in the Standards, as follows:

"Intent" is the conscious objective or purpose to accomplish a particular result.

"Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

"Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

As pointed out in the brief of the OPC, Courts ought to evaluate the attorney's mental state based upon the facts and the reasonable inferences to be drawn therefrom.

Since the Court has already determined that Mr. Henderson violated Rule 3.3(a) of the Rules of Professional Conduct, the Court can infer that Mr. Henderson's mental state of mind was intentional. The Court can also infer that Mr. Henderson acted intentionally, or at least knowingly, when he failed to comply with the tribunal's order to file a Withdrawal of Counsel. Mr. Henderson knew he was required to inform all courts, opposing counsel, and clients that he had been suspended from the practice of law. Even after being directly ordered by the ALJ to file his Withdrawal of Counsel, Mr. Henderson did not file his Withdrawal until October 15, 2002, after he received the Bar Complaint. See, Findings at 4-5, Nos. 24-25.

It can also be inferred that Mr. Henderson acted knowingly when he failed to adequately determine the status of Mr. Blakley's personal injury suit and communicate with Mr. Blakley. Mr. Henderson knew Mr. Blakley was pursuing a third party claim against the driver in the accident that was the basis of the worker's compensation claims. See, Findings at 2, Nos. 3-7.

ACTUAL AND/OR POTENTIAL INJURY CAUSED BY THE RESPONDENT

Utah's Standards provide that "injury is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct...." "Potential injury is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." Definitions, Standards.

Mr. Henderson caused potential harm to his client due to his lack of competence and communication. Mr. Blakley might not have chosen to pursue the worker's compensation claim had he been aware of the effect the personal injury settlement would have had on his claims. Mr. Henderson's failure to properly withdraw could have also harmed his client's case.

Mr. Henderson caused actual harm to the Court and the legal system when he failed to comply with the withdrawal of counsel procedural requirements and the Order of Suspension, and later the ALJ's Order to

file a withdrawal. The tribunal and opposing party incurred additional time and expense to continue the hearing due to Mr. Henderson's failure to properly withdraw.

The profession and the legal system were also at least potentially harmed by Mr. Henderson's misleading conduct. Honest conduct by officers of the court is key to the maintenance of public trust in the profession and the legal system.

PRESUMPTIVE SANCTION

The Standards set forth presumptive sanctions for broad categories of misconduct, absent the existence of aggravating or mitigating circumstances. See, Rule 4, Standards. Pursuant to the Standards:

Suspension is generally appropriate when a lawyer:

- (a) knowingly engaged in professional misconduct as defined in Rule 8.4(a), (d), (e) or (f) of the Rules of Professional Conduct and causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceedings; or
- (b) engaged in criminal conduct that does not contain the elements listed in Standard 4.2(b) but nevertheless seriously adversely reflects on the lawyer's fitness to practice law.

Rule 4.3, Standards. Mr. Henderson's misconduct falls within the ambit of subsection (a) based upon his knowing misconduct in violation of Rule 8.4(a).

As noted in the Findings of Fact, previously made by the Court, Mr. Henderson failed to notify Mr. Blakley that he had been suspended, that he failed to notify Mr. Blakley of a pending hearing and failed to return

Mr. Blakley's file when he did withdraw, which withdrawal was nearly 20 months after being directed to do so.

Mr. Henderson failed to comply with the previous suspension Order despite filing an Affidavit indicating he had complied. He also made a misrepresentation to a tribunal and failed to inform the Court of his suspension even after being ordered to file a Notice of Withdrawal within ten days.

AGGRAVATING CIRCUMSTANCES

Rule 6 (of the Standards) provides for the adjustment of the presumptive discipline according to mitigating and aggravating factors.

A. Prior Record of Discipline

The Standards recognize as an aggravating factor a respondent's prior record of discipline. See, Rule 6.2(a), Standards. Mr. Henderson has a record of discipline in the form of a suspension imposed in 2000 and other discipline imposed in 1988 and 1997. Further, Mr. Henderson was suspended in part for similar violations of the Rules of Professional Conduct including, failing to provide competent representation, failing to communicate with clients, missing a court hearing and filing a false Affidavit.

B. Dishonest or Selfish Motive

The Standards recognize as an aggravating factor a respondent's dishonest or selfish motive. See, Rule 6.2(b), Standards. The OPC argues that Mr. Henderson's actions demonstrate a selfish motive when he

failed to send and file the required notices to all parties in Mr. Blakley's case that he had been suspended from the practice of law. As a result of the action, Mr. Henderson failed to fully inform Mr. Blakley of what needed to be done next, misled the tribunal about why he had withdrawn from the representation and failed to timely file a Notice of Withdrawal despite being ordered to do so within ten days. See, Findings at 4-5, Nos. 16-25.

C. Multiple Offenses

The Standards recognize multiple offenses as an aggravating factor. See, Rule 6.2(d), Standards. Mr. Henderson's five violations of the Rules of Professional Conduct constitute multiple offenses within the meaning of the Standards.

D. Obstruction of the Disciplinary Proceeding

The Standards recognize as an aggravating factor "obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority." Rule 6.2(e), Standards.

Mr. Henderson obstructed the disciplinary proceedings in this court, which is now the disciplinary authority, by failing to comply with the rules and the Case Management Order of this Court. Mr. Henderson filed his Answer late, despite OPC's repeated agreements to give Mr. Henderson until May 26, 2004, before it raised the matter with the Court and he delayed the filing of the Stipulated Discovery Plan in this matter. See, Reply to Respondent's Response to Utah State Bar's Office of Professional

Conduct's Motion for Summary Judgment. Pursuant to the Case Management Order, Mr. Henderson's initial disclosures were due to the OPC by August 16, 2004, but Mr. Henderson failed to provide OPC his initial disclosures. Further, the OPC served by mail discovery requests on Mr. Henderson on December 27, 2004, but he did not respond to the OPC's discovery requests within the 30 day period required by the Utah Rules of Civil Procedure. See, Findings at 5, 26-27.

E. Refusal to Acknowledge the Wrongful Nature of the Misconduct

The Standards recognize as an aggravating factor respondent's "refusal to acknowledge the wrongful nature of the misconduct involved, either to the client or to the disciplinary authority." Rule 6.2(g), Standards. Mr. Henderson has not acknowledged the wrongful nature of his misconduct. In fact, at the sanction hearing, he argued that he had done nothing wrong in relation to the Blakley case.

F. Substantial Experience in the Practice of Law

The Standards recognize as an aggravating factor the "substantial experience in the practice of law." Rule 6.2(i). Mr. Henderson has been a member of the Utah State Bar since April 20, 1971. More experience beyond his 29 years of experience would not have taught Mr. Henderson more than he already knew about competent preparation and communication with his client.

G. Lack of Good Faith Effort to Rectify the Consequences

The Standards recognize as an aggravating factor a respondent's "lack of good faith effort to...rectify the consequences of the misconduct involved." Rule 6.2(j), Standards. Mr. Henderson failed to make a good faith effort to rectify the consequences of his misconduct in this matter. After failing to file his Withdrawal of Counsel, the ALJ directed Mr. Henderson to file his Withdrawal within ten days, but Mr. Henderson disregarded the Order for more than a year and a half. See, Findings at 4-5, Nos. 24-25. He did not file his Withdrawal of Counsel until after a Bar Complaint was filed by Mr. Blakley in this matter. Further, Mr. Henderson never corrected the misrepresentation he made to the tribunal when he filed his Notice of Withdrawal of Counsel, nor did he correct his inaccurate Affidavit in the disciplinary suspension case.

MITIGATING CIRCUMSTANCES

Rule 63 provides a list of mitigating circumstances to be considered by the Court.

The respondent raises two of the factors listed in the Rule in mitigation.

First, respondent's counsel argues that nothing in the record establishes dishonesty or selfishness. His position is that the respondent gained nothing from his actions, did not have a financial benefit and that suspension should be reserved for attorneys who misappropriate client funds or are convicted of a felony.

This Court does not find that to be the standard to apply. Mr. Henderson lied to the tribunal and deceived his client, the tribunal, and opposing attorney by omitting the fact of his suspension. These actions are both dishonest and selfish.

Second, he presents evidence of good character from a practitioner in the same field. This evidence was challenged by an OPC witness who testified that he reported the respondent to the Bar because of his actions.

SUMMARY

After weighing the aggravating and mitigating circumstances addressed above, the Court determines that there is no basis for a lesser sanction than the suspension presumed by the Standards.

The OPC argues for a suspension of three years or at the least, six months. The respondent argues for a public reprimand.

The problem with the respondent's suggestion is that there is no evidence before the Court to mitigate the presumptive sanction. The argument that if respondent had been able to present his case, suspension would not be the appropriate sanction is too late. The fact of the respondent's acts coupled with his neglect has resulted in his suspension. The fact that his previous suspension was for similar actions leads the Court to believe he has not learned from the minimum suspension.

With the foregoing in mind, and consistent with the Standards for Imposing Lawyer Discipline, as addressed in detail herein, the Court now makes and enters its following:

ORDER, suspending respondent J. Keith Henderson from the practice of law in the State of Utah for a period of twelve months, effective March 8, 2006, pursuant to Rule 26, Rules of Lawyer Discipline and Disability.

The Court is imposing the entire twelve months' suspension, but Mr. Henderson is hereby granted leave to petition the Court to stay all but three months of the suspension, on the following conditions: That Mr. Henderson, at his expense, retain an experienced member of the Utah State Bar who is generally experienced in litigation to act as supervisor and mentor for a period of up to nine months. The supervision shall include one-on-one counseling regarding practice matters, review of files, participation in court and discovery procedures, review of documents prepared by Mr. Henderson, including specifically correspondence to opposing counsel, and review of all aspects of Mr. Henderson's practice. It is anticipated that the lawyer selected and who must be approved by this Court shall spend approximately five hours per week with Mr. Henderson (as an average), for up to nine months, but the specific time shall ultimately be at the discretion of the supervising lawyer and at a rate of compensation to be agreed between Mr. Henderson and the lawyer.

If Mr. Henderson chooses not to petition for a stay, he shall serve the full suspension.

At the end of the suspension period, Mr. Henderson may petition for reinstatement pursuant to Rule 26, Rules of Lawyer Discipline and Disability.

The Court intends that this Ruling and Order shall be the final Order of the Court, but either the OPC or Mr. Henderson may request the Court for any modification or clarification that either may think necessary to comply with all applicable Rules or to effect the Court's purposes set forth herein.

Dated this 6 day of February, 2006.


L.A. DEVER
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling and Order Re: Sanctions, to the following, this 6th day of February, 2006:

Diane Akiyama
Assistant Counsel
Office of Professional Conduct
Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

John T. Caine
Attorney for Respondent
2550 Washington Blvd., Suite 300
Ogden, Utah 84401

Debbie Peterson

FILED DISTRICT COURT
Third Judicial District

NOV - 9 2000

By S. Motenas
SALT LAKE COUNTY
Deputy Clerk

Charles A. Gruber, #7391
Assistant Counsel
Office of Professional Conduct
UTAH STATE BAR
645 South 200 East
Salt Lake City, Utah 84111
Telephone: (801) 531-9110

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

)	FINDINGS OF FACTS AND
)	CONCLUSIONS OF LAW AND
In the Matter of the)	ORDER OF SUSPENSION AND
Discipline of:)	PROBATION
)	
KEITH J. HENDERSON, #1459)	CIVIL NO. 990910496
)	JUDGE: Sandra N. Peuler
Respondent.)	

This matter was tried before the Court on September 26 and 27, 2000. The Office of Professional Conduct ("OPC") was represented by counsel, Charles A. Gruber. The respondent was personally present and was represented by counsel, Gregory G. Skordas. At the conclusion of trial, the Court took this matter under advisement and now issues its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The respondent is an attorney licensed to practice law in the state of Utah for approximately 30 years.

Stanley and Susan Spooner Complaint

2. In 1993, Stanley and Susan Spooner retained the respondent to represent them in a bankruptcy matter. The main purpose of the bankruptcy filing was to discharge tax debts for which the Spooners were being garnished. The respondent filed the bankruptcy action too early to be able to discharge all of the Spooners' taxes. Therefore, one year of taxes was not discharged. The Spooners thereafter continued to be garnished by the I.R.S. for the one year of tax debt that was not discharged.

3. During the bankruptcy proceedings, the respondent represented Susan Spooner against Stanley Spooner in a divorce action. Although the respondent testified that Stanley Spooner waived any conflict, the respondent did not obtain a written waiver and in the divorce decree Stanley Spooner was ordered to reimburse Susan Spooner for the tax debts which had been the subject of the bankruptcy proceedings.

4. The Spooners sued respondent for malpractice and were awarded a Judgment in the sum of approximately \$11,000. During the course of the malpractice litigation, the respondent filed an Affidavit in opposition to the Motion for Summary Judgment in which respondent alleged that the clients, themselves, made the decision

to file the bankruptcy case early. During the course of the same litigation at a later deposition, the respondent admitted that he had made the error in the filing date.

5. Judgment was entered against respondent in approximately June, 1997. On August 10, 1999, respondent paid the Judgment, plus interest, in the sum of \$12,500.

6. The Spooners filed a Complaint against respondent with the Bar in October, 1995. On September 30, 1996, the OPC sent a letter to respondent seeking information regarding the Spooners' Complaint. The OPC sent a total of seven letters to respondent before respondent replied to the Bar's request for information in July, 1998.

Richard B. Robinson Complaint

7. The OPC received a Complaint from Richard B. Robinson regarding respondent's representation of him on March 19, 1997. The Bar first requested information from respondent in a letter dated March 27, 1997. Respondent filed a response to their request July 27, 1997. The Bar thereafter filed an informal Complaint against respondent October 25, 1998.

8. Richard Robinson failed to appear at the trial to testify regarding the substance of his Complaint.

Lewis and Marie Henderson Complaint

9. Lewis and Marie Henderson filed a Complaint against respondent with the OPC on April 3, 1997. On June 11, 1997, the OPC sent a letter to respondent seeking information regarding the above Complaint. The OPC sent five letters to respondent before respondent replied to the Bar's request on July 31, 1998. Lewis and Marie Henderson failed to appear at the trial regarding the substance of their Complaint against respondent.

Larry N. Jenkins Complaint

10. Larry N. Jenkins filed a Complaint with the OPC on May 7, 1997. The Bar sent a letter to respondent June 11, 1997, seeking information and a written response to Jenkins' allegations. A total of six letters were sent to respondent before he replied on July 30, 1998. Larry Jenkins failed to appear at the trial to testify regarding the substance of his Complaint against respondent.

Lance L. Miller Complaint

11. Lance L. Miller contacted respondent in March, 1997, regarding a wage claim based upon his termination from employment. Miller paid the respondent a retainer of \$204. Miller expected respondent to file his wage claim, but respondent did not. Respondent testified that he had declined to represent Miller, although he

acknowledged that the statute of limitations provided only a 60 day period within which to file a claim.

12. Respondent took no action to protect Miller from losing his wage claim due to the statute of limitations and also refused to return the retainer. Respondent also failed to return Miller's phone calls.

13. Miller brought an action against respondent in Small Claims Court seeking the amount of his wage claim, approximately \$3,100, and the amount of the retainer, \$204. Ultimately, Judgment was entered against respondent only for the retainer.

14. After the time ran for appeal, respondent paid Miller the retainer.

15. Miller filed a Complaint against respondent on May 28, 1997. The Bar requested information and a response from the respondent in a letter dated June 10, 1997. The Bar sent six letters to respondent, but respondent never complied with the requests made in the letters.

Michael R. Dick Complaint

16. From March, 1997 through July, 1997, the respondent represented Michael R. Dick regarding a worker's compensation claim. During the four month period Dick called respondent approximately 30 times, and the respondent called back only two or three times.

17. At the end of March and again at the end of April, respondent assured Dick that respondent's office was working on his file. Toward the end of April, respondent said that Dick's file was "getting big." In July, 1997, respondent met with Dick, at which time Dick saw his file. The file contained only the same three or four papers Dick had given him months earlier, but nothing else. Respondent testified that he had wanted to delay his client's independent medical examination, so that he could, ultimately, obtain more funds for his client. The delay, however, was not in accordance with the client's wishes. Respondent also testified that he attempted to have his client at Western Institute of Neuropsychiatry. Respondent provided no documentation, however, of any work done in the case.

18. Thereafter, Dick sent a letter firing respondent. After Dick's new attorney requested his file, respondent took three months to deliver the same.

19. Dick filed a Complaint against respondent with the Bar on July 23, 1997. On August 18, 1997, the OPC sent a letter to respondent requesting information and a response. The respondent thereafter failed to reply.

Michael Chouinard Complaint

20. In December, 1996, Michael Chouinard retained respondent regarding a worker's compensation matter. In January, 1997, Chouinard filled out and signed a form requested by the respondent. During the period of time from January through

May, 1997, Chouinard telephoned respondent from Chouinard's home in Idaho 50 or more times. The respondent only spoke with Chouinard personally once or twice. During this period of time, respondent advised Chouinard that the application for hearing had been filed with the Industrial Commission. Chouinard thereafter contacted the Industrial Commission and learned that the forms had not been filed. Respondent, upon being contacted, acknowledged that his secretary had forgotten to file it, but that he would do it immediately.

21. During the summer of 1997, Chouinard again learned that the application for hearing had not been filed. Chouinard called respondent five times per day, every day, but could never get through to respondent. Respondent sent a letter to Chouinard, dated September 24, 1997, indicating that the application for hearing had been filed. However, the application for hearing was not filed until October 8, 1997. The respondent explained that he had "submitted it for filing," which is not credible, based on the time between the two events.

22. Respondent testified that he arranged for a psychiatric evaluation for Chouinard due to the client's complaint of headaches. Respondent provided no documentation of any work on Chouinard's claim, however.

23. Chouinard testified that he requested his file when he fired respondent in February, 1998, and that he did not receive all of his documents back. The respondent

mailed documents to Chouinard's Washington attorney and then received a second request from an attorney in Provo. No evidence was provided as to the time period that elapsed between the request for documents and respondent's mailing to counsel in Washington.

24. Chouinard filed a Complaint against respondent with the Bar September 18, 1997. The OPC requested information and a response on September 23, 1997. The OPC sent a total of five letters to respondent before he filed a reply on July 29, 1998.

James Franklin Complaint

25. In January, 1997, James Franklin retained respondent to represent him in a criminal matter. In February, 1997, Franklin's home was searched and various personal property seized by the State. In May, 1997, Franklin was served with a forfeiture Complaint. Respondent appeared with Franklin on the criminal matter, but did no work in the civil forfeiture action.

26. Franklin testified that respondent had agreed to represent him in the civil forfeiture case, although respondent denied that. Additionally, Franklin paid no retainer or other monies to respondent for representation in the civil case.

27. The Court allowed respondent to withdraw from representation in the criminal matter and appointed the Legal Defenders Office to represent Franklin.

Franklin testified that he failed to appear on numerous occasions in the criminal matter because respondent intentionally told him to appear on the wrong dates. Franklin missed numerous court dates over a period of time from May 23, 1997, until the case was completed August 15, 2000. Several of Franklins' failures to appear occurred after respondent was allowed to withdraw.

28. The property seized in the civil forfeiture action had a value of approximately \$30,000. Judgment was entered against Franklin in the civil forfeiture case based upon a failure to respond. Franklin thereafter attempted to represent himself in setting aside the Default Judgment, which was unsuccessful. Franklin has not received the property or any funds representing the value of the property.

29. Franklin filed a Complaint with the OPC on August 20, 1998. The Bar sent a letter to respondent September 1, 1998, seeking information and a response regarding that Complaint. Respondent replied to the Bar's request September 14, 1998.

Diane Jones Complaint

30. Attorney Diane Jones represented a plaintiff in a divorce action in which the respondent was opposing counsel in 1996 (Trevino v. Trevino).

31. In December, 1996, respondent failed to appear at a pretrial conference held before the Commissioner. Jones telephoned respondent, who had failed to

calendar the pretrial, and respondent thereafter appeared late for the pretrial conference.

32. In March, 1997, respondent failed to appear at a pretrial conference with the Judge. The pretrial conference had been scheduled and noticed to both counsel by the court. Respondent did not appear because he was not able to resolve the case by stipulation and anticipated Jones would simply obtain a trial setting. The Judge awarded attorney's fees to Jones from respondent as a result of his failure to appear at the court hearing. Respondent failed to pay the attorney's fees awarded until September, 1998.

33. The respondent had difficulty communicating with his client from the time the Complaint was filed August, 1996, until the case was resolved approximately one year later based upon his client's incarceration in California. Jones' client had to leave her job three times to appear in court for the various proceedings. The case was delayed based upon respondent's inability to communicate with his client, respondent's failure to appear at court proceedings, and his failure to communicate with attorney Jones.

34. On May 12, 1998, Jones filed a Complaint against respondent with the OPC. The OPC mailed a letter to respondent July 29, 2000, requesting information and a response regarding the allegations. The respondent thereafter failed to reply.

Guadalupe Trevino Complaint

35. The respondent represented Guadalupe Trevino in a divorce action filed by Ms. Jones in August, 1996. On September 9, 1997, Trevino filed a Complaint against the respondent with the OPC. The OPC sent five letters to respondent before he replied to the Bar's request on July 14, 1998. The Bar's first letter was sent September 17, 1997. Trevino failed to appear at trial to testify concerning the substance of his Complaint. Jones testified that at the December pretrial, respondent acknowledged he had had no contact with his client. Respondent testified, as noted above, that based upon Trevino's incarceration in California, that communication was difficult.

Ranae Johnson Complaint

36. In 1996, Ranae Johnson retained respondent to represent her in an action against her employer. On October 16, 1998, Johnson filed a Complaint against respondent with the OPC. The OPC sent a letter to respondent November 16, 1998, requesting information regarding the Complaint filed against respondent by Johnson. Respondent thereafter failed to reply to the Bar's request. Johnson failed to appear at the trial to testify regarding the substance of her Complaint against respondent.

Katrina Rose Complaint

37. In 1987, Katrina Rose retained respondent to represent her in a divorce action. On December 14, 1998, Rose filed a Complaint against respondent with the OPC. On January 11, 1999, the OPC sent a letter to respondent regarding the Complaint and seeking information and a response. The respondent thereafter failed to reply to the OPC's request. Rose failed to appear at the trial to testify concerning the substance of her Complaint against respondent.

Based upon the above findings of fact, the Court now enters the following conclusions of law:

CONCLUSIONS OF LAW

1. As to the Spooner Complaint, the respondent has violated Rule 1.1 in that his filing date on the bankruptcy was erroneous, Rule 1.7 as to the representation of Susan Spooner, which adversely affected Stanley Spooner regarding disposition of debts, Rule 8.4 regarding respondent's filing a false Affidavit in the civil lawsuit brought by the Spooners, and Rule 8.1 related to respondent's failure to comply with the OPC's request for information.

2. As to the Miller Complaint, respondent violated Rule 1.3 regarding his failure to file Miller's Complaint in a timely manner or counseling Miller about the need to file before the statute of limitations ran, Rule 1.3 relative to respondent's failure to return

Miller's phone calls, and Rule 8.1 regarding his failure to comply with the Bar's request for information.

3. As to the Dick Complaint, respondent violated Rule 1.3 in that respondent undertook no work on Dick's Complaint during the four month period of his representation, Rule 1.4 based upon respondent's failure to communicate appropriately with his client, Rule 3.2 for his failure to expedite the client's cause of action, and Rule 8.1 regarding respondent's failure to comply with the Bar's request for information.

4. As to the Chouinard Complaint, respondent violated Rule 1.3 based upon respondent's failure to file the client's application for hearing for a period of approximately ten months, Rule 1.4 for respondent's failure to appropriately communicate with his client and keep his client advised as to the status of the matter, Rule 3.2 for failure to expedite the client's cause of action, Rule 8.1 for respondent's failure to comply with the Bar's request for information, and Rule 8.4(d) for misrepresenting the status of the application to his client.

5. As to the Franklin Complaint, no Rules of Professional Conduct were violated by respondent. This is based upon the Court's assessment of Franklin's credibility. Franklin, for example, testified that he failed to appear on numerous occasions in the criminal matter because respondent deliberately provided him with incorrect dates. That testimony is contrary to respondent's testimony, as well as all

other evidence the Court received in this case. In addition, the Court notes the inconsistencies as to retainers paid to respondent. In the criminal case, Franklin testified that he paid respondent a retainer fee. In the civil case, however, Franklin testified he had paid nothing. Based upon the inconsistencies in Franklin's dealings with respondent in the two cases, as well as his lack of credibility, the Court concludes that respondent's testimony that he never represented Franklin in the civil case is credible and accurate. Therefore, none of the actions or inactions of respondent relative to the civil matter are a violation of the Rules of Professional Conduct.

6. As to the Diane Jones Complaint, the respondent violated Rule 3.2 based upon his failure to expedite the divorce matter, Rule 3.4 in that respondent failed to appear at the Court ordered pretrial conference, thereby causing opposing counsel and her client to appear without being able to take any action, and Rule 8.1 for his failure to respond to the Bar's request for information relative to the Jones Complaint.

7. As to the Guadalupe Trevino Complaint, the Lewis and Marie Henderson Complaint, the Larry Jenkins Complaint, the Ranae Johnson Complaint, and the Katrina Rose Complaint, the respondent violated Rule 8.1 based upon his failure to respond in a timely manner to the Bar's request for information regarding the substance of the Complaints. Based upon the complainants' failures to appear at trial, all other allegations raised by these complainants in these causes of action are dismissed.

8. As to the Richard Robinson Complaint, the Court concludes that respondent violated no Rules of Professional Conduct. The complainant failed to appear at the trial, and therefore the substance of his Complaint is dismissed. In addition to that, it appears that respondent promptly responded to the Bar's request for information regarding that Complaint.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING SANCTIONS

Based upon the Court's Findings of Fact and Conclusions of Law relative to the respondent's violations of the Rules of Professional Conduct, the Court now enters the following Decision with regard to sanctions.

1. Pursuant to Rule 3 of the Standards for Imposing Lawyer Sanctions, generally the following factors should be considered: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors.

2. The specific duties violated by respondent essentially fall into five separate categories. In four cases, respondent failed to timely file his clients' petitions. In the Spooner case, he erroneously filed the bankruptcy petition too soon. In three other cases, he filed applications for hearing late, or not at all.

3. The second area of specific duties violated by respondent are ten separate instances of failures to respond to the Bar's request for information upon

Complaints being filed. In each of these ten cases, respondent either failed to respond to the Bar at all, or responded only after numerous letters had been sent over a period of months.

4. The third area of specific duty violated by respondent are three separate instances of respondent's failure to communicate with a client and keep the client advised of the status of the matter.

5. In addition, in one case, respondent violated his duty of loyalty to a client by representing one of his clients against the other. Respondent also failed to appear in one case at a Court ordered hearing.

6. As to the lawyer's mental state, the only evidence submitted to the Court was respondent's testimony, which included his statement that he would become irritated when a client or former client would file a Complaint against him, and that during this time he had buried his head in the sand.

7. As to potential or actual injury caused by respondent's conduct, respondent caused actual injury to the Spooners in failing to properly calculate the time at which their bankruptcy petition should be filed. The actual harm caused was the continued garnishment of the Spooners by the I.R.S. for the tax debt that was not discharged. Respondent also caused actual harm to Stanley Spooner against whom respondent represented Susan Spooner in the divorce action, at the same time the

bankruptcy action was pending. In the divorce action, Stanley Spooner was ordered to pay the marital debts, which included the I.R.S. debt.

8. In addition, respondent caused actual harm to Lance L. Miller, whose cause of action on a wage claim was lost because the statute of limitations was allowed to expire. Respondent also caused potential injury in the sum of the retainer he charged, \$204. Miller obtained this amount from respondent at a subsequent time based upon a small claims action that Miller filed against respondent.

9. Respondent also caused potential harm to Michael R. Dick and Michael Chouinard, whose worker's compensation claims respondent failed to timely file. Their subsequent attorneys were able to resolve the matters and both thereafter received funds from their claims.

10. Finally, respondent caused both potential and actual injury to the public, the legal system and the profession by first failing to appear at a Court ordered pretrial conference, and by failing and refusing to respond to the Bar's request for information relative to ten separate Complaints.

11. As to aggravating factors, the Court finds as follows:

(a) Prior record of discipline. Respondent has a prior record of discipline beginning 1987, and concluding in November, 1997. The majority of those matters fell between August, 1988 and August, 1992, and involved cautions, admonitions and private reprimands. Included in those are an April, 1989, admonition for failure to communicate with a client, and February, 1991, an admonition for failure to respond to the Bar's request for information relative to a Complaint.

(b) Pattern of misconduct. The Complaints filed in this matter and heard by the Court include numerous failures to communicate with clients, to timely file matters, and to respond to the Bar.

(c) Multiple offenses. Twelve separate Complaints were filed in this matter. Ten of those were substantiated, either in part or in whole.

(d) Obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary authority. Respondent failed and refused to respond to the Bar's repeated requests for information in ten separate cases.

(e) Refusal to acknowledge the wrongful nature of the misconduct involved, either to the client or the disciplinary authority. Respondent testified that he believed he had done nothing wrong, except for his failure to respond to the Bar's requests for information. Numerous witnesses testified that respondent had never acknowledged any wrongdoing or apologized for his actions or inactions relative to their cases.

(f) Substantial experience in the practice of law. As noted above,

respondent has practiced law for approximately 30 years.

(g) Lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved. On two separate occasions, respondent required a Judgment to be entered against him before any restitution was paid to a client.

12. As to mitigating circumstances, the Court finds as follows:

(a) Absence of a dishonest or selfish motive. There is no evidence that any of respondent's actions or failure to act were based upon dishonest or selfish motives. In fact, none of the duties that he violated appeared to benefit him in any manner.

(b) Imposition of other penalties or sanctions. In the Spooner and Miller cases, respondent was ordered to repay the clients for their losses. He has actually paid those amounts in the sum of over \$12,000.

(c) Remoteness of prior offenses. The respondent's prior disciplinary history includes one admonition in 1997 for practicing law after failing to pay his Bar dues in a timely manner. With the exception of that admonition, all of his other sanctions occurred from 1987 through August, 1992. As noted above, respondent has been practicing law for approximately 30 years. There is no evidence of any prior discipline before 1987, and there was a period of a number of years after August, 1992, before further proceedings were filed against him.

(d) Time period of these Complaints. With the exception of the Rose and

Spooner cases in which respondent represented the claimant in 1987 and 1993, all of the other Complaints filed in this action resulted from respondent's representation of clients from September, 1996, through July, 1997. It appears, then, that there were a number of Complaints filed against respondent, but during a fairly brief period of time. As noted above, respondent had had no Bar Complaints filed for a period of approximately four years before these Complaints were filed.

13. In determining appropriate sanctions, suspension is generally appropriate when the lawyer's misconduct is knowing, while reprimand is generally appropriate when the lawyer's misconduct is negligent. The Court finds that the respondent's misconduct as to failure to appear at a Court ordered hearing and failure to respond to the Bar were actions taken knowingly. As to the first, the pretrial hearing was noticed to both counsel by the Court with a directive that counsel appear. Respondent acknowledged that he knew about the Court hearing and determined not to go. His reason was that he would not be able to accomplish anything, because he didn't have his client's consent to resolve the matter. However, he made a conscious decision not to appear at the hearing.

14. As to the failure to respond to the Bar, the respondent testified that he was aware of his obligation to respond to the Bar's requests for information relative to each of the Complaints filed against him. He further testified that he did not respond. The Court finds that the respondent knew of his obligation, and again made a conscious decision not to comply.

15. As to the remaining violations, the Court finds that those are negligent conduct as defined in the Standards for Imposing Lawyer Sanctions.

16. It appears, then, that for two areas of violations, suspension is presumptively appropriate, while reprimand is appropriate for the remaining violations. The Court further notes, however, that based upon respondent's prior discipline regarding his failure to communicate with his client, a more serious sanction is generally appropriate, based upon his knowledge that such conduct is a violation of the Rules of Professional Conduct. In addition, based upon respondent's experience in practicing law, his acknowledgment that he was aware of his duties, and his repeated violation of them, the aggravating factors clearly outweigh the mitigating ones.

ORDER OF SUSPENSION AND PROBATION

IT IS THEREFORE ORDERED THAT based upon all of that, the Court Orders that respondent should be suspended from the practice of law for a period of two years. All but six months of that period is stayed. When respondent is readmitted to practice after six months, he should serve an additional 18 months of probation, to be supervised by the OPC.

1. **IT IS THEREFORE ORDERED THAT** the terms and conditions of his probation are as follows:

That respondent should engage the services of a supervising attorney, to be approved both by the OPC and the Court, who shall report as required by the OPC on a regular basis on respondent's office management practices.

Respondent shall demonstrate to the supervising attorney that there is a procedure for insuring that all client requests for information are responded to on a timely basis, a procedure for tracking filing dates, to insure that client claims are timely filed, and a calendaring system to insure that court appearances are met.

2. **IT IS THEREFORE ORDERED THAT** Respondent shall complete an office management class approved by the OPC.

3. **IT IS THEREFORE ORDERED THAT** Respondent shall be ordered to pay costs of this litigation incurred by the OPC.

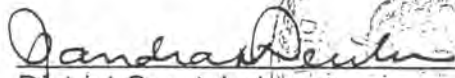
4. **IT IS THEREFORE ORDERED THAT** Respondent shall have no violations of the Rules of Professional Conduct.

5. **IT IS THEREFORE ORDERED THAT** Respondent shall promptly respond to any requests the Bar makes for information relative to future Complaints.

Pursuant to the Court's Motion, Counsel for the OPC has been directed to prepare these Findings of Facts, Conclusions of Law, and an Order reflecting this Decision.

DATED this 9 day of Nov, 2000.

BY THE COURT:


District Court Judge
Sandra N. Peuler



Approved as to form:


Greg Skordas, Attorney for Respondent

CERTIFY THAT THIS IS A TRUE COPY OF THE
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY, STATE
OF UTAH.



RECEIVED

Third Judicial District

MAR 29 2005

MAR 29 2005

IN THE DISTRICT COURT OF THE PROFESSIONAL DISTRICT OF SALT LAKE COUNTY

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

By _____ Deputy C

In the Matter of the Discipline : RULING AND ORDER
of: RE: SANCTIONS

MARSHA M. LANG, #4995 : CASE NOS. 010910847
030908681

Respondent. : Judge Robert K. Hilder

The first phase of this bifurcated proceeding was tried to the Court on November 17, 18 and 19, and December 14, 2004. Findings of Fact and Conclusions of Law were entered on December 20, 2004. The court found that Ms. Lang had violated several Rules of Professional Conduct, as follows: Rule 1.3 (diligence) as to the Elsbury and Burch-Knowley matters; Rule 1.4(b) (communication) as to the Elsbury, Willcut, and Burch-Knowley matters; Rule 1.4(a) (communication) as to the Willcut and Burch-Knowley matters; Rule 8.1(b) (failure to respond to the office of Professional Conduct regarding complaints) in the Willcut and Burch-Knowley matters; Rule 8.4(d) (conduct prejudicial to the administration of justice, in this case during the course of a deposition) in the Kelley matter; and Rule 8.4(a) in all four matters, based on the findings of other, specific, violations of the Rules of Professional Conduct.

After the court entered its Findings and Conclusions, the

court commenced the sanctions hearing on January 13, 2005, within the thirty days required by Rule 11(f), Rules of Lawyer Discipline and Disability, but the time set aside for hearing proved inadequate. The sanctions phase was ultimately heard over several days, concluding with the last arguments on March 22, 2005. Prior to closing arguments, five witnesses were examined. The Office of Professional Conduct was represented by Kate A. Toomey, and respondent was represented by Andrew B. Berry. Based upon the testimony of the witnesses during both phases of this proceeding, the court's Findings and Conclusions, the arguments of counsel, and the Standards for Imposing Lawyer Sanctions, and applicable case law, the Court now enters its following Ruling and Order imposing sanctions against Ms. Lang as a result of the violations previously adjudicated:

Pursuant to the Standards: "A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgement that the lawyer had engaged in professional misconduct." Rule 2.1. As indicated above, in this case the determination of violations is based on this court's Findings and Conclusions, and not on any acknowledgement by Ms. Lang. It is true that, during the course of the sanctions hearing, acting through counsel, Ms. Lang generally accepted the findings without further argument. Nevertheless, to the extent there was any acknowledgement, it occurred only after the court entered adverse findings, and such acknowledgement cannot

be considered in mitigation of the violations for sanctions purposes.

The factors the court must consider in imposing sanctions are set forth in Rule 3.1. They are: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors. The court believes that these factors, in the order stated, are a useful framework for consideration of the appropriate sanction(s) in this case:

(a) The duty (duties) violated.

The duties violated are set forth above in summary, and in detail in the court's Findings of Fact and Conclusions of Law entered December 20, 2004. They will not be repeated in detail here, except as necessary to explain the court's Ruling and Order below.

(b) The lawyer's mental state, and

(c) The potential or actual injury caused by the lawyer's misconduct.

Three mental states (intent, knowledge, and negligence) may be considered pursuant to the Standards, and the determination of which applies has a significant bearing on the presumptive sanction for the violation(s), as does the injury factor. The three mental states are defined in the Standards as follows:

"Intent" is the conscious objective or purpose to accomplish

a particular result.

"Knowledge" (or "knowing") is the conscious awareness of the nature of the attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

"Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

The Standards also provide definitions for injury and potential injury, as follows:

"Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.

"Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

The court has very carefully considered the mental state to be ascribed to Ms. Lang for each of the adjudicated violations, and the injury or potential injury resulting therefrom, if any. No one

mental state applies to all occurrences under the facts of Ms. Lang's violations. The court first determines that, with the exception of the two violations regarding non-responsiveness to the OPC, none of the violations includes conduct that could fairly be deemed intentional. The court will now consider the mental state and resulting injury, if any, of each violation, by complainant:

In the **Elsbury** matter the court cannot determine that there is sufficient evidence to find that the initial failure to locate and forward income verification, etc. was knowing. It is clear; however, that in light of the evidence, there was a substantial risk that the result would follow from Ms. Lang's failure to carefully investigate her files and question her staff, and it was manifestly negligent conduct that resulted in actual injury to the client (the Order to Show Cause hearing regarding failure to produce documents as ordered) as well as potential injury, had Judge Henriod found contempt, which would probably have occurred but for the judge's active questioning at the hearing (which constituted an intervening factor or event).

On the other hand, Ms. Lang's abandonment of her client at the hearing on Order to Show Cause, when she sought to deflect any blame from herself or her office, and place it on her client, was knowing; that is, the conduct reflected a conscious awareness of the facts and circumstances, but the court nevertheless does not find a conscious purpose to abandon or harm the client; therefore,

intent is not present. Finally, as to Mr. Elsbury, the court determines that Ms. Lang negligently failed to inform him of his options such that he could make appropriate decisions, particularly regarding representation, and that this failure created significant potential harm that would likely have become actual injury, but for Judge Henriod's insistence that Ms. Lang represent Elsbury at the hearing. The representation did not, in fact, substantially aid Mr. Elsbury, but Ms. Lang's presence helped Judge Henriod understand the circumstances and fairly allocate fault for the failure to provide documents as ordered.

Ms. Lang's violations in the **Willcut** matter were primarily knowing. Despite Ms. Lang's testimony, the court is persuaded that she knew that she failed to respond to repeated requests for information, and that she did not keep Ms. Willcut informed sufficiently (with or without inquiry) to permit the client to make informed decisions. The unusual feature of the Willcut matter is that there is no evidence of actual injury, and given the conflicting client instructions, shifting objectives, and inconsistencies in Ms. Willcut's claims regarding the underlying facts, the court cannot determine even potential injury resulting from Ms. Lang's omissions.

The **Kelley** matter, which resulted in the court's determination that Ms. Lang's conduct during the deposition of her client was prejudicial to the administration of justice, was clearly a knowing

act. Ms. Lang claimed both ignorance of the rules of conducting depositions (based on inexperience) and misunderstanding of the state of the law on some specific issues. That may be so, but Ms. Lang was inescapably aware of the nature and circumstances of her conduct, as the deposition deteriorated into an unproductive and argumentative exercise, even if she did not consciously desire that result at the outset. The conduct resulted in actual harm, in that the deposition had to be taken again (part of the cost of which was ultimately borne by Ms. Lang pursuant to court order), and actual harm to the client (both Ms. Lang's and the opposing party), the legal system and the profession, both of which were cast in an unnecessarily bad light.

The **Burch-Knowley** matter encompasses several violations. The failure to move the matter to a conclusion, when it could have been accomplished months earlier but for Ms. Lang's refusal to cooperate in providing minimal legitimate discovery to the other side, was a knowing act, but one which did not intend the resulting delay. Ms. Lang did intend to be obdurate, because she resented opposing counsel's request, but that still does not evince an intent to cause delay. Nevertheless, delay inevitably occurred, and Ms. Lang must have known of the circumstances that led to the delay.

While Ms. Lang was engaging in conduct that created delay, she was knowingly not responsive to her client and she did not provide information, particularly between late November, 2001, and March,

2002, that either informed her client of the status of the matter or permitted the client to make decisions consistent with the existing circumstances. All of the foregoing violations resulted in actual injury to the client, primarily delay in obtaining increased child support, as well as injury to the profession, insofar as the opposing counsel was placed in an impossible situation with his client, resulting in a loss of confidence and termination before the matter concluded, and the reputation of the profession suffered significantly in the eyes of both parties and also the spouse of the child's father.

In both the **Willcut** and **Burch-Knowley** matters, the court further finds that the failure to respond to the OPC requests for information and answers to complaints was intentional. The court recognizes that as Ms. Lang's problems multiplied, she came to believe that responses were futile (in fact, she apparently clings to that belief to this day), but this conscious belief only supports the finding that Ms. Lang accordingly made a conscious decision to not respond.

Finally, the court has not addressed the inevitable findings of violations of Rule 8.4(a), which follow from the findings of other, more specific, misconduct. The court believes that it is not necessary to assign a mental state to these violations, but if one is required, in each instance the mental state should comport with the mental state assigned to the underlying misconduct.

In summary, the court finds that failure to respond to the OPC was intentional, most of the remaining violations were knowing, but some were merely negligent, as set forth in detail above. In all but the Willcut matter, the violations created both actual or potential injury, and the existence of actual injury predominates.

The court has found all three mental states, ranging from intentional (but only for the failures to respond to the OPC which, while important, occurred after the underlying violations), to negligent, but the most prevalent state is knowledge, or knowing. The court has also found both actual and potential injury in all but one matter. Accordingly, the presumptive sanction is suspension, and the court must now proceed to consider aggravating and mitigating factors that may enhance or reduce the presumptive sanction.

(d) The existence of aggravating and mitigating circumstances.

The Office of Professional Conduct argues several instances of aggravating conduct, and concedes some mitigation. Ms. Lang, of course, argues substantial mitigation, and suggests that the only possible aggravating factor is that there are four cases at issue, but she nevertheless argues that these four cases do not establish a pattern of misconduct. The court has carefully considered the arguments of both counsel, but in the interests of brevity, the court will address only those factors which it deems to be truly in controversy.

1. Aggravating factors.

The court will first address factors listed in the Standards, in the order listed, then consider any additional factors:

- **Dishonest or selfish motive.** The court is persuaded that Ms. Lang was dishonest in her excuses proffered to Paula Willcut; dishonest in her blaming actions directed against opposing counsel, primarily Joseph Bean; and selfish in her candidly stated intent to protect herself at Mr. Elsbury's expense in the hearing before Judge Henriod. The court does not identify any other specifically dishonest or selfish motive or conduct.

- **Pattern of misconduct.** If four cases in which violations are found (extending over a period of four to five years) do not constitute a pattern, the court is not sure what would be required. More to the point, the pattern is of similar misconduct, including failure to communicate, blaming of clients and opposing counsel, and refusal to accept responsibility for the lawyer's own actions.

- **Multiple offenses.** See the preceding paragraph.

- **Obstruction of the disciplinary process, etc.** The court's findings of non-responsiveness in at least two cases, and Ms. Lang's admission that she still believes any response and cooperation with the OPC to be futile establish this factor beyond question.

- **Refusal to acknowledge the wrongful nature of the misconduct,** either to the client or the disciplinary authority.

The record fully supports such refusal to acknowledge, at least until after the court determined certain specific violations, and even then the acknowledgements were limited. The greater concern for the court, as will be addressed more fully below, is that even when Ms. Lang appears to have a will to acknowledge and address problems in her professional performance, she appears to lack critical insight into her own conduct and the thought processes that have created, and to some extent, justified the conduct (that is, in Ms. Lang's mind).

- **Substantial experience in the practice of law.** This is a problematic factor. Ms. Lang now has nineteen years of practice. She practiced ten or eleven years before the first violation, but it is also true that Ms. Lang had very limited experience (at least in 1997) in the areas of practice, and in the specific practice activities, involved in the violations. By 2001; however, when several relevant events occurred, Ms. Lang's experience was considerably greater, and she had focused exclusively (as she still does) in family law, and she should be held to the standard of an experienced family law practitioner with respect to at least the Burch-Knowley and Paula Willcut matters.

- The foregoing are factors drawn from the Standards, but the court finds that the most troubling aggravating factor is Ms. Lang's manifest inability to understand some of the more fundamental issues involved in her misconduct. As will appear in

the mitigation section, below, the court notes and commends Ms. Lang for systemic changes that will undoubtedly prevent recurrence of some of the violations, but those violations that arise from lack of understanding of the advocate's role, a professional's duty to put the client's interests above her own, and the professional obligation to be candid and courteous with opposing counsel (and not engage in dishonest or otherwise improper blaming behavior) are troubling characteristics that will need more than systemic remedies.

2. The existence of mitigating circumstances.

- **Absence of a prior record of discipline.** There is no prior record, but this factor cannot be given great weight, because (1) Ms. Lang's practice in family law was relatively new when the first instance occurred, and (2) even this case, involving multiple violations, is a consolidation of two separate District Court filings. Accordingly, had the actions remained separate, at least the violations in the later filing would have been preceded by an earlier record of discipline.

- **Inexperience in the practice of law.** This factor probably applies fairly to the Kelley matter, and to a lesser extent to the Elsbury matter, but not to the later violations. The court also notes that the inexperience of opposing counsel in the Kelley deposition, and her sometimes provocative conduct, are factors that the court weighs in considering any sanction related to that

matter.

- **Unreasonable delay in proceedings.** The court only addresses this factor because it was urged by Ms. Lang's counsel throughout the proceedings. Delay can only refer to the Kelley matter, and the court finds that all proceedings were timely initiated and no prejudice resulted to Ms. Lang from the fact that the matter was not ultimately adjudicated until more than seven years after the deposition. First, the initial delay resulted from Ms. Kelley's reasonable decision to delay a disciplinary complaint until the underlying litigation was concluded. Second, the OPC acted with reasonable speed and within all time limits imposed by statute and rule. Third, ultimate disposition was significantly delayed by Ms. Lang's own actions, including self-representation, dilatory discovery, and consolidation of cases at her request. Finally, the sole factual predicate was conduct during one deposition in 1997. All parties and the court had benefit of the transcript as a full record, and all attorneys present at the deposition (Ms. Lang, her associate, Ms. Hayes, and Ms. Kelley) testified in court, and each had a clear recollection of the incident; therefore, no prejudice was shown.

- **Interim reform.** As is alluded to above, Ms. Lang has made substantial, and apparently effective, systemic changes. Those changes include a message response and documentation protocol, improved calendaring, and specific procedures regarding withdrawal

as counsel. These steps are genuine and commendable, and the court determines that it is unlikely that most of the communication or withdrawal of counsel problems will recur. The court makes this statement mindful of the testimony of David Lee, because even Mr. Lee, who is unapologetically adverse to Ms. Lang, conceded that she responded to all messages by at least the second request. In addition, Ms. Lang's billing records and her file in the Lee matter confirmed that messages were carefully documented and promptly returned.

In addition to systemic changes, Ms. Lang has attended the OPC ethics school, and also attended continuing legal education regarding deposition practice, but as addressed in the next paragraph, it appears to this court that not all lessons were well learned.

- **Imposition of other penalties or sanctions.** Ms. Lang was sanctioned by the trial judge for her conduct in the Kelley matter, and that sanction should have acted as a caution regarding conduct in future depositions. After reviewing the much more recent Marlise Smith deposition (July 21, 2004), the court is persuaded that some improvement has occurred, but viewed as a whole, the Janaka deposition (at issue in the Kelley matter) and the Marlise Smith deposition show a continuing failure on Ms. Lang's part to understand both the rules of defending a deposition, and perhaps even more importantly, the rules and expectations of professional

civility. It appears that the trial court sanctions in the Kelley matter taught a very narrow lesson, at best.

- **Remorse.** Ms. Lang points to her remorse, but her counsel had to concede that remorse delayed until trial is not a legitimate factor in mitigation, and that is the only remorse the court observed.

SUMMARY AND ORDER

After weighing the aggravating and mitigating circumstances addressed above, the court determines that there is no basis for a lesser sanction than the suspension presumed by the Standards. On the other hand, based on the aggravating factors, and the court's specific concern that beyond systemic adjustments, Ms. Lang appears unlikely to address the core, underlying professional failings that brought her to this point, disbarment might be justified and appropriate. In fact, as the court has wrestled with its options, the recurring question is just what sanction might give Ms. Lang the best possible chance to make fundamental changes that could substantially improve her prospects of practicing law until retirement without being plagued by continuing allegations of professional misconduct?

The OPC argues for a suspension of at least six months and one day, but the preferred sanction is a one year suspension. As already indicated, this court does not believe that the presumption of suspension is overcome in this case in any way that would

justify the lesser sanctions urged by Ms. Lang. Accordingly, the sanction must include suspension, but the court firmly believes that a suspension of six months, or even one year, without a more proactive component, will do anything to change Ms. Lang's professional conduct in the long term. There must be a term of actual suspension to bring home the seriousness of this lawyer's misconduct, but the court determines that there must also be a period of supervised practice to give Ms. Lang a chance to see how family law can and should be practiced at the highest levels of professional responsibility, with due regard for clients, other counsel, and the courts.

With the foregoing in mind, and consistent with the Standards for Imposing Lawyer Discipline, as addressed in detail herein, the court now makes and enters its following:

ORDER, suspending respondent Marsha M. Lang from the practice of law in the State of Utah for a period of twelve months, effective May 15, 2005 (to allow winding up, pursuant to Rule 26, Rules of Lawyer Discipline and Disability). The court is, at this time, imposing the entire twelve months' suspension, but Ms. Lang is hereby granted leave to petition the court to stay all but three months of the suspension, on the following conditions: That Ms. Lang, at her expense, retain an experienced member of the Utah State Bar, who is generally experienced in litigation, and specifically experienced in family law, to act as supervisor and

mentor for a period of up to nine months. The supervision shall include one-on-one counseling regarding practice matters, review of files, participation in court and discovery procedures, review of documents prepared by Ms. Lang, including specifically correspondence to opposing counsel, and review of all aspects of Ms. Lang's practice. It is anticipated that the lawyer selected (who must be approved by this court¹) shall spend approximately four hours per week with Ms. Lang (as an average), for up to nine months, but the specific time shall ultimately be at the discretion of the supervising lawyer, and at a rate of compensation to be agreed between Ms. Lang and the lawyer. If Ms. Lang chooses not to petition for a stay, she shall serve the full suspension.

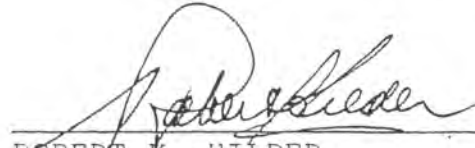
At the end of the suspension period, Ms. Lang may petition for reinstatement pursuant to Rule 26, Rules of Lawyer Discipline and Disability.

The court intends that this Ruling and Order shall be the final Order of the court, but either the OPC or Ms. Lang may request the court for any modification or clarification that either may think necessary to comply with all applicable Rules or to

¹ The court will stringently consider the qualifications of any prospective supervising lawyer. If Ms. Lang wishes, the court is willing to provide a list of possible candidates. These names will not be persons the court has contacted, but merely experienced family law practitioners in whom the court reposes confidence based on experience.

effect the court's purpose as set forth herein.

Dated this 29th day of March, 2005.


ROBERT K. HILDER
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 010910847 by the method and on the date specified.

METHOD NAME

Mail	ANDREW B BERRY ATTORNEY DEF 39 W MAIN ST POB 600 MORONI, UT 84646
Mail	MARY KATE A TOOMEY ATTORNEY PLA OFFICE OF PROFESSIONAL CONDUCT 645 S 200 E SALT LAKE CITY UT 84111

Dated this 29th day of March, 2005.



Deputy Court Clerk

19 2005

OFFICE OF
PROFESSIONAL CONDUCT
THIRD JUDICIAL DISTRICT COURT

AUG 17 2005

BY _____ *mb*
CLERK OF COURT

Kate A. Toomey, #6446
Deputy Counsel
OFFICE OF PROFESSIONAL CONDUCT
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the
Discipline of:

)
) ORDER STAYING THE
) RESPONDENT'S SUSPENSION
) AND CONCERNING THE
) RESPONDENT'S REINSTATEMENT
) TO THE PRACTICE OF LAW
) UPON TERMINATION OF THE
) PERIOD OF SUSPENSION

Marsha M. Lang, #4995

)
) Civil No. 010910847

Respondent.

)
) Judge Robert K. Hilder

The matter of the Respondent's Verified Petition for Stay of Suspension and Imposition of Supervised Practice came on for hearing before the Court on July 26, 2005. The Respondent, Marsha M. Lang, was present and represented by Andrew Berry; the Utah State Bar's Office of Professional Conduct ("OPC") was represented by Kate A. Toomey. The Court having read the Verified Petition, the response filed by the OPC, and the Reply to the OPC's Response to Petition for Stay and Supervised Practice submitted by Ms. Lang, and being fully advised in the premises, does hereby enter its ORDER:

1. The effective date of Ms. Lang's twelve-month suspension is May 1, 2005.
2. The Court hereby stays nine months of Ms. Lang's twelve-month suspension, commencing August 1, 2005, upon the following conditions:
 - a. During the nine-month period, Ms. Lang shall at her own expense retain Gary Howe to act as Ms. Lang's supervisor and mentor.
 - b. The supervision shall include one-on-one counseling regarding practice matters, review of files, participation in court and discovery procedures, review of documents prepared by Ms. Lang, including specifically correspondence to opposing counsel, and review of all aspects of Ms. Lang's practice.
 - c. It is anticipated that Mr. Howe shall spend approximately four hours per week with Ms. Lang (as an average), for nine months, but the specific time shall ultimately be at the discretion of Mr. Howe, and at a rate of compensation to be agreed between Ms. Lang and Mr. Howe.
3. The OPC shall publish notice in the next *Utah Bar Journal* that Ms. Lang's suspension has been stayed subject to the conditions identified above.
4. Ms. Lang may petition for reinstatement to the practice of law pursuant to Rule 25, Rules of Lawyer Discipline and Disability ("RLDD"), except that the Court hereby abates the requirement that a suspended respondent seeking reinstatement must pass the Multistate Professional Responsibility Examination.

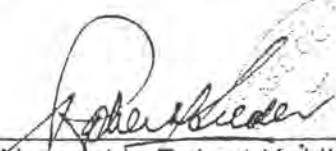
5. Pursuant to Rule 25(c), RLDD, Ms. Lang shall serve a copy of the petition for reinstatement upon the OPC, and the OPC shall publish notice of the petition in the *Utah Bar Journal* pursuant to the requirements of Rule 25(d), RLDD. The OPC shall also notify the complainants pursuant to Rule 25(d), RLDD.

6. Pursuant to Rule 25(f), RLDD, after receiving Ms. Lang's petition for reinstatement, the OPC shall either advise Ms. Lang and the Court that it will stipulate to Ms. Lang's reinstatement or file a written objection to the petition.

7. Pursuant to Rule 25(g), RLDD, if the OPC objects to Ms. Lang's petition for reinstatement, the Court will conduct a hearing on Ms. Lang's petition. If the OPC files no objection, the Court will review the petition without a hearing and enter its findings and order.

Dated this 11th day of August, 2005.

BY THE COURT:


Honorable Robert K. Hilder
Third Judicial District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____, 2005, I mailed via United States mail, first-class postage pre-paid, a true and correct copy of the foregoing ORDER STAYING THE RESPONDENT'S SUSPENSION AND CONCERNING THE RESPONDENT'S REINSTATEMENT TO THE PRACTICE OF LAW UPON TERMINATION OF THE PERIOD OF SUSPENSION to:

Andrew Berry
62 West Main Street
P.O. Box 600
Moroni, Utah 84646-0600

Summary Chart of State Rules Governing Probation and Stayed Suspensions

Jurisdiction	Probation	Stayed Suspension
Alabama	Rule 8(h), Alabama Rules of Disciplinary Procedure, provides that probation is appropriate only in cases where there is little likelihood that the respondent will harm the public during the period of probation and where the conditions of probation can be adequately supervised.	Not identified in rules as a sanction but are ordered as "other requirements that the Disciplinary Board deems consistent with the purposes of lawyer discipline."
Alaska	Rule 16(a)(3), Alaska Rules of Disciplinary Enforcement, provides for probation as a sanction.	Not identified in rules as sanction
Arizona	Rule 60(a)(5)(B), Arizona Supreme Court Rules, provides that probation may be imposed when there is little likelihood that Respondent will harm the public during probation and conditions of probation can be adequately supervised	Not identified in rules as sanction
Arkansas	Section 17.E(7), Arkansas Supreme Court Procedures of Regulating Professional Conduct of Attorneys at Law, provides that prior to or subsequent to the filing of a formal complaint, a panel of the Committee may place the lawyer on probation for a period not exceeding two years. Probation shall be used only in cases where there is little likelihood the lawyer will harm the public during the period of rehabilitation and the conditions of probation can be adequately supervised.	Does not stay suspensions based on compliance with conditions

California	General Standard 1.5(e), California Standards for Attorney Sanctions for Professional Misconduct, addition of reasonable conditions, such as supervision by a probation monitor may be reasonable and appropriate in assessing compliance with any duties or conditions imposed	General Standard 1.4(c)(I), California Standards for Attorney Sanctions of Professional Misconduct, provides that an execution of a suspension may be stayed for a period of one to five years only if the stay and the performance of specified duties by the respondent are consistent with Standard 1.3, regarding protection of the public, courts, legal profession maintenance of high legal standards, etc.
Colorado	Rule 251.7, Colorado Rules of Civil Procedure, provides that an attorney may be placed on probation if they can demonstrate that they are unlikely to harm the public during the probationary period, can be adequately supervised, are able to practice law without causing the courts and the profession to fall into disrepute, and have not committed acts warranting disbarment.	Rule 251.7 allows probation to be imposed in conjunction with a suspension, which may be stayed in whole or in part (pursuant to Rule 251.6(b))
Connecticut	Not identified in the rules as a sanction, but can and has been ordered by the Court, in its discretion to fashion whatever discipline necessary to protect the public	Not identified in the rules as a sanction, but can and has been ordered by the Court, in its discretion to fashion whatever discipline necessary to protect the public
Delaware	Rule 20, Delaware Lawyers' Rules of Disciplinary Procedure, provides for probation as a sanction.	Not identified in rules as sanction
District of Columbia	Rule XI, Section 3(a)(7), Rules Governing the District of Columbia Bar, may not be for more than three years. Imposed in lieu of or in addition to other sanctions.	Not identified in rules as sanction
Florida	Rule 3-5.1(c), Rules Regulating the Florida Bar, Respondent may be placed on probation for a period not less than 6 months nor more than three years or for an indefinite period determined by conditions stated in the order. Conditions may include but are not limited to: completion of a practice and professionalism enhancement program, supervision by a member of the Florida Bar, etc.	Not identified in rules as sanction
Georgia	Not identified in rules as sanction	Not identified in rules as sanction

Hawaii	Not identified in rules as sanction	Not identified in rules as sanction
Idaho	Rule 506(c)), Idaho Bar Commission Rules, only imposed in cases where there is little likelihood that the defendant will harm the public during the probation and the probation can be adequately supervised.	Rule 507(a)(1), Idaho Bar Commission Rules, provides that suspensions may be withheld in whole or in part, contingent upon the defendant's observance of specified conditions
Illinois	Rule 772, Illinois Supreme Court Rule, imposed only in cases where the attorney has demonstrated that he is unlikely to harm the public during the period of rehabilitation and the necessary conditions of probation can be adequately supervised. Attorney cannot have committed acts which warrant disbarment	Not identified in rules as sanction
Indiana	Rule 23 Section 3(c), Indiana Rules for Admission to the Bar and the Discipline of Attorneys, in cases of misconduct or disability, the Court may, in lieu of disbarment or suspension place an attorney on probation and permit the attorney to continue practicing law if in its opinion such action is appropriate and desirable. The attorney will be subject to the conditions and limitations as the Court sees fit to impose and upon violation of such conditions the attorney may be suspended or disbarred.	No identified in rules as sanction but it appears that Rule 23 Section 3(c) allows the Court to "stay" a suspension and place the attorney on probation. If the attorney violates the conditions of probation they may be suspended.
Iowa	Rule 34.13, Rules of Procedure of the Iowa Supreme Court Attorney Disciplinary Board, provides for a deferral of "further proceedings pending the attorney's compliance with conditions imposed by the board for supervision of the attorney for a specified period of time not to exceed one year unless extended by the board"	Not identified in rules as sanction
Kansas	Not identified in the rules as a sanction; however, Rule 203, Kansas Supreme Court Rules, Subsection (a)(5) provides for any form of discipline or conditions separate from or connected to any other discipline that the Supreme Court deems appropriate	Not identified in the rules as a sanction; however, Rule 203, Kansas Supreme Court Rules, Subsection (a)(5) provides for any form of discipline or conditions separate from or connected to any other discipline that the Supreme Court deems appropriate

Kentucky	Rule 3.380, Rules of the Supreme Court of Kentucky, does not specifically provide for probations but rather public reprimands and/or suspensions with conditions. The "with conditions" clause has been used to probate sanctions.	Not identified in rules as sanction
Louisiana	Rule XIX, Section 10(A)(3), Rules for Lawyer Disciplinary Enforcement, probation should be used only in cases where there is little likelihood that the respondent will harm the public during the period of rehabilitation and the conditions of probation can be adequately supervised	Not identified in rules as a sanction, they have developed jurisprudentially
Maine	Not identified in rules as sanction	Not identified in rules as sanction
Maryland	Not identified in rules as sanction	Not identified in rules as sanction
Massachusetts	Not identified in rules as sanction	Not identified in rules as sanction
Michigan	Rule 9.121(C), Michigan Court Rules, provides for probation when during the subject period the attorney was under the influence of drugs or alcohol and the impairment caused or substantially contributed to the conduct. Probation must not be contrary to the public interest and cannot exceed two years.	Rule 9.106 Michigan Court Rules allows reprimands or suspensions with conditions as the hearing panel, the board, or the Supreme Court may impose. In practice panels are more likely to issue a reprimand with conditions than probation.
Minnesota	Rule 15(a)(4), Minnesota Rules on Lawyers Professional Responsibility, upon conclusion of the proceedings the Court may place the lawyer on probationary status for a stated period or until further order of the Court, with such conditions as the Court may specify and to be supervised by the Director.	Not identified in the rules as a sanction but the Court routinely imposes stayed suspensions, and even imposed one stayed disbarment.
Mississippi	Rule 8(b)(iii), Rules of Discipline for the Mississippi State Bar, provides for suspensions with or without probation for a fixed period of time	Not identified in rules as sanction
Missouri	Rule 5.225(a), Missouri Rules Governing the Missouri Bar and the Judiciary, lawyer is eligible for probation if he or she is unlikely to harm the public during the period of probation and can be adequately supervised; lawyer must be able to practice law w/o causing courts or profession to fall into disrepute; and cannot have committed an act warranting disbarment. Must be imposed for a specified period of time and in conjunction with suspension	Rule 5.225(a), Missouri Rules Governing the Missouri Bar and the Judiciary, Probation provides that probations must be imposed in conjunction with suspension that may be stayed in whole or in part

Montana	Rule 9(C), Montana Rules of Lawyer Disciplinary Enforcement, allows lawyer to be placed on probation for such time and conditions as are determined to be appropriate.	Not identified in rules as sanction
Nebraska	Rule 4(A)(3), Nebraska Disciplinary Rules, provides for probation in lieu of or subsequent to a suspension.	Not identified in rules as sanction
Nevada	Not identified in the rules as a sanction but are routinely imposed by agreement and/or contested hearing and are upheld by the Supreme Court	Not identified in the rules as a sanction but are routinely imposed by agreement and/or contested hearing and are upheld by the Supreme Court
New Hampshire	Not identified in rules as sanction	Not identified in rules as sanction
New Jersey	Not identified in rules as sanction	Not identified in rules as sanction
New Mexico	Rule 17-206(B), New Mexico Rules Governing Discipline, if the record discloses that the respondent can still perform legal services with proper supervision the Supreme Court may impose probation or other conditions as a type of discipline by itself or may defer the effect of the sanctions specified in subparagraphs 1, 2, 3, or 4 (regarding disbarment, suspension, indefinite suspension, or public censure).	Rule 17-206(B), New Mexico Rules Governing Discipline, provides that the Supreme Court may defer the effect of sanctions, including suspensions.
New York	Not identified in rules as sanction	Not identified in rules as sanction
North Carolina	Not identified in rules as sanction	General Statutes of North Carolina section 84-28(c)(2) allows for suspension for a period of up to five years, any portion of which may be stayed.
North Dakota	Rule 4.5(a), North Dakota Rules for Lawyer Discipline, provides for probation in cases where there is little likelihood that the attorney will harm the public during the supervised period and the conditions of the probation can be adequately supervised.	Not identified in rules as sanction
Ohio	Rule V, Section 6.(B)(4), Rules for the Government of the Bar of Ohio, probation for a period of time upon conditions as the Supreme Court determines, but only in conjunction with a suspension pursuant to division (B)(3) of this section.	Rule V. Section 6. (B)(3) Suspension from the practice of law for a period of six months to two years subject to a stay in whole or in part

Oklahoma	Not identified in the rules as a sanction, but can and has been ordered by the Court, in its discretion to fashion whatever discipline necessary to protect the public	Not identified in the rules as a sanction, but can and has been ordered by the Court, in its discretion to fashion whatever discipline necessary to protect the public
Oregon	Rule 6.2(a), Oregon State Bar Rules of Procedure, upon determination that an attorney should be suspended the trial panel may stay the suspension in whole or in part and place the attorney on probation for a period no longer than three years.	Rule 6.1(a)(v), Oregon State Bar Rules of Procedure, a suspension for any period in BR 6.1(a)(iii) or 6.1(a)(iv) which may be stayed in whole or in part on the condition that designated probationary terms are met
Pennsylvania	Pennsylvania Rules of Disciplinary Enforcement, Subchapter G section 89.291 respondent attorney may be placed on probation if they have demonstrated that they can perform legal services and will not cause the legal profession to fall into disrepute; are unlikely to cause harm to the public during the period of probation; the necessary conditions of probation can be adequately supervised; and are not guilty of acts warranting disbarment.	Not identified in rules as sanction
Rhode Island	Not identified in the rules as a sanction but the Court can and does enter disciplinary orders imposing conditions that are tantamount to probation	Not identified in the rules as a sanction but the Court can and does enter disciplinary orders imposing conditions that are tantamount to stayed suspensions
South Carolina	Not identified in rules as sanction	Not identified in rules as sanction
South Dakota	Not identified in rules as sanction	Not identified in rules as sanction
Tennessee	Rule 9 Section 8.5, Tennessee Rules of Disciplinary Enforcement, the imposition of a suspension may be suspended in conjunction with a fixed period of probation. Probation shall be used only in cases where there is little likelihood that the respondent will harm the public during the probationary period and where the conditions of probation can be adequately supervised.	Rule 9 Section 8.5, Tennessee Rules of Disciplinary Enforcement, indicates that a suspension may be stayed in conjunction with fixed period of probation.

Texas	Rule 15.11, Texas Rules of Disciplinary Procedure, provides that fully probated suspensions shall not be used in cases where the respondent received a public reprimand or a fully probated suspension within the last five years for violation of the same rule/rules; the respondent received two or more fully probated suspensions within the last five years; or the respondent received two or more public reprimands or greater within the last five years for conflict of interest, theft, misapplication of fiduciary property, or the failure to return a clearly unearned fee.	2.25 and 3.14, Texas Rules of Disciplinary Procedure, allow for stayed suspensions. Disbarments may not be stayed.
Vermont	Administrative Order 9, Rule 8(A)(6), Vermont Supreme Court Administrative Orders and Rules, Probation may be imposed only in conjunction with another sanction, reinstatement from disability, reinstatement from disbarment, or suspension. Shall be used only in cases where there is little likelihood that the respondent will harm the public during the probation and the conditions of probation can be adequately supervised.	Not identified in rules as sanction
Virginia	Not identified in rules as sanction	Not identified in rules as sanction
Washington	ELC 13.8, Washington Rules for Enforcement of Lawyer Discipline, a respondent who has been sanctioned under 13.1 (disbarred, suspended, or reprimanded) or admonished under 13.5(b) may be placed on probation for a fixed period of two years or less.	Not identified in rules as sanction
West Virginia	Rule 3.15(1), West Virginia Rules of Disciplinary Procedure, provides for probation.	Not identified in rules as sanction
Wisconsin	Not identified in the rules as a sanction, although the Court occasionally imposes "conditions on continued practice."	Not identified in rules as sanction
Wyoming	Not identified in rules as sanction except as may be appropriate under the terms of a diversion contract pursuant to Section 14, Wyoming Disciplinary Code	Stayed suspension cannot be longer than five years pursuant to Section 4(a)(ii), Wyoming Disciplinary Code

*This chart was prepared in August 2006 based upon information provided to the OPC by its counterparts in other states.