

1957

## In Re: Dwight L. King : Brief of Petitioner

Utah Supreme Court

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Arthur H. Nielsen; Attorney for Petitioner

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JUL 15 1957

Clerk, Supreme Court, Utah

# IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE: DWIGHT L. KING

} No. F-39  
8652

UNIVERSITY UTAH

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## Brief of Petitioner

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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IN RE: DWIGHT L. KING

} No. F-39

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## Brief of Petitioner

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### STATEMENT OF FACTS

DWIGHT L. KING, a member of the Bar of this Court, has petitioned for a review by this court of the proceedings had in the above entitled matter, seeking to have annuled and rejected the recommendation of the Board of Commissioners of the Utah State Bar entered on the 4th day of February, 1957, wherein the Board recommended to the Supreme Court, "that an order be entered suspending Mr. Dwight L. King from the practice of law in this state for a period of six months and

until he is recommended for reinstatement by the Board of Commissioners of the Utah State Bar upon application duly filed and submitted by said court.”

The proceedings were originally initiated upon the written complaint of one John M. Sherman, an attorney licensed to practice in California. Mr. Sherman, under date of August 6, 1954, wrote to the Utah State Bar Commission stating that he wanted to file “a formal complaint against a member of the Bar of the State of Utah, Dwight L. King, associated with the firm of Rawlings, Roberts, Wallace and Black of Salt Lake City.” (R. 3) Mr. Sherman alleged:

“ . . . The basis of the complaint against Dwight L. King is clearly indicated by the Court records and matters contained in the transcript of the proceedings which show beyond any reasonable doubt that Mr. King had personal knowledge that certain documents introduced into evidence were prepared in his office on the morning of June 10th, 1954. Mr. King, through his client, Harold J. Schnitzer, produced them, they were admitted into evidence on that day with the testimony that they had been prepared in Portland, Oregon more than a year prior to June of 1954. This matter was testified to by both Harold J. Schnitzer and Walter E. Hutchinson and at that time Mr. King himself well knew that the documents were not prepared in Portland, Oregon but were, in fact, prepared in his office and by his secretary.

The record and transcript clearly show that Mr. King was in the hotel room in the Hotel Utah occupied by Harold J. Schnitzer on the morning of June 10th, 1954, between the hours of 8:30 and 9:00 o'clock a.m., that he left the hotel room in company with Mr. Hutchinson and Mr. Schnitzer

to return to his own law office for the purposes of preparing the above mentioned documents.

This conduct on the part of Mr. King is a definite breach of the Code of Ethics of any bar association and the acts committed by Mr. King in permitting perjured testimony to be given to the Court and false information given to the Court, together with overt and open acts on his part in assisting with and participating in these acts are clearly such acts that warrant appropriate disciplinary action by your Commission.” (R. 4)

Following receipt of this communication, the Utah State Bar Commission appointed a committee to investigate the matter. This committee held an informal hearing on November 4, 1954, “for the purpose of taking a voluntary statement from Dwight L. King, who is here in company with Wayne L. Black.” (Exh. T 3, p. 1) Mr. King, who was not represented by counsel and Mr. Wayne L. Black, a fellow member of the Bar, made voluntary statements before the committee which statements were stenographically reported and transcribed and appear in the record before this Court as Exhibit T 3.

Subsequently, on March 7, 1955, the investigating committee through its chairman, Mark K. Boyle, made a report to Mr. Lee M. Cummings, Secretary of the Utah State Bar, in which the committee summarized its activities as follows:

“Mr. Sherman alleges generally that Mr. King had personal knowledge of the fact that certain documents had been prepared and executed in his office on June 10, 1954, and that with such knowledge he caused them to be introduced into evidence

purporting to be documents which had been prepared many months prior in Portland, Oregon.

“Mr. King’s version is that he was aware that some documents were being prepared in his office on the morning of June 10th, but that he paid little attention to the subject matter thereof and that he was taken by surprise when his witnesses testified that they had been prepared and executed at a different time and place.

“The Committee feels that this explanation is not entirely satisfactory and that Mr. King’s conduct during the examination of the witnesses indicates that he was not taken by surprise. However, according to his own statement he conferred with his witnesses during the noon recess and supposedly chastized them for misrepresenting the facts, but he nevertheless remained silent during the rest of the day when the misrepresentation continued.

“It is the recommendation of the Committee that appropriate disciplinary action be taken by the Board of Commissioners.”

Sometime later, (the record does not disclose the date thereof), a formal complaint, No. F-39 was filed and a citation issued to Mr. King directing him to appear within 10 days after the service of the citation upon him to defend the allegations of the complaint. (R. 8) The complaint alleged that Mr. King was guilty of unprofessional conduct as follows:

“Knowingly permitting witnesses to fabricate evidence and testify falsely before the District Court of Davis County.” (R. 9)

The citation was served upon Mr. King by mail on the 3rd day of October, 1955. (R. 11) A motion for a

more definite statement was filed requesting the hearing committee to require the prosecution more specifically to set forth the nature of the charges of unprofessional conduct. Particularly, with reference to the phrase, "knowingly permitted" the motion asserted that Mr. King could not determine whether he was being charged with having committed overt acts or with merely acquiescing in the acts of others. Likewise, in being charged with "permitting witnesses to fabricate evidence" it was also urged that the accused could not determine whether the evidence claimed to have been fabricated related to documentary evidence or whether it related to the fabrication of oral testimony. (R. 13)

The motion for more definite statement was overruled without hearing and Mr. King thereupon through his counsel filed an Answer denying the allegations of the complaint in respect to any unprofessional conduct.

The matter was finally brought to trial on the 5th day of May, 1956, at Provo, Utah, at which time counsel for the prosecution posed the question if it were determined that Mr. King did not actually fabricate evidence or permit anyone to testify falsely, "What was Mr. King's duty under the Rules of Ethics of the Utah State Bar in regard to a matter presented to the court which he knew to be false?" (R. 47)

As its evidence in support of the charges made, the prosecution offered "The full transcript of the record in the matter involving Locke vs. the Harsh Utah Corporation, and Mr. Schnitzer." (R. 64) In objecting to the introduction of the full transcript of testimony counsel for Mr. King stated that he had just overheard



opposing counsel state that after the entire record had been introduced in evidence they would move to amend the complaint to conform to the proof in that it would be further claimed and alleged that Mr. King was guilty of professional misconduct in failing to advise the court that perjury had been committed. (R. 70)

Thus, for the first time a charge was made that Mr. King "had a duty to confer with his clients and then divulge to the court the facts, the truth, respecting the evidence concerning which false testimony had been made." (R. 72) After considerable discussion on this matter, counsel for the prosecution were allowed to amend their complaint by adding thereto the charge "Knowingly refraining from divulging to the court the truth concerning such evidence presented to it." (R. 85-88) This amendment to the complaint was objected to by counsel for Mr. King who sought to have the Hearing Committee proceed with the hearing at that time upon the charge made in the original complaint. (R. 89) However, not only was the amendment accepted but the hearing was continued to a future date.

The matter came on again for hearing on June 11, 1956, at which time Mr. John M. Sherman appeared at counsel table with the attorneys for the prosecution. When asked by Mr. King's counsel as to the nature of Mr. Sherman's appearance at the hearing, Mr. Thomas replied:

"He is here as a witness. He has been subpoenaed as a witness, but he has been very helpful in the association by way of advice in an advisory capacity in this matter, but he does not appear

here as co-counsel. He merely appears as a witness." (R. 113)

The hearing before the committee was concluded on the same day, the only persons appearing to testify in the matter being Mr. Sherman, Mr. King, and Mr. Wayne L. Black. The committee received Exhibits T 1 through T 6; and the deposition of Harold J. Schnitzer, a witness for the accused Mr. King, was published.

Following the hearing, the matter was argued by counsel for the respective parties on August 6, 1956, and thereafter on a date which does not appear from the record but which was approximately November 1, 1956, the hearing committee submitted its Findings of Fact and Conclusions of Law in which it found in part as follows:

"3. That during the course of said trial, and particularly on June 10, 1954, in Davis County, Utah, one Harold J. Schnitzer, one of the defendants, represented by said Dwight L. King, and Walter E. Hutchison, Secretary of the defendant, Harsh Utah, a Corporation, knowingly, while under oath, testified falsely before the Court as to dates and place upon and at which a resolution and waiver of notice of directors of Harsh Utah, a Corporation, had been prepared and signed by the President and Secretary, respectively, of said Corporation.

"4. That at the time the testimony was given by the said Harold J. Schnitzer, and Walter E. Hutchison, to wit: on June 10, 1954, as aforesaid, the said Dwight L. King, one of counsel for Harold J. Schnitzer, and Harsh Utah, a Corporation, knew that such testimony was false.

“5. That the said Dwight L. King did not disclose to the Court or to other counsel, true facts as to the place and dates of the execution of such waiver of notice of directors, and resolution of Harsh Utah, a Corporation, until June 21, 1954, at a time when said defendants began their case in chief in such trial, although such Dwight L. King, as counsel, had opportunity to do so.

“6. That the resolution of Harsh Utah, a Corporation, and the waiver of notice of directors of Harsh Utah, a Corporation, were prepared by Walter E. Hutchison in the office of Dwight L. King, on the morning of June 10, 1954, and signed by the said Harold J. Schnitzer, and Walter E. Hutchison on that date.”

Based upon the foregoing Findings, the Disciplinary Committee determined as a Conclusion of Law that “The said Dwight L. King violated the provisions of Rule III, Sec. 32, Sub-Paragraphs 15 and 41 of the revised rules of the Utah State Bar governing professional conduct and discipline.” (R. 281)

Thereafter, the Board of Commissioners of the Utah State Bar, on February 1, 1957, made its recommendation that Mr. King be suspended from the practice of law in this state for a period of six (6) months, (apparently adopting the Findings and Conclusions made by the Hearing Committee). (R. 282)

## STATEMENT OF POINTS

In his Petitioner for Review, Dwight L. King set forth his reasons for urging that the recommendation and proposed order of the Board of Bar Commissioners are without merit and should not be approved. As broken

down and segregated into points, they appear as follows :

1. The evidence is insufficient to support the implied findings that Petitioner did not make a disclosure of the facts of the false testimony to the court within a reasonable time. Under all the facts and circumstances of the case, including the pressure being exerted upon Petitioner by the nature of the trial, the tactics and conduct of opposing counsel, and the professional desire on the part of Petitioner "to maintain inviolate the confidence" and "preserve the secrets of his client," Petitioner acted with propriety and in keeping with the ethical standards of the profession.

2. Neither the evidence nor the findings justify the conclusion that Petitioner violated the provisions of Rule III, Sec. 32, Sub-Paragraphs 15 and 41, Revised Rules of the Utah State Bar governing professional conduct and discipline.

3. The evidence does not justify the recommendation of the Board of Bar Commissioners that Petitioner be suspended from the practice of law for a period of six (6) months.

The foregoing points will be analyzed and discussed in this brief under the following headings :

## I.

### **PETITIONER DID NOT UNREASONABLY DELAY REPORTING THE FALSE TESTIMONY TO THE COURT.**

## II.

PETITIONER'S CONDUCT DID NOT VIOLATE SUB-PARAGRAPHS 15 OR 41 OF SECTION 32, RULE III, REVISED RULES OF THE UTAH STATE BAR GOVERNING PROFESSIONAL CONDUCT AND DISCIPLINE.

## III.

UNDER ALL THE FACTS AND CIRCUMSTANCES OF THIS CASE PETITIONER SHOULD NOT BE SUSPENDED FROM THE PRACTICE OF LAW.

## ARGUMENT

### I.

PETITIONER DID NOT UNREASONABLY DELAY REPORTING THE FALSE TESTIMONY TO THE COURT.

Although the amended complaint charged Petitioner with knowingly permitting witnesses to fabricate evidence and testify falsely, as well as "knowingly refraining from divulging the truth to the court or parties concerning such evidence and testimony," the Hearing Committee failed to find against Petitioner on the first ground of the charge. The only finding of any alleged misconduct appears in Finding No. 5 to the effect that Dwight L. King failed to disclose to the court or to other counsel the true facts with respect to the execution of the waiver of notice and the resolution of the directors until the 21st day of June, 1954, when he had opportunity to do so. This finding was not disturbed by the Board of Bar Commissioners and therefore must be deemed to have been

approved. Likewise, since the Board of Commissioners failed to make any further findings or conclusions, it must be taken as accepted that the Board exonerated Dwight L. King of any other alleged misconduct.

Petitioner's position at the hearing was, and now is, that if he had a duty to disclose the facts to court and counsel he did so within a reasonable time under all the facts and circumstances of the case. In order to have a full and complete picture of such circumstances, it is necessary to give a description of the transactions and occurrences surrounding the incident complained of. In doing this, we must not only refer to the testimony before the Hearing Committee, but also to the testimony in the original case, entitled *Pacific States Cast Iron Pipe Company, et al. vs. Harsh Utah Corporation and Harold J. Schnitzer*. This Court is undoubtedly well aware of the record in that case since the decision of the trial court in Davis County was appealed to this Court. The decision rendered on appeal is reported in 5 Utah 2d 244, 300 P. 2d 610. However, since some of the facts which we feel are pertinent here may have been obscure or lost in the voluminous record before the court we will attempt to summarize the facts briefly.

The particular matter with which we are concerned involved the claim of Alvin T. Locke, an intervening Plaintiff, against the Harsh Utah Corporation and Harold J. Schnitzer. The actual hearing of Locke's case began on Tuesday, June the 8th, 1954. (R. 133) Prior thereto, Mr. Sherman, Locke's attorney, obtained information concerning the room in which Mr. Schnitzer would be registered at the Hotel Utah. On the Sunday before

the 8th, Mr. Sherman obtained a key to the room which would be later assigned to Mr. Schnitzer and took a Mr. Don H. Terry to the room. Mr. Terry then wired the room for the purpose of eavesdropping on all conversations which might take place therein and for the purpose of recording such conversations. A microphone was placed over the window of the room, and a wire led from the microphone to a suite of connecting rooms down the hall and around the corner occupied by Mr. Terry and Mr. Sherman. (R. 142, 143, 161) During the ensuing days of the trial many, if not all, of the conversations taking place in Mr. Schnitzer's rooms were monitored and overheard by Mr. Terry, and tape recordings of some parts of these conversations were made.

The first person called by Mr. Sherman to be examined, was the Defendant, Harold J. Schnitzer, President of Harsh Utah Corporation. Mr. Schnitzer took the stand on the afternoon of Tuesday, June 8th, and was interrogated by Mr. Sherman the balance of that day and all day of the 9th. (R. 130, 134) During this examination, reference was made to the minute book of the Harsh Utah Corporation. Mr. Schnitzer testified that this minute book was in the possession of the secretary of the corporation, a Mr. Walter Hutchinson of Portland, Oregon. When Mr. Sherman continued to press his examination concerning the corporate minute book, Mr. Schnitzer advised Mr. Sherman that Mr. Hutchinson was coming to Salt Lake City and that he would be requested to bring the minute book with him and that Mr. Schnitzer would produce it in court. (R. 148)

Mr. Hutchinson arrived in Salt Lake City on the evening of June 9, 1954, and came to the hotel room occupied by Mr. Schnitzer. There was some conversation about the minute book which Mr. Hutchinson had brought with him. It was decided that it would be advisable to discuss the testimony which Mr. Hutchinson, (an expert on federal housing matters) was going to give in court while he was in Utah with Dr. Dwight King before court the next day. Mr. King was called on the phone, invited to meet with the others the following morning for breakfast. This conversation and other discussion between the parties, including some telephone conversations, were overheard and recorded by Mr. Terry in his room down the hall. At the hearing before the Committee, Petitioner produced these tape recordings and requested the Committee to hear as much of the monitored conversations as it desired. A portion of the recording relating to the morning of June 10, 1954, was played several times. (R. 193-198)

The following morning, Mr. King met Mr. Schnitzer and Mr. Hutchinson and had breakfast with them at the hotel, after which he came to the hotel room. During the course of the discussion, reference was made to typing certain minutes which belonged in the corporate minute book. According to the undisputed testimony of Mr. King, he was requested to allow Mr. Hutchinson, who was an attorney as well as secretary of Harsh Utah Corporation, use of a stenographer for the purpose of having the minutes typed and put into the minute book. Mr. King understood that the minutes had been prepared but were not in final form and therefore required typing.



The conversation in the hotel room between Mr. King and Mr. Hutchinson, related to the testimony Mr. Hutchinson was to give on the federal housing matters. (R. 250) The parties finally left to go to Mr. King's office where the minutes were to be typed up. The uncontradicted testimony is that upon the arrival at Mr. King's office, Mr. King allowed Mr. Hutchinson the use of his office and secretary for the purpose of having the minutes typed up. Mr. King further testified that Mr. Hutchinson had in his possession and appeared to be dictating from documents and papers which he, Mr. King, assumed were the minutes which were being typed and prepared in final form. (R. 253, 254) Because of the delay involved in the typing of the minutes, it was necessary to call the court and request a postponement of the starting time that morning. (R. 252) When the people arrived at the courthouse, Mr. Sherman again put Mr. Schnitzer on the stand and began to examine him relative to the corporate minute book, which at that time was produced and handed to Mr. Sherman. Keeping in mind, that Mr. Terry had already monitored the conversation regarding the parties going to Mr. King's office where the minutes were to be typed up, Mr. Sherman proceeded to cross-examine Mr. Schnitzer regarding the minute book and, by leading and suggestive questions invited Mr. Schnitzer to testify that the minutes had been prepared and signed approximately a year before in Portland, Oregon. Finally, Mr. Schnitzer broke down and stated that the minutes had actually been signed by him that morning. Thereupon, Mr. Sherman proceeded to go into the matter of the waiver of the notice of the meeting (which had also been prepared that

morning), and finally obtained a statement from Mr. Schnitzer that the waiver of the meeting had actually been prepared and signed at the time the meeting was held a year before.

In the present hearing, Sherman testified he could observe from the appearance of the two documents that they had been prepared on the same typewriter and similar in appearance. (R. 178, 179) He also testified in response to a question by a member of the Hearing Committee:

“MR. COLTON: Mr. Sherman, which of these days did you find out this testimony was perjured?

“WITNESS: I first found it out on the 10th of June.

“MR. COLTON: Is that why you were examining the witness Mr. Schnitzer?

“WITNESS: Mr. Schnitzer and Mr. Hutchison on the tenth of June, yes.”

Following Mr. Sherman's examination, Mr. King was given an opportunity to cross-examine Mr. Schnitzer, but he stated that he had no cross-examination “at that time.” During the noon hour, Mr. King and Mr. Bleak, (who was associate counsel during the trial) had a discussion with Mr. Schnitzer and Mr. Hutchinson. Mr. Schnitzer was rebuked severely for having testified falsely. Mr. Black's testimony of what transpired is particularly descriptive:

“A. My recollection is that the conversation commenced before we arrived at the place where we ate that noon. As a matter of fact the discussion started as soon as we arrived at Mr. King's

station wagon and continued while we were traveling to the place where we ate, which was an establishment known as Wild Horse Charlie's I believe, where we customarily ate, and it continued during the course of the meal at Wild Horse Charlie's.

“Q. Is Wild Horse Charlie's down some distance south of Farmington?

“A. Yes, it is on the main highway.

“Q. Relate what conversation you heard or overheard between these parties and what part of the conversation you took part in, if any.

“A. Mr. King, about the first time that we were alone and together in his automobile stated to Mr. Schnitzer that he was shocked; that he had never been the victim of such conduct on the part of counsel or of a client, since he had been practicing law. That his evasion and his refusal to be frank and tell the truth on the witness stand was shocking to him. And that he had completely lost the confidence and the respect of the court, and he didn't know—

“Q. That who had completely lost the confidence of the court?

“A. Mr. Schnitzer had, and he didn't know what was going to come of the situation from that point on.

“Q. Was anything mentioned with respect to Mr. Hutchinson testifying or the probability of his testifying later about the same act?

“A. Without trying to recollect the exact words that were spoken, which I certainly can't do at this time, Mr. Hutchinson's response to that was 'Well, Dwight, I think that you are giving this far more importance than it actually has.' He said, 'I don't think this has any significance in

the case. It can't possibly make any difference.' And he said 'I don't think there is going to be any further questioning about it and I think you are unduly alarmed by this situation.'

"Q. Did Mr. King make any statement to Mr. Hutchinson, as to what his attitude should be about these minutes if he were called to testify?

"A. Mr. King's response to Mr. Hutchinson, and this part of the conversation took place while we were eating after we had arrived at Wild Horse Charlie's as I recall, the first part of the conversation was confined more to the discussion back and forth between Mr. King and Mr. Schnitzer. But as we were eating at Wild Horse Charlie's, Mr. King said to Mr. Hutchinson that he thought that attorneys have frequently had to assume responsibility for their own neglect and for their own failure to perform their duties towards a client and he thought Mr. Hutchinson ought to go back on the witness stand and if he was asked any questions about this matter to be perfectly frank and perfectly honest about the preparation of the minutes and the resolution.

"Q. It was a fact, was it not, that Mr. Hutchinson was the Secretary of Harsh Utah Corporation and the testimony indicated that it was his responsibility to prepare the minutes?

"A. Yes. Mr. King as I recall, also asked 'Now what is the fact about this resolution and the minutes and the waiver? I want to know what the facts are?' Mr. Hutchinson said, 'Well the meeting was held. There is no question about that.' And he said 'I have a lot of things to do and I am busy and I don't know. I was just slow in getting them prepared and as a matter of fact the time crept up on me and I didn't have them ready.'

“Q. I think you stated something to the effect that Mr. King said ‘You should get back on the stand.’ Had Mr. Hutchinson been on the stand at that time?

“A. I misstated myself. He had not been on the stand but it was anticipated that he would go on that afternoon.”

Notwithstanding the discussion at lunch, when Mr. Hutchinson was called to the witness stand by Mr. Sherman, he proceeded to corroborate Mr. Schnitzer’s version in respect to the time of signing of the minutes and the waiver of the notice of the Board meeting.

After Mr. Sherman’s examination of Mr. Hutchinson, Mr. King again stated that he had no cross-examination at that time. Mr. Sherman continued to present his case every day of the trial from then until the 21st day of June. On Friday, the 18th of June, Mr. Sherman called a Mr. Percy Goddard to testify that the minutes of the meeting and the waiver of the notice of the meeting had been prepared on the same typewriter at approximately the same time. Mr. Sherman also called Mr. Terry who testified in some detail concerning conversations allegedly overheard by him on the wired connections with Mr. Schnitzer’s room.

Not only did Mr. Terry testify as to what he claimed was said, he also purported to identify the various persons who made the alleged statements, notwithstanding it appears from the record that the only time that he ever actually confronted the parties who had talked was when he appeared in court on the afternoon of June 18th to give his testimony. (R. 163, 164)

Although the Hearing Committee found that Mr. King did not make a disclosure of facts to the trial court or opposing counsel until June 21, 1954, the record does show that Mr. King endeavored to on the afternoon of June 17, and was prevented from doing so by the tactics of Mr. Sherman, who refused to accept any stipulation unless Mr. King acknowledged that he and Mr. Black participated in the preparation of the records. I quote:

“I will continue with the examination, unless you want to make a complete stipulation the documents were prepared by Mr. Hutchinson, yourself, Mr. Black and Mr. Schnitzer in your office.

“MR. KING: Mr. Hutchinson, I understand,—

“I offer the stipulation, and you can either leave or take, that stipulation is that you, yourself, and Mr. Schnitzer, Mr. Black and Mr. Hutchinson were there.

“MR. KING: I won't stipulate to that. I had nothing to do with preparing the minutes.” (R. 153, 154)

Why Mr. King would have any duty to disclose the facts with respect to the preparation of the documents to opposing counsel when the latter appeared to have all the facts and was attempting to distort them so as to implicate Mr. King and Mr. Black in the matter is not known. However, the record in the Harsh Utah Corporation Case, *supra*, as well as the testimony before the Hearing Committee, amply demonstrates the difficult circumstances under which Mr. King was attempting to try the case. We readily concede that Mr. Sherman is not on trial in these proceedings (although there is much

evidence to indicate that he should have been censored by the trial court on numerous occasions for his conduct); but his method of operating and proceeding in the trial furnishes explanation for the determination by Mr. King and Mr. Black to wait until Sherman was through with the presentation of his evidence before having Schnitzer and Hutchinson make a formal retraction.

In explaining, on Cross-examination, why a more immediate disclosure was not made, Mr. Black testified:

“A. Well, I suppose there were a complexity of reasons why it wasn’t corrected on that occasion, Mr. Thomas. I can only relate my own impressions about the matter, which would be this. That this was a very shocking and a very unusual occurrence, the testimony that had occurred on the 10th. It was an occurrence that had called into being a number of problems; the first problem being to attempt to correct the testimony at that time with the possibility that it would be tantamount to the confession of a criminal act on the part of our client, whom we represented and whose interests we were endeavoring to protect. That problem had to be explored. The next problem that had to be explored was the welfare of our case which was being tried. We couldn’t completely abandon any kind of a plan or any kind of an organized thinking in connection with the ultimate outcome of the lawsuit in hand. So we had the problem of deciding when would be the most strategically proper time to correct this testimony. And then we had the problem which was a very serious one of convincing a stubborn client and a stubborn lawyer as to what should be done and how to do it, and what would be the best procedure on that subject. And between all of those problems that combined and came together,

plus the fact that this lawsuit was still continuing in a rapid fire manner with Mr. Sherman moving with his customary mental agility from one subject to the other and jumping from one subject to the other, and trying to keep up with what he was doing, I for one can't conceive of any lawyer who under those circumstances could reflect calmly and considerately and have canons of ethics in mind and determine what the proper thing for a lawyer to do would be under those circumstances, and come to a conclusion on all of those matters in the space of one day. That is why we didn't correct the testimony with Mr. Hutchinson on the 11th day of June, 1954.

First of all we have a situation where Mr. Sherman had access to all of the confidential conversations taking place between Mr. King's client, Mr. Schnitzer and other persons coming to the hotel room. This enabled Mr. Sherman to anticipate defenses and to produce evidence which would not otherwise be available to him, and generally to confuse and harass opposing counsel in respect to any cross-examination or interrogation of witnesses called by Mr. Sherman.

Next we have the attitude of Mr. Sherman in the trial itself. There is no doubt but that his belligerence and domineering attitude toward Mr. Schnitzer and Mr. Hutchinson (as well as the manner in which he framed the questions) was primarily responsible for the perjured testimony in the original instance. As testified by Mr. Schnitzer in his deposition:

“A. Mr. Sherman's attitude in questioning me, particularly at that particular morning, was, it appeared to me, was to unnerve me. He came practically up to my face, and shouted in my face,



slammed records on the Judge's desk, in, it seemed to me, an effort to unnerve me and upset me." (Deposition p. 14)

Mr. Schnitzer was corroborated by Mr. Black who testified:

"A. Mr. Sherman that morning and on all other occasions when he questioned Mr. Schnitzer stood next to him and adopted a manner as though shaking a finger in his face and talking in a rather loud and bullying fashion, and his mannerisms and his demeanor towards Mr. Schnitzer was so obviously antagonistic and hateful toward him it aroused a similar response in Mr. Schnitzer and the two of them day after day and throughout the proceeding continued in that hostile and antagonistic attitude that they evinced toward one another." (R. 208)

It is the opinion of the writer of this brief, and such opinion is submitted to this Court for its consideration, that Mr. Sherman was not interested in obtaining from Mr. Hutchinson or Mr. Schnitzer the truth with respect to the preparation of the corporate minutes when he examined these individuals on June 10, 1954. The manner in which his examination was conducted, as indicated above, together with the language in which the questions were couched, clearly indicates that Mr. Sherman was more interested in having a misrepresentation made by the witness with respect to the preparation of minutes than a correct representation. Since Mr. Sherman could not dispute the fact that the meeting of the directors was actually held and that the action was taken as reflected in the minutes, the only purpose which could be served by showing that the minutes had not been prepared until

the morning of June 10, 1954, was to discredit the testimony of Mr. Schnitzer and Mr. Hutchinson. Obviously, this could be accomplished more effectively if the witnesses themselves were induced to misrepresent the facts with respect to the execution of the minutes. This would also cast more doubt and suspicion upon any other testimony which they might give in the case. We submit that Mr. Sherman wanted to win the case on behalf of his client by influencing the court not as to the merits of his client's position but as to the lack of respect for the individuals who were defendants in the case.

This is further evident by the fact that after the case was appealed to the Supreme Court, Mr. Sherman used an insidious method of further intimidating the Defendant Schnitzer. Not only did Mr. Sherman file the original complaint against Mr. King in this matter, but also while the appeal in the case of Pacific States Cast Iron Pipe Company v. Harsh Utah Corporation, *supra*, was pending before this Court, he wrote a letter to an attorney by the name of Walter H. Evans in Portland, Oregon, and mailed a copy of the letter to Mr. Schnitzer in which reference was made to the appeal, as follows:

*“From all the information I can gather, it would appear that the Utah Supreme Court will make a decision on the Utah matter within the next couple of weeks, and I fully expect a decision well in advance of the first day of July. In this regard, we have cross-appealed, asking for total of \$363,895.20 and from all the information I can gather we will be successful in a substantial portion of our cross-appeal. In this event, there are insufficient funds in the State of Utah to secure our judgment in the state of Oregon against other*

assets of Schnitzer and his various corporations.”  
(Italics added)

This letter (Exhibit T 6 in the instant matter) contains repeated innuendos to the effect that the decision of the Supreme Court of this State in favor of Locke and against Schnitzer is assured, some of which follow:

“We have also been delaying in the filing of our final brief in Montana, in sincere hopes that the Utah Supreme Court will make its decision prior to the time that briefs must be filed in Montana. Because of certain points covered in the opinion of the trial court in Montana, it would be most helpful to have a final judgment in Utah in presenting our appeal.”

Also:

“It is entirely possible that prior to the time that it is necessary to file pleadings in response to the action that Harsh Construction Company has started, that we will have obtained a judgment from the Supreme Court in Utah in excess of the amount on deposit there securing our judgment.”

Again:

“I am very confident that ultimately we will obtain a judgment in Montana equal to the amount or in excess of the amount that we will obtain in Utah, but my better judgment has been to delay pushing the action in Montana until we have received a final determination from the Supreme Court in Utah.”

The letter goes on to state that unless Mr. Schnitzer will accede to the demands and claims of Mr. Sherman and his client Locke, that Mr. Schnitzer will be unable to make any sale or disposition of his property:

“Both Mr. Locke and I have spent considerable time in Washington, D. C. during the past year. We found that Schnitzer’s reputation for underhanded dealings with the various branches of the Military is quite famous. *I am satisfied that Schnitzer himself would not receive favorable consideration in attempting to dispose of his own properties because of his past dealings with the Government. On the other hand, Mr. Locke and myself and others connected with our construction company have been very fortunate in establishing a most congenial relationship with all branches of the Government on certain Government contracts that our present construction company is engaged in, and I am satisfied through connections we have established, could dispose of, or assist in disposing of, Mr. Schnitzer’s Wherry Housing Projects to his substantial advantage, but of course we would not entertain anything of this nature until such time as our claims and judgments were satisfied in full.*

“My experience has been that in dealing with the United States Government the most advantageous transactions can be consummated by being the first to take advantage of any new legislation, such as the program to purchase Wherry Housing Projects. *However, because of the pending litigation and judgments, it is impossible for Schnitzer to take advantage of this fact, and he would undoubtedly lose again, just as he has in the past, by reason of his not being willing to make final settlement with Mr. Locke.*” (Italics added)

On cross-examination in the instant matter, Mr. Sherman admitted sending a copy of the above letter to Mr. Schnitzer but denied that his purpose in sending it was to use a psychological force in effecting a settlement of Locke’s claim in the case of Pacific States Cast Iron

Pipe Company v. Harsh Utah Corporation. (R. 160)

Although it is most difficult to reconstruct the actual conditions which existed during the trial of the case, the facts outlined above should be of assistance to this Court in understanding the tension and extreme pressure under which Mr. King was laboring. With this in mind, let us proceed to discuss the events which transpired between June 10th, (the date on which the false testimony was given), and June 21st, (the date on which a complete and full disclosure thereof was made by Mr. Schnitzer and Mr. Hutchinson). Mr. Sherman was in the process of presenting the case for his client Mr. Locke from June 8th, (which was a Tuesday), until June 21st. The 10th of June was on a Thursday and the false testimony given by Mr. Schnitzer occurred in the morning of that day, while the false testimony of Mr. Hutchinson occurred in the afternoon. Immediately following the testimony of Mr. Hutchinson in the afternoon of June 10th, Mr. Sherman proceeded to call other witnesses and to examine them on the afternoon of June 10th and the morning of June 11th. In the afternoon of Friday, June 11th, Mr. King endeavored to get the court's permission to put Mr. Hutchinson back on the stand to testify with respect to the special matter for which he had been called from Portland, Oregon. This matter related to the lump sum contract and unless he was allowed to testify then, he would have to remain over until the next week.

At first Mr. Sherman objected, and the court allowed Mr. Sherman to proceed with other witnesses until approximately one-half an hour before the time of adjournment. At that time Mr. King again interrupted and the

court allowed Mr. King to put Mr. Hutchinson on the stand to testify with respect to the lump sum contract. Some claim has been made that Mr. King should at that time have attempted to correct the record in respect to Mr. Hutchinson's testimony. However, it must be borne in mind that the time was very limited in which Mr. King could examine Mr. Hutchinson with respect to the matter involving the merits of the case and at that time, Mr. King and Mr. Black were still endeavoring to ascertain what the best means would be of correcting the record.

Following Mr. Hutchinson's testimony on the afternoon of Friday, June the 11th, the court adjourned until Monday morning June the 14th. Mr. Sherman continued to present Locke's case Monday the 14th, Tuesday the 15th, Wednesday the 16th, Thursday the 17th, and Friday the 18th. Again the court adjourned on Friday afternoon, the 18th, until Monday morning June the 21st and it was on this day that Mr. Schnitzer and Mr. Hutchinson got on the stand as the first witnesses called by Mr. King in presenting the defense.

Certainly when the false testimony was given on the 10th of June by Mr. Schnitzer and Mr. Hutchinson, both Mr. Black and Mr. King were deeply shocked and considerably worried as to how the record should be corrected to the best interest of their clients. The question whether the individuals could be relieved of the perjury if they got on the stand and recanted was before counsel. Mr. Black's testimony as to the position counsel were in and as to the course which they followed in ascertaining and determining what should be done is as follows:

“Q. Did Mr. King consult with you with reference to what should be the position that he should take, and that of his client, Mr. Schnitzer, with reference to what they had stated on the 10th?

“A. Yes. The first opportunity I believe that we had to actually sit down and discuss the subject was on Saturday. Because Friday of course Mr. King was extremely busy and at the end of the day of trial work we separated immediately upon arriving back in Salt Lake and we didn't have an opportunity to actually discuss the matter except in our proceedings in Farmington and Salt Lake. But on Saturday we were both in the office together and we were both working toward discovering what the law was with respect to recantation of perjury and the effect recantation would have legally upon the party involved, so that we could apprise ourselves of just what our legal problem was.

“Q. When you speak of perjury, are you referring to the testimony Mr. Schnitzer and Mr. Hutchinson had given on the 10th?

“A. I was. And my advice to Mr. King, and he heartily agreed with me, was this. I stated to Mr. King that there was only one course that we could possibly follow in this case, that there was only one way that we could ever rehabilitate Mr. Schnitzer in the eyes of the court and re-establish his credibility in this case and that was for him to get back on this witness stand and tell the absolute truth about this matter and to correct the record. And furthermore, I advised Mr. King and he heartily agreed with me, we had a complete meeting of the minds on it, that we should by all means bend every effort to get Mr. Hutchinson to come back to Salt Lake at the proper time and that the best time as far as our case was con-

cerned, and correct his testimony as well. We discussed the very serious situation that confronted Mr. Hutchinson, being a member of the bar of his state, and attorney at law, and the effect this might have on him. But our feeling on it as we discussed it, was that he had gotten himself into this thing over the advice that Mr. King had given him and against the wishes of counsel handling the case and that it was just one of those unfortunate situations where he had gotten himself into this situation and he would have to get himself out.

“Q. You said he had gotten into it “over” the advice. You mean—?

“A. Against the advice of Mr. King.

“Q. Did you and Mr. King do some research as to recantation?

“A. Yes, we did.

“Q. Do you recall reading a case as to the testimony of Senator Norris?

“A. Yes.

“Q. What was the effect of that case, so far as your determination as to whether any recantation on the part of either Schnitzer or Hutchinson would avoid perjury?

“A. We satisfied ourselves, and of course the Norris case is clear that recantation, no matter how soon it was given after perjury on the witness stand, will not cleanse the record of perjury, but on the contrary it will be nothing more or less than a confession of guilt.

“Q. Then in respect to your conclusion, you say you and Mr. King concurred in and were unanimous in, what was the purpose of having Mr. Schnitzer and Mr. Hutchinson get back on the



stand or resolving that they should get back on the stand and clear the record?

“A. Well, the thing that was foremost in our minds and of greatest importance to us was the conviction that we had, as a result of observing the situation, that the court had lost confidence in our client and that the court unquestionably had come to the conclusion that he was unworthy of belief, and our primary concern was to re-establish the integrity of our client in the eyes of the court and to correct the record for that reason.” (R. 208-210)

Mr. King, on cross-examination, explained the problem similarly:

“Q. Now when this thing started to unfold in court, the falsity of the testimony of Mr. Schnitzer, as I suppose it started to unfold on the 10th of June, and then subsequent to that time you and Mr. Black decided upon a course of action and as you have stated, I believe, you were somewhat confused and didn't know what direction to turn or what to do. I think that was in substance Mr. Black's testimony.

“A. No, I don't think we didn't know which way to turn. We were very much aware that these men were in an extremely dangerous position. That they were men of substance and character in the community and there was a very difficult problem. First we had this job of informing the court concerning the truth of the matter and as a secondary consideration we had the welfare of Mr. Hutchinson. You might not know it but he is about sixty years old, a very dignified appearing person, and an intelligent man and I considered very carefully the course we were to take.

“Q. Some time before the actual testimony of Terry and of Goddard, I believe you and Mr.

Black concluded that the record should be corrected. Can you fix about when that took place? Was it over the week end when you had the opportunity to talk to Mr. Black that that occurred?

“A. We concluded that the record should be corrected during the lunch hour, before we even got out of Wild Horse Charlie’s and that is what I told Mr. Hutchinson to do. I told him to correct that record and I told Mr. Schnitzer to do it too.

“Q. That was the 10th, wasn’t it?

“A. That was the day it occurred and there wasn’t any ifs, ands, or buts about that, and there wasn’t any equivocation on the instructions. But they didn’t correct the record that afternoon and that night we began to thrash around and try to resolve the problems we were confronted with.”  
(R. 270, 271)

Mr. Schnitzer, in his deposition, testified that not only had they agreed to correct the record at the first available opportunity, but that a transcript on the testimony had been ordered prior to the 17th of June, in order that the specific statements could be referred to and corrected as made:

“MR. THOMAS: Q. Well, Mr. Schnitzer, — This is on the record— when you finally did decide that it would be proper for you to take the stand again and testify in respect to the truth and to put Walter Hutchinson back on the stand to testify to the truth at that time Mr. Hutchinson was not in Salt Lake City, and you called him back from wherever he was to so testify. That’s correct, is it not?

“A. That is exactly right. Walter left immediately after he testified on the stand on June 10th, and we wouldn’t have had an earlier opportunity

until Mr. King took over the case, and it was at that precise time that I was put on the stand and Mr. Walter Hutchinson was put on the stand to clear this record.

“Q. Now, what I am trying to get at, Mr. Schnitzer, is when Mr. King decided to put you back on the stand prior to the testimony of Mr. Terry.

“A. I can’t give you the exact date, but I can say this: that we had discussed it, and we had ordered—Mr. King had ordered a transcript of that particular portion of the testimony from myself and Mr. Hutchinson of June 10th well before Terry ever was brought to the stand, so that prove conclusively that we were thinking and planning the correction of these particular statements.

“Q. Did he order a transcript prior to the testimony of Percy Goddard, do you know?

“A. I don’t recall exactly in the space of time that Goddard came in, but I believe—it is my recollection—I might be wrong—that the transcript was ordered the afternoon or the next Monday after the testimony of June 10th.” (Deposition, page 43, 44)

Implicit in the finding by the Hearing Committee that the accused Mr. King, did not disclose all of the facts to the court and opposing counsel until June 21, 1954 is the conclusion that it was Mr. King’s duty to disclose such facts some time prior to that date. When he should have disclosed the facts is not determined. Should he have disclosed them immediately at the time of the false testimony? Certainly from the record it would appear that no one was deceived by the testimony since Mr. Sherman testified that he knew both Schnitzer

and Hutchinson were lying; and Mr. Black testified that although he at that time knew nothing about the typing of the minutes, it was very obvious that Schnitzer was “guilty of falsehood by evasion at least.” (R. 211)

Exhaustive research on the subject has resulted in finding one case quite similar in point where the question of the duty to disclose and the responsibility of an attorney for failing to disclose was involved. In the case of *In Re Hoover*, (Ariz. 1935) 46 P. 2d 647, the attorney was charged, among other things, with the following misconduct:

“1. For purchasing on November 16, 1933, a bottle of cough syrup during the progress of a case, State of Arizona v. Rola Marlow, No. 1890, then pending in the Superior Court of Yuma County, State of Arizona, in which case you represented the defendant, giving the bottle of cough syrup so purchased to the defendant, Marlow, and permitting him to testify under oath that he, the defendant, Marlow, had purchased the said bottle of cough syrup just prior to the time when he was arrested.”

Hoover, the accused attorney, had represented Marlow on a drunk driving charge. During the course of the trial, Hoover put Marlow on the stand to testify with respect to the matter. On cross-examination by the attorney for the state, Marlow testified that the odor of alcohol which had been discerned by the police officer at the time of his arrest was the odor of cough syrup. At that time, Marlow took a bottle of cough syrup from his pocket, which had been partly consumed, and testified that this was the bottle from which he had been drinking. Upon being questioned as to where he had obtained the

bottle he testified that he had purchased it at Minor's Drug Store prior to the time of the arrest. In fact, however, the actual bottle of cough syrup which he produced had been purchased by the attorney, Hoover, during the course of the trial. Hoover had given it to Marlow, according to Hoover's statement, with the understanding that Marlow would identify it as being a bottle similar to that from which he had been drinking at the time of his arrest. The Board of Governors of the Arizona Bar found Marlow guilty of misconduct and recommended that he be reprimanded in respect thereto. In holding the evidence was insufficient to justify any reprimand, the Supreme Court of Arizona stated:

“Plainly it was respondent's duty, when his client incorrectly and falsely stated that he bought the medicine himself, to endeavor by questions put to him to elicit the correct and truthful answer. This duty he owed to his client, to the court, and to himself. While a lawyer owes the duty to his client of seeing that his rights are fully protected under the forms of the law, he is never justified in imposing upon the court or knowingly permitting his client to do so by testifying falsely. We think that an experienced right-thinking lawyer, under the circumstances, would have felt impelled to take steps, before his client left the witness stand or during the trial, to have him correct his testimony. *Because respondent did not do so, however, we cannot conclude that his silence was necessarily a studied effort to impose upon the court, or a wilful disregard of the ethical standards of the profession. It was in the midst of the trial and respondent doubtless was taken un-awares and did not expect or think that his client would make such a statement. Under such circum-*

*stances, the wisest most experienced lawyer might hesitate to elicit the real truth for fear of jeopardizing his client's case. There was nothing unethical in respondent's buying the medicine for illustrative purposes in the trial, if done openly and above board. The truth about the purchase of the bottle would have answered as well or better than a lie. There was no reason for the respondent to have incited Marlow to swear falsely, and we do not think that he did. The most that can be said is that he remained silent when he should have spoken. We do not think that respondent's conduct in the Marlow case merits his disbarment, suspension or reproof. We are satisfied if like circumstances ever arise in his practice he will act more ethically and more wisely."* (Italics added.)

The conduct of the attorney in the Hoover Case is far more questionable than the conduct of Mr. King in the instant matter. In the Hoover Case, the attorney not only set the stage for what took place (by buying the cough syrup and delivering it to the defendant), but he also allowed his client to take advantage of the false and perjured testimony by not correcting it before the case was completed. In the instant matter, the attorneys had nothing to do with the production of the testimony nor with the testimony itself. And subsequently the matter was corrected before the case was ever submitted to the court so that there could have been no prejudice result. As will hereinafter be urged, there seems to be no reason why the attorney who has not caused the false statement to be made should not be permitted to make a disclosure to the court at any time before the client appears to have obtained an unfair advantage by reason of the perjured

or false testimony.

Our court has on more than one occasion announced the rule with respect to the degree of proof necessary to establish misconduct on the part of an attorney. In the case of *In Re Hanson*, 48 Utah 163, 158 Pac. 778, the court stated the rule as follows:

“To disbar an attorney is a very serious matter indeed. It not only may deprive him of gaining a livelihood for himself and a dependent family, but it may, and usually does, result in preventing him from making available all antecedent preparation, although that may cover practically the period of a lifetime. In no other calling are such far-reaching consequences visited upon a delinquent who has not been found guilty of some felonious act. *The rule, therefore, that the evidence should be clear and convincing is based upon a most solid foundation.* (Italics added.)

Again in *In Re McCullough*, 97 Utah 533, 95 Pac. 2d 13, the court stated:

“The standard or quantum of proof which should govern this court in such a review was stated in *Re Hanson*, supra, at page 167 of 48 Utah, at page 779 of 158 P. to be: “\* \* \* “the charges should be clearly sustained by convincing proof and a fair preponderance of the evidence.” \* \* \* the evidence should be clear and convincing \* \* \* ’

“And in *Re Evans & Rogers*, 22 Utah 366, 387, 62 P. 913, 919, 53 L.R.A. 952, 83 Am. St. Rep. 794; ‘The summary proceeding of disbarment is civil, and not criminal. 6 Enc. Pl. & Prac. 709; *Matter of Randel*, 158 N. Y. (216) 219, 51 N. E. 1106; *State v. Clarke*, 46 Iowa 155. In that proceeding, however, more than a preponderance of the evi-

dence is required. The guilt of the attorney must be clearly established.' ”

A general annotation on the subject may be found in 105 A.L.R. 984, 987.

In the case of *In Re Mitgang*, 385 Ill. 311, 52 N.E. 2d 807, the court held that a lawyer will not be subjected to discipline merely upon suspicious circumstances, citing an earlier case where the court had held:

“In order for a recommendaiton of disbarment to stand there must be not only a charge of moral turpitude but also proof of the charge made. The proof, we have consistently announced, must be of a convincing character. Suspicious circumstances do not suffice. The proof must be clear and convincing.” *In Re Amaden*, 380 Ill. 545, 44 N.E. 2d 558.

The foregoing authorities, when considered in the light of the testimony in the instant matter, not only establish that Mr. King did not act unreasonably under all the circumstances of this case, but support the other propositions urged in this Brief, to the effect that the charges against him should be dismissed.

## II.

PETITIONER'S CONDUCT DID NOT VIOLATE SUB-PARAGRAPHS 15 OR 41 OF SECTION 32, RULE III, REVISED RULES OF THE UTAH STATE BAR GOVERNING PROFESSIONAL CONDUCT AND DISCIPLINE.

While the amended complaint filed in this case against Mr. King, and the finding of the Hearing Committee, accuses Mr. King of failing to report to the court



the true facts with respect to certain false testimony, the Hearing Committee actually determined that such alleged conduct was unethical because it is claimed that such action and conduct on the part of Mr. King violated the provisions of Sub-Paragraphs 15 and 41 of Section 32, Article III, Revised Rules of the Utah State Bar governing professional conduct and discipline. We respectfully submit that even though it may be concluded that Mr. King did not report the facts to the court or opposing counsel concerning the false testimony until June 21, 1954, that such cation on the part of Mr. King did not in any way violate either fo the foregoing provisions. Sub-Paragraph 15 of Section 32, Rule III provides as follows:

“Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client’s cause as is often set up by the unscrupulous in defense of questionable transactions.

“It is improper for a lawyer to assert in argument his personal belief in his client’s innocence or in the justice of his cause.

“The lawyer owes ‘entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,’ to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should

restrain him from the full discharge of his duty. *In the judicial forum the client is entitled to the benefits of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.*" (Italics added.)

Sub-Paragraph 41 of Section 32, Rule III, provides as follows:

*"When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps."* (Italics added.)

If the testimony of either Mr. King or Mr. Black is to be given any weight (and we respectfully submit that there is no evidence in the record to the contrary), the portion of sub-paragraph 15 which appears in italics was being closely followed by them in the matter before the court. This is much more than can be said of opposing counsel who, although well aware of the false statements made on the witness stand by Mr. Schnitzer and Mr. Hutchinson, failed to disclose the information to the court until the 18th of June so that in the meantime he could continue to monitor and overhear the conversations

going on in Mr. Schnitzer's room. If Mr. Sherman had been forthright with the court or with the witnesses who were on the stand on June 10th, 1954, he would have immediately disclosed that he knew the minutes were not prepared nor the waiver of notice of the meeting signed until that morning. However, to have done so would have destroyed the possibility of his continuing to use the wire tapping system, and would have exposed him as an unscrupulous individual in the methods used in obtaining information by such device. Mr. Sherman did not make any disclosure to the court until at the final conclusion of the evidence in his case and during the interim made no reference in the record at all to the fact that the testimony given on the 10th was false. (R. 188) On the other hand Mr. King and Mr. Black made preparations to bring the matter to the attention of the court in such a way as to minimize the derogatory affect it would have upon their client's cause, realizing at the same time, that in doing so they were acknowledging the commission of a crime by Mr. Schnitzer and Mr. Hutchinson which could not be expunged from the record by recanting. See *United States v. Norris*, 300 U.S. 564, 81 L. Ed. 808, 57 Sup. Ct. 535 where the court stated:

“The respondent admitted he gave intentionally false testimony on September 22d. His recantation on the following day cannot alter this fact.”

We submit that the provisions of Sub-paragraph 15 apply far more to the conduct of Mr. Sherman than to any alleged misconduct on the part of Mr. King.

Implicit in the italicized portion of sub-paragraph 41 is the proposition that the client has, by reason of fraud or deception, obtained an advantage from the court. It is this advantage unjustly gained by the client which the attorney must forego and obtain permission of his client to forego or withdraw from the case. In the instant matter the evidence is undisputed that no unfair advantage or any advantage at all was gained by the false testimony. Everyone appears to be in agreement that the court was very dissatisfied with the evasive way Mr. Schnitzer attempted to answer Mr. Sherman's questions on the morning of the 10th, so that the advantage, if any, was with the opposing party rather than with Mr. Schnitzer. Too, the decision of the trial court in that case indicates that it was influenced by the nature of the false testimony and the conduct of Mr. Schnitzer on the witness stand since the judgment which it rendered was later reversed by this Court. In reversing the judgment this court stated:

“We have a great deal of sympathy for the trial court which was required to wade through a morass of claimed embezzlement and perjury, accusations and counter-accusations as well as recriminations between opposing counsel, but we cannot allow even the self-confessed perjury of the appellant Schnitzer to blind our eye to the plain, unambiguous terms of the contract between the parties.” (5 Utah 2nd 244, 257, 300 P. 2d 610)

It is also significant that the confessed false testimony related to an immaterial matter, the actual preparation and signing of the minutes in question being immaterial to the issues in the case. See *State v. Hutchinson*, 4 Utah 2d 404, 406, 295 P. 2d 345.

In the case of *In Re Watson*, 83 Neb. 211, 119 N.W. 451, the accused attorney had dictated an affidavit in the presence and hearing of the witness, but had the witness sign a blank paper below where the information was to be typed. After conferring with another attorney it was decided that additional statements were needed in the affidavit and after the witness had gone the additional statements were added to those which the affiant had previously disclosed. The affidavit further stated that the statements were made before three witnesses, all of which was not true. After the corrected affidavit was typed up, the attorney instructed a notary in the office to notarize and find the affiant and have him sign it at the bottom again. However, the notary could not find the affiant so the name apparently was erased in the position where it had originally been signed and placed at the end of the instrument. It was a forgery. Subsequently, the attorney who prepared the affidavit was accused of an effort to deceive and practice a fraud upon the court and of causing a false, forged and untruthful affidavit to be made. Upon review of the facts the Supreme Court of Nebraska held that in the absence of any attempt on the part of the attorney to take advantage of the affidavit the conduct would not warrant disciplinary action by disbarment or suspension. The court commented:

“Had he made an attempt to mislead or deceive the court even though unsuccessfully, it would have been a different question.”

In the instant matter, Mr. King did nothing to mislead the court. He did not have anything to do with the

preparation of the minutes or of the waiver of notice of meeting and the Hearing Committee has not found that he had any connection therewith. Nor did he elicit the false testimony before the court or at any time attempt to take advantage of such false testimony or attempt to influence the court therewith. In the case of *In Re Palmeri*, 162 N.Y.S. 799, 176 App. Div. 58 (Order reversed 117 N.E. 1078), the attorney, charged with unprofessional conduct, had previously defended one DeLane in a criminal case. DeLane was charged with living from money given him out of the profits of certain prostitutes. The District Attorney had a complaining witness, a prostitute, whom he allowed to live in a certain flat, rather than in custody, during the time awaiting trial. One day she disappeared and the police were unsuccessful in finding her. The State's case was greatly weakened because of her absence. During the middle of the Defendant's case, she appeared in the courtroom with a suitcase in hand, and testified, upon being called as a defense witness, that she read about the case in a newspaper out of town and just arrived in town. As a matter of fact she had not left town and had been in constant touch with the Defendant's attorney who had staged her spectacular appearance. She testified falsely as to other matters also, which the attorney for Defendant knew were false. He relied upon these false statements in summing up to the jury, and made no effort to correct them.

The lower court, in finding the attorney guilty of unprofessional conduct stated:

“We cannot think that an attorney conforms to professional standards where he permits a

witness procured by him, and regarded by him as highly important, to state a play by suddenly appearing in the courtroom with a suitcase in her hand, and by permitting her to testify that she had just arrived on an early morning train, that no one knew of her coming, and that her attention had been called to the trial by an evening paper in an up-state town the night before, when he knew that she had been sent for by his client, had been at his home in consultation with him in a distant part of the city each day of the trial, and, to his knowledge, was deliberately and knowingly testifying falsely. His failure to say to her on her first statement that she had just reached town that morning: 'Why, are you not mistaken? Did you not come to see me yesterday?' is susceptible to the interference that he knew exactly what she was going to testify to; and his second question as to what she had in her hand when she entered the courtroom was to draw attention to the suitcase and add verisimilitude to her narrative. If there be any grounds for not holding respondent to a strict accountability for her false testimony, there certainly is no excuse for his adopting such false testimony, in his own summing up, for which he was alone responsible . . . He is therefore debarred."

On appeal to the Court of Appeals (117 N.E. 1078) the decision of the lower court was reversed by a memorandum which held that the "evidence does not warrant the conclusion that there was intentional misconduct on the part of the appellant, justifying his disbarment upon the charge sustained by the Appellate decision." This decision in effect approved the dissenting opinion rendered in the lower court wherein Justice Page stated that the evidence was insufficient that the attorney

“coached or instructed the witness to testify as she did”; and since the witness gave the false testimony voluntarily and not in response to any questions of the attorney, the attorney was not responsible and not guilty of misconduct.

Another case which we feel is significant and persuasive in this matter is the case of *In Re Smith*, 365 Ill. 11, 5 N.E. 2d 227. There the complaint charged that Smith, an attorney, while representing a colored defendant, caused the defendant to change clothes with his brother and the brother to blacken his face with burned cork. It was discovered by the State’s attorney and the Court instructed the men to change clothes and for defendant to appear as he did when brought to the courthouse on the morning of the trial. The attorney said he only wanted the defendant to appear just as he was on the night of the alleged crime, and thus had the two people change clothes and add black to their faces. The trial court indicated it did not believe that the attorney was attempting to impose on the court. However, the state’s attorney thought it was an attempt to confuse his witnesses on their identification. The Supreme Court of Illinois held:

“Each case of this character must be considered on its own merits, as no hard and fast rule can be laid down to govern them all. To justify disbarment, proof of carelessness or mistaken judgment is not sufficient. Misconduct complained of must be shown by clear and convincing testimony to have been fraudulent and the result of dishonest and improper motives. *The proof must not only show acts of misconduct, but must clearly*



*show they were intended to defraud or deceive. The burden of proof where fraud is charged is upon the party bringing the charge, as all men are presumed to act from honest motives until the contrary is shown. Charges of misconduct, to form the basis for disbarment or suspension of an attorney, must be proved by clear and convincing testimony. The record must disclose a case that is free from doubt, not alone as to the act done, but also as to the fraudulent motive with which it is done . . . The mere failure of an attorney to exercise good judgment in a transaction with his client, due to his inexperience, where no motive or intent to cheat or defraud is shown, does not disclose any fraudulent intent or dishonest motive on the part of respondent, we do not believe it justifies his disbarment or suspension from the practice of law."* (Italics added.)

The italicized portion above clearly demonstrates that the motive of the attorney must be established as being dishonest and improper, not only by suspicion or by a preponderance of the evidence, but by clear and convincing evidence. We submit in this case that the evidence does not so establish and that the accused Mr. King did not have any dishonest or improper motives in remaining silent when the witnesses testified falsely upon examination by opposing counsel.

### III.

UNDER ALL THE FACTS AND CIRCUMSTANCES OF THIS CASE PETITIONER SHOULD NOT BE SUSPENDED FROM THE PRACTICE OF LAW.

As hereinbefore stated, both the facts as well as the authorities cited in this brief support the proposition

that the accused Mr. King acted reasonably under all the facts and circumstances; and the evidence fails to disclose by clear and convincing proof that he is guilty of any misconduct. The most that can be said is that by reason of the innuendos and statements of Mr. Sherman and Mr. Terry there are suspicious circumstances but when these circumstances are considered in the light of all of the testimony in the case any doubt as to the integrity and professional responsibility of Mr. King should be dispelled.

This is not a *csae*, for instance, where the attorney has been charged and convicted of withholding client's money as was the case in *In Re Barclay*, 82 Utah 208, 24 P. 2d 302 where the court suspended the attorney for three months for the misappropriation of his client's funds. Rather, we refer the court to the case of *In Re Evans*, 42 Utah 282, 130 Pac. 217 where the court, thirteen years after the original accusation was filed against the attorneys, exonerated them from any misconduct on the basis of all of the facts and circumstances attendant in the matter.

When this entire case is boiled down to the "nub" and all of the chaff and straw blown away, we have only the claim and the finding that Mr. King did not promptly and immediately notify the court with respect to his knowledge concerning false statements made by his client on examination by opposing counsel. We agree with the statement made by Mr. Black on cross examination:

"A. I have been trying cases in the courts of this state for a good number of years. I have been

confronted on a good number of occasions, both as counsel for and as counsel against parties who in my judgment and in my opinion have testified falsely. I have on every occasion when my own client has done that, endeavored to the very best of my ability to correct the record and to bring out the truth in that case. But I have yet to see one single counsel who in all my experience stood forth immediately and without question, either before the court or in the chamber of the court and denounced the perjury in part, and I will say this, if that is the proper thing to do and the appropriate thing for counsel to do, then we ought to be educated to that fact and we ought to have a clear cut determination of that fact. But I know of no such determination that has ever been made yet, and I know of no such counsel who has such a shining armor of virtue that he has been doing that in this community or in any other community.” (R. 227)

If this Court desires to take a position and announce to the public and the Bar generally that in situations of this kind, where counsel for either side is aware of false testimony being given in the case, he should immediately, forthrightly and unequivocally announce to the Court his knowledge concerning the matter, every member of the Bar of this state should be apprised of his responsibility. Mr. King should not be pilloried because of the accusations of an unscrupulous attorney or made the example of a principle which has yet to be formulated and defined by this Court.

## SUMMARY

It is respectfully submitted that in view of all the facts and circumstances in this case, the charges against

Mr. King should be dismissed and that the recommendation and proposed order of the Board of Bar Commissioners be rejected.

Respectfully submitted,

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