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In Re: Dwight L. King : Petition for Rehearing

Utah Supreme Court

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Arthur N. Nielsen; Attorney for Petitioner;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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Clerk, Supreme Court, Utah

IN RE: DWIGHT L. KING

No. F-39

8652

Petition for Rehearing

ARTHUR H. NIELSEN

Attorney for Petitioner

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE: DWIGHT L. KING

} No. F-39

Petition for Rehearing

Petitioner in the above-entitled matter hereby petitions this Honorable Court for a rehearing of the review by this Court of the recommendations of the Board of Commissioners of the Utah State Bar, and in support of said petition, states as follows:

1. The Court, in its opinion, overlooked certain material matters which have a direct bearing on the decision.
2. The Court failed to consider and properly apply the Canons of Ethics of the Utah State Bar and has neglected to consider the Statutes of the State of Utah, spe-

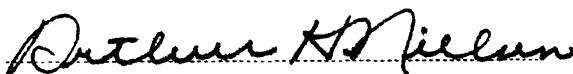
cifically Utah Code Annotated, 1953, Section 78-51-26, Subsections 4 and 5.

3. The Court failed to apply the proper principles of law relating to the quantum of proof necessary to establish the alleged unprofessional conduct of the accused.

4. The Court failed to consider the severity of the punishment in the light of all facts and circumstances of this case and particularly the conflicting duties and dilemma created by the Canons of Ethics of the Utah State Bar and the Statutes of the State of Utah.

WHEREFORE, petitioner prays that this Honorable Court grant a rehearing in the above-entitled matter so that the material oversights and failures revealed by the decision heretofore filed may be corrected and the ends of justice accomplished.

DATED this 22nd day of April, 1958.

A handwritten signature in dark ink, appearing to read "Arthur H. Nielsen", written over a horizontal line.

Arthur H. Nielsen

of NIELSEN AND CONDER

510 Nehouse Building, Salt Lake City, Utah

Attorneys for Petitioner

STATEMENT OF POINTS

A careful examination of the opinion of the Court reveals what petitioner considers to be several basic misunderstandings by the Court concerning the facts and the legal issues involved. These matters have been segregated into four main topics for discussion, with some sub-topics, as follows :

- I. Material matters having a direct bearing on the case which were apparently overlooked by the Court.
 - A. Alleged change of position by petitioner.
 - B. Alleged failure of petitioner to disclose false testimony until June 21st.
 - C. The false testimony was on an immaterial matter.
- II. Application of the Canons of Ethics and Statutes of Utah to the instant matter.
- III. Incorrect application by the Court of the law relating to burden of proof.
- IV. Severity of the punishment in the light of all the facts and circumstances.

ARGUMENT

POINT I.

MATERIAL MATTERS HAVING A DIRECT BEARING ON THE CASE WHICH WERE APPARENTLY OVERLOOKED BY THE COURT.

A. ALLEGED CHANGE OF POSITION BY PETITIONER.

The Court states in its opinion that petitioner “changed his position somewhat” by asserting, when first investigated, that he considered his duty to his client to be greater than his duty to the Court to disclose the false statement and then later at the hearing claimed that he intended at the first opportunity to disclose the false statement of his client.

This Court, in making such an observation has apparently failed to take into account that petitioner was talking in reference to different matters so that his position in this case has not changed. Originally, petitioner was charged with “knowingly permitting witnesses to fabricate evidence and testify falsely before the District Court of Davis County.” (R. 9). The disciplinary committee subsequently at the hearing amended its complaint to include an alleged additional offense of “knowingly refraining from divulging the truth to the Court or parties concerning such evidence and testimony.” (R. 16)

The findings of the disciplinary committee did not sustain either of the charged grounds. Paragraph V of

the disciplinary committee's findings were only that petitioner "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 Corporation until June 21, 1954, at a time when said defendants begin their case in chief at such trial although Dwight L. King, as Counsel, had opportunity to do so." (R. 280)

The claim that Petitioner knowingly permitted others to fabricate evidence apparently was abandoned after the hearing on the matter. As a matter of fact, the Waiver and Resolution were both proper documents for the officers of Harsh Utah Corporation to prepare. There is no evidence that these documents do not now constitute a part of the official record of the corporation, and so, are not fabricated or false documents.

It is respectfully submitted that it must be kept in mind that the only offense which the disciplinary committee found petitioner guilty of was not divulging the true facts before the 21st day of June, 1954, although opportunity was present to do so.

When the disciplinary committee added the second clause of its charge it then became incumbent upon petitioner to meet the assertion that he had not disclosed the false testimony which originally he was under investigation for allegedly assisting in preparing and presenting false false testimony to the Court. When the Findings of Fact were finally drawn it then became

incumbent upon petitioner to show that he made a disclosure within a reasonable time.

The facts concernng the occurrences, both in Davis County and in the office of petitioner have never been, in any way, varied nor has there been any change whatsoever in the testimony of the witnesses presented by petitioner.

Rule 41 of the Canon of Ethics required petitioner to advise his client, Schnitzer, and the witness, Hutchinson, to rectify the false statement which they made under oath. The evidence that he did this is uncontradicted.

The second requirement of Rule 41 requires the counsel to advise the Court, or opposing party, of the false testimony so that any benefit of the false testimony would be given up.

This Court has heretofore determined specifically that the false statements of both Hutchinson and Schnitzer were immaterial to any issue in the case. So, even if the witnesses, Schnitzer and Hutchinson, had refused to rectify the false statements the only other requirement would have been that petitioner inform the injured person or counsel and any advantage obtained would then be given up. No advantage could possibly be obtained by false testimony on an immaterial matter. The second requirement of Rule 41, it would seem, is not applicable.

This Court, in *State v. Hutchinson*, 4 U 2d. 404, 295 P. 2d. 345, at page 406, concerning the false testimony of Hutchinson and Schnitzer, stated as follows:

“They reasoned well since the trial court found the statements to have been on immaterial matter with which conclusion we agree.”

B. ALLEGED FAILURE OF PETITIONER TO DISCLOSE FALSE TESTIMONY UNTIL JUNE 21st.

On page 2 of the Opinion of the Court it is stated:

“There was no effort to disclose false testimony on the next Court day which was the following Monday, nor on Tuesday, Wednesday, Thursday or Friday of that week.”

This statement is not accurate, nor does it fairly interpret the evidence which is undisputed.

On June 16th the Court Reporter, J. L. Mays, took over the reporting duties in the trial of the Harsh Utah case. Mr. Mays reported only the 16th and 17th of June, 1954. The 17th of June was the Thursday referred to in the quoted portion of the Court's opinion. On Thursday, the witness Goddard had taken the stand and Sherman began to examine him. At that time, the petitioner attempted to stipulate into the record, and did get a partial stipulation into the record, concerning the false testimony of Hutchinson and Schnitzer. (Exhibit No. P 2, F. 39, Page 224.) The attempted stipulation shows the effort of petitioner to state fairly that the resolution and waiver were prepared in his office by his secretary upon the

dictation of Hutchinson. It was refused by Sherman unless petitioner would stipulate that Mr. Black and he were both participants in the preparation of the Waiver and the Minute. Since such was not the fact an agreeable stipulation was not made. The statement of Mr. Sherman indicates that he was not concerned about proving that the testimony of Schnitzer and Hutchinson was false but his main purpose was to implicate both Counsel Black and petitioner in some alleged improper conduct regarding the matter. He said:

“I will continue the examination for the purpose of the record. I would prefer to have it testified to.” (Exhibit No. P 2 F. 39, page 224.)

The attempted stipulation on June 17th constituted an effort by petitioner to disclose the facts and it was completely effective in that it revealed the fact that the documents had not been prepared in Oregon and could not, therefore, have been signed at the time Schnitzer and Hutchinson testified that they were signed.

Even though Counsel for the opposition refused to allow Petitioner to stipulate the facts on June 17th, Petitioner caused a complete disclosure of all the facts surrounding the false testimony to be made on the 21st day of June when both Schnitzer and Hutchinson testified and withdrew their false statements. The attempted stipulation on June 17th was an effort by petitioner to reveal to counsel and the Court that both Hutchinson and Schnitzer had testified falsely when they stated that the Resolution and Minute were prepared in Portland and were signed on April 1st, 1953.

Counsel for the Bar Association in their brief attempt to discredit the actions of petitioner by claiming that petitioner misrepresented the facts. Actually, as petitioner stated, he did not remember when the documents were prepared; but the Court Reporter's transcript which records petitioner as stating that the parties "left" the office to prepare the documents is an incorrect reporting of what petitioner said. It is obvious that this is an error of the reporter since the transcript further records petitioner as having stated he knew his stenographer was being used to type up the material. Surely he would not have attempted to claim that Schnitzer and Hutchinson left the office with the stenographer and later returned. In the light of the other statements contained in the record, the only reasonable conclusion to be reached is that petitioner stated the parties "went to" his office, rather than "left."

The Court, in its decision, places great emphasis on the number of days which passed before any effort was made. The amount of time which elapsed between the false statements and the attempted disclosure of the same was 7 days, not 11, as stated in the Court's opinion. And within that 7 days there was a weekend, so that there were only 5 days of trial time lapsed between the time of the false testimony and its disclosure by petitioner.

C. THE FALSE TESTIMONY WAS ON AN IMMATERIAL MATTER.

Throughout the Court's opinion the testimony of Schnitzer and Hutchinson is repeatedly referred to as

perjury. At no place in the majority opinion does the Court state that the perjury was second degree, or disclose that the perjury was on an immaterial matter. Apparently the Court has overlooked this particular aspect of the case. The immateriality of the testimony is now conclusively determined, since this Court, in the case of *State v. Hutchinson*, supra, determined that the false statements were on immaterial matters.

Petitioner feels that this failure of the Court's opinion to state in unequivocal language the basic fact that the perjury committed was second degree and on an immaterial matter may be one of the explanations why the Court did not give the matter of punishment more consideration.

Another evidence that the immaterial aspect of the testimony has been overlooked by the Court is found in the only quoted authority of the main opinion. Thornton, on "Attorneys At Law," Volume 2, page 1235, Section 1822. The quoted statement is applicable only where an attorney finds that his case is being *supported* by perjured testimony. Petitioner's case was not being supported by perjured testimony in any way.

The fact that the testimony was on an immaterial matter has a definite bearing on the action taken by petitioner. Only by recognizing that no harm or prejudice resulted to anyone by reason of the false statements of Hutchinson and Schnitzer, can a true perspective of the action of petitioner be gained.

Throughout the record, and in the original complaint filed, complainant Sherman accused petitioner of fabricating evidence and participating in the preparation of false testimony and false documents. On the witness stand he stated that he had been informed that Schnitzer was perjuring himself indiscriminately in the litigation. There was no evidence of any perjury on material or immaterial matters other than the single instance which is the subject matter of this proceeding.

It would appear, that Sherman, equipped as he was with his means of eavesdropping during the off Court hours, and cross-examining during the Court hours, would uncover any type of false statements, falsification, or fabrication of documents. Certainly, with his aggressive attitude toward both the opposing parties and their counsel, any false statements or documents he discovered would have been made known to the Court.

POINT II.

APPLICATION OF THE CANONS OF ETHICS AND STATUTES OF UTAH TO THE IN- STANT MATTER.

The opinion of the Court does not, at any place, discuss the several rules of conduct for attorneys, which appear to be inconsistent with each other, nor does the opinion in any way discuss the dilemma into which petitioner was placed by the examination (by Mr. Sherman) of the party Schnitzer and the witness Hutchinson.

While the court may have considered petitioner was in a dilemma, it does not appear to have been given any consideration in the opinion.

The provisions of the rules of conduct, attorneys' oaths, the statutes of the State of Utah, under circumstances shown by the evidence here, place an attorney in a dilemma, the solution to which it is respectfully submitted is not as simple as the decision of the Court indicates.

The attorney's oath contains the following promises by a counselor at law. This oath is required upon admission to the Bar of the State of Utah:

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

"I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with his business except only with his knowledge and approval."
(Exhibit P-7)

Sec. 78-51-26, U.C.A., sets forth the contrasting duties of an attorney in the following language:

"4(4). To employ for the purposes of maintaining the causes confided to him such means only as are consistent with truth and never to seek to mislead the judges by any artifice or false statement of fact or law.

“5. To maintain inviolate the confidences and at *every peril to himself* to preserve the secrets of his client.”

The Canons of Ethics which set up and delineate the conflicts under which a lawyer labors are as follows: No. 6, 15, 22, 29, 32, 37 and 41. Stated succinctly, these canons seem to require of the lawyer that he at all times maintain the confidential communications of his client and at the same time extend to the Courts of Law full candor and fairness.

In the day-to-day practice of law there are numerous situations which arise where the conflicting loyalties of an attorney are the subject of serious concern. Canons 36 and 37 require the attorney to maintain absolute loyalty to his client and to preserve his confidences without fear of any kind as to the consequences to himself. Canons 15, 22, 29, 32 and 41 require that the lawyer reveal to the Court any fraud, chicane or false testimony which is submitted in the course of litigation.

This Court has determined that under the facts and circumstances of this case as outlined in the decision of the Court the duty of petitioner to the Court was paramount to his duty to the client. To this determination petitioner cannot in any way object, but it is respectfully submitted that the determination by the Court concerning the primary duty of petitioner does not mean that the primary duty was so clear, unequivocal, or free from doubt at the time of the trial in Davis County.

The American Bar Association has rendered opinions regarding similar problems which have been presented to the Committee on Professional Ethics and Grievances of the American Bar Association by Committees of the State and Local Bar Association. The opinion most directly in point on the dilemma which faced petitioner is Opinion No. 287, at page 609 of the American Bar Association Canons of Professional and Judicial Ethics, Opinions of Committee on Professional Ethics and Grievance, 1957. The opinion is dated the 27th of June, 1953, and is entitled: "Confidential Communications, Candor and Fairness to the Court — Duty of Lawyer on learning of client's perjury in litigation conducted by him. Conflicting Loyalties under Canons 6 and 37 and under Canons 15, 22, 29, 32 and 41."

The various Canons above mentioned by the American Bar Association opinion are similar in text to the Canons of the Utah Bar Association as set forth in the Revised Rules of Utah Bar governing professional conduct and discipline. The numbers correspond to the Revised Rules numbers and, as a consequence, the opinions are directly in point on the problem which confronted petitioner. Two factual situations are considered, one where the attorneys involved learned of the perjury of his client sometime after the commission of the perjury. The other fact situation concerned false statements (made in the presence of the lawyer) by his client to the Court and which, at the time of the making, the attorney knew were false. The Committee on Professional Ethics and Grievances determined by its majority opinion that the

duty of the attorney was to respect the confidence of his client and not to divulge the confidential communication or the confidential information which he had received. The opinion of the majority was concurred in, in part, and dissented from, in part, by one of the members of the committee and a dissenting opinion was written by three members of the Committee. The majority opinion was concurred in by four of the Committee members.

The opinion of this Court is, it is respectfully submitted, similar to the opinion of the minority of the Committee. This Court, in effect, follows the minority opinion of the Committee on Professional Ethics.

The close split between the members of the committee indicates that the solution to the question of what an attorney's duty is when a false statement is made by a client, is not clear or free from doubt.

It is respectfully submitted that an attorney adopting the majority opinion of the Committee should not be found to have violated professional ethics. He chose to keep the confidence of his client rather than adopt the other horn of the dilemma and immediately disclose the false testimony amounting to perjury in the second degree.

The concept of the immediate duty adopted by petitioner is one which is greatly valued in our democratic society. See *Communists' Slavery vs. Individual Freedom*—an address by Charles S. Rhyne, President of the American Bar Association, given on December 10th, 1957, and

quoted in full in the Utah Bar Bulletin for November and December, 1957. Mr. Rhyne states, in his address, as follows:

“Behind the iron curtain we find the most shocking record in all World history of wholesale systematic denial, suppression and destruction of human rights of the individual. In fact, the average citizen, in communist-controlled states, has few rights. Those he does have are often violated. Soviet lawyers owe their first duty to the state, not to their client.” (Page 159)

At another point, Mr. Rhyne states as follows:

“The rules of collectives lay down the lawyer’s obligation in conducting the defense of the client. They bluntly stress the fact that his first obligation is to the State, not the client. During a criminal trial the defense lawyer is duty bound to help the prosecution bring out adverse points against his client.” (P. 161)

These quotes, in this brief, are cited for the purpose of demonstrating to the Court that the choice between the duty to the Court and the duty to the client is not one which is easily made or free from doubt. Certainly, petitioner should not be punished because he honestly conceives his immediate duty to his client is paramount to his duty to the Court — even though this Court now holds that he was in error in so doing.

POINT III.

INCORRECT APPLICATION BY THE COURT OF THE LAW RELATING TO BURDEN OF PROOF.

The Court, in its opinion, states as follows:

“* * * and we are not convinced by any clear evidence in the record that there was entire good faith exercised when the disclosure came after, not before, the falsifiers were caught and exposed, some 11 days after the perjury and one court day after it was clearly shown they had perjured themselves.”

As has been demonstrated, the petitioner made an effort to disclose the false statements five court days after they were made, so in this respect, the opinion is in error.

A more serious objection to the above statement is that the Court has shifted the burden to the petitioner to present clear evidence which convinces it of his good faith.

Of similar import is the weight given by the Court to the fact that “The matter has been heard by an investigating committee of five, a disciplinary committee of three and a Board of Commissioners of seven, and there appears to have been no dissent voiced nor any minority report of any kind filed which would indicate that those hearing the matter did not join in a unanimous conclusion that disciplinary action was called for in this case.” The Court appears influenced by this situation notwith-

standing the provisions of the Statute which put the responsibility upon this Court to determine the guilt or innocence of the attorney involved. Under Section 78-51-18, U.C.A. 1953, the Board of Bar Commissioners can only make recommendations to this Court. Under the provisions of Section 78-51-19, the Supreme Court has the sole responsibility of finally determining the unprofessional conduct, if any, of a member of the Bar. Surely it is a fundamental principle of our government that no person stands convicted because of suspicion or for failure to exonerate himself from accusation. In this case Petitioner was accused of assisting in the fabrication of false testimony. This charge was not sustained, but along the course of prosecution someone else conceived the idea that he might be guilty of failing to divulge to the Court that persons had committed perjury, and he was finally found guilty of failing to disclose such facts "within a reasonable time." Does this history of the prosecution of this case demonstrate the unanimity of thinking which this Court states manifestly appeared to the investigating committee, hearing committee, and Bar Commission?

Petitioner further desires to point out to the Court that the report of the original investigating committee apparently adopted the same philosophy that this Court adopted when it recommended prosecution because it felt Mr. King's "explanation is not entirely satisfactory" (R. 6). If under our democratic processes a person is to be adjudged guilty of misconduct because he fails satisfactorily to explain the same when accused by another

then indeed we are in danger of losing our civil liberties and our way of life is in jeopardy.

If, as appears from the record, the original investigating committee recommended prosecution of the case because petitioner failed satisfactorily to explain his conduct regarding the preparation of the documents in question; if the prosecuting committee after endeavoring to sustain the original charge found it necessary to amend the complaint because of insufficiency of proof to support the original charge; if the hearing committee, which did not agree with either the investigating committee or the prosecuting committee felt petitioner had not disclosed the perjury timely to the Court but didn't want the responsibility of prescribing any punishment; if the State Bar Commission thereafter adopted such finding and recommended disciplinary action in order to support the action of the hearing committee and because the ultimate responsibility for final determination was with this Court then and in such event this Court, by giving weight to the actions of those who were appointed to seek out the facts, has inadvertently caused an injustice to be done not only to petitioner but to the orderly process of the law.

POINT IV.

SEVERITY OF THE PUNISHMENT IN THE LIGHT OF ALL THE FACTS AND CIRCUM- STANCES.

Finally, petitioner respectfully submits that should this Court refuse to reconsider its decision it should nev-

ertheless reduce the punishment which the Bar Association recommended and which this Court has ordered because under all the facts and circumstances attendant in this case, such punishment is excessive. In the first instance it must be remembered that since the false testimony and the document themselves were immaterial to any issue in the litigation the disclosure of such falsity would have had no beneficial effect and its concealment would have had no detrimental effect on the action. Petitioner's explanation that he avoided an immediate disclosure because of his desire to avoid, if possible, criminal prosecutions against the persons involved, should satisfy this Court that he did not seek to gain or take advantage of the false testimony but only to minimize its harmful effects.

Petitioner has reviewed all of the cases which he has been able to find concerning disciplinary action of members of the Bar before this Court. In many of the cases read it would appear that the punishment decreed to the offending member of the Bar was less severe than that which the Court has ordered in this case.

The following is a list of the cases, together with the punishment decreed:

In re Evans & Rogers, 22 U. 366, 6 P. 913.

See Also: *In Re Evans*, 42 U. 282, 130 P. 217.

Evans & Rogers were accused of champerty and failing to deliver to their clients funds which they had re-

ceived and to which he was entitled. The Utah Supreme Court disbarred said attorneys but in a later opinion rendered many years later the disbarment was set aside and the Court acknowledged that a great miscarriage of justice had been perpetrated. As in the case at bar the disbarment arose out of a heated lawsuit and one in which disagreement between counsel representing the various parties seemed to be the basic seed which caused the complaint and proceeding against Evans & Rogers.

In re Foxley, 61 U. 575, 217 P. 248. The attorney was convicted of embezzlement. This Court ordered disbarment.

In re Hilton, 48 U. 172, 158 P. 691. Hilton was convicted of falsely stating, both publicly and privately, that the Utah Supreme Court was under the control and influence of the Mormon Church and was ordered disbarred.

In re Hanson, 48 U. 163, 158 P. 778. This proceeding involved Attorney Willard Hanson. He was caught by the Police Department of Salt Lake City while taking certain clothing from the department belonging to the defendant whom he represented and who was charged with the crime of murder. It appeared that the Court believed the Attorney had taken the clothing for the purpose of destroying them or concealing them from the State's prosecuting authority. Discipline ordered was sixty days' suspension to run from the 1st day of July to the 31st day of August.

In re Barclay, 82 U. 288, 24 P. 2d 302, Barclay was accused of withholding funds belonging to his client. The Bar recommended six months' suspension. This Court reduced it to three months upon a showing that during the proceedings Barclay had restored to his client the moneys which he was accused of withholding.

In re Stephenson, 85 U. 380, 39 P. 2d 722. Stephenson was accused of withholding funds collected on behalf of his client, and was ordered that he be suspended from practice for a period of three months.

In re McCullough, 97 U. 533, 95 P. 2d 13. McCullough was accused of soliciting legal actions and withholding information concerning the whereabouts of a defendant who was released to his custody and whom he advised to leave the State of Utah to escape prosecution. Recommended punishment two years' suspension was reduced by this Court to nine months' suspension.

In re Pearce, 103 U. 522, 137 P. 2d 969. Pearce was convicted of an indictable misdemeanor involving a conspiring to operate houses of ill fame. On the basis of this conviction he was disbarred.

In re Norton, 106 U. 179, 146 P. 2d 899. Norton falsely represented to this Court that a certain offered Exhibit had been received by the trial court when, in fact, it had not been received but had been rejected. The Court, one discovers from the opinion, believed not only that Norton falsely represented the status of Exhibit I, but also that

the Exhibit sheets in the case had been altered to show the receipt of the exhibit and that the alterations were probably accomplished by Norton. Ordered one year suspension.

The evidence in this case shows petitioner was only guilty of failing to reveal false statements concerning immaterial matters during the time the opposing party was presenting his case. This Court has determined this violates professional ethics. The violation, it is respectfully submitted, was an innocent mistake made because the petitioner erroneously believed he owed a duty to his client to wait for an opportune time before making a disclosure to the Court or correcting the record. Punishment certainly should not approach that given for wrongfully appropriating clients' funds or attempting to destroy State's evidence in a murder case.

The Court should further consider the fact that the matter complained of occurred in June 1954. Since August 6, 1954, when the complainant Sherman wrote to the Utah State Bar lodging a "formal complaint," petitioner has been under investigation and subjected to considerable mental pressure, as well as adverse publicity. The stigma attached to such proceedings, as well as to the Order of the Court finding petitioner to be guilty of unprofessional conduct, has been and is sufficient, under the facts and circumstances of this case, to satisfy the Court that the ends of justice have been accomplished.

CONCLUSION

Petitioner respectfully submits that the Court should grant a rehearing for the purpose of reviewing and considering the matters raise dherein, or at all events the Order in respect to the punishment should be amended so as to eliminate any suspension or reduce the time thereof.

Respectfully submitted,

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