2010

Nathan Nolan Jardine v. Office of Professional Conduct : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT

FOR THE STATE OF UTAH

In the Matter of the
Discipline of

Nathan Nolan Jardine

Respondent and Appellant,

Office of Professional Conduct

Appellee.

District Case No:
~~020901858~~ 070913637

Supreme Court Case No.
2010~~0698~~
600

REPLY BRIEF OF APPELLANT

Appeal from the decision of the Honorable Denise Lindberg,

Third Judicial District Court, Salt Lake County.

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ARGUMENT

1. Appellant's brief was adequately briefed pursuant to Rule 24(a)(9).

This Court in *State v. Green*, 108 P.3d 710, 714 (Utah 2005), identified the principles under which a brief is adequately briefed. This court said the following:

> The rules of appellate procedure require adequate briefing. See *id.* at 24 (detailing the proper format of appellate briefs). . . .
>
> In *State v. Gamblin*, 200 UT 44, 1 P.3d 1108, we noted that an appellant's brief was inadequate because it provided no "meaningful legal analysis"' instead the appellant provided only "one or two sentences stating his argument generally ... and then broadly conclud[ed] that [he] was entitled to relief." *Id.* At Paragraph 7. A brief which does not fully identify, analyze, and cite its legal arguments may be "disregarded or stricken" by the court, and we may fine the responsible attorney. . . .

Appellee states that no legal authority was quoted to further appellant's position yet, appellate cites this court to the *Rules of Professional Conduct*, Utah case law, and analysis of the same supporting his position. Certainly the *Rules of Professional Conduct* and Utah Case Law are "authority" upon which appellant and every other attorney in this states relies upon in order to conduct his or her affairs as lawyers.

Unfortunately, no Utah Case Law exists explaining when and under what circumstances a non-refundable retainer may be charged. We are, therefore, left with Ethic's Opinion 136, which does not have the force of law, but which provides guidance to lawyers who wish to adhere to the *Utah Rules of Professional*

Conduct.

No case law exists to guide lawyers as to the effect of the Ethic's Opinions which have been promulgated by the Utah State Bar. Notwithstanding the dearth of legal authority regarding this important point, we learn from appellee that the Utah State Bar advises lawyers calling their "hotline" to act in accordance with the Ethics Opinions that have been promulgated.[1] Brief of Appellee, p. 15 footnote 2.

In any event, unlike the *Green* and *Gamblin* cases, cited above, appellant did not just offer up a line or two of analysis to support his position. Rather, he offered sixty pages of in-depth analysis including cites to Utah Case Law and the *Rules of Professional Conduct* supporting his position.

Green requires legal analysis. Appellant's Opening Brief contained 60 pages of analysis. The issues in the Appellant's Opening Brief were adequately briefed.

2. The OPC should be bound by the ethics opinions. As admitted in its brief, the OPC admits that, the "OPC counsel routinely references the opinions

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[1] Yet, even though a lawyer may rely on a specific opinion, we also learn from appellee that this Court has taken the position that it is not bound by the Ethics Opinions. *Id.* footnote 3. Therefore, lawyers are left to their own devises and legal reasoning to determine how to apply the *Rules of Professional Conduct* given their unique circumstances.

issued by the Opinion Committee when answering questions on [its] own Ethic's Hotline." Given the fact that the Bar relies on the Ethic's Opinions to guide lawyers regarding the ethical practice of law, and given that the Bar actually cites the Ethic's Opinions when they are guiding lawyers, it is disingenuous of the Bar to later prosecute a lawyer when he applies the teaching of an ethics opinion to his practice. If the Bar disagrees with an ethic's opinion its remedy should be to strike the opinion, de-publish it and put all lawyers on notice that the Utah State Bar is not going to adhere to the opinion. Fairness and due process demand these actions.

This court should not let the Utah State Bar prosecute a lawyer when the lawyer relies on an Ethic's Opinion to that Lawyer's detriment. Nevertheless, that is what has occurred in the case at bar. Nathan Jardine relied on Ethic's Opinion 136, applied its principles to his practice, and, as a result, has now been disciplined, in part, for that reliance.

This Court, on the other hand is not bound by the Ethic's Opinions. This Court did not draft or issue the opinions. Even so, this Court should take into account the fact that the Ethic's Opinions do exist and that lawyers are encouraged by the Utah State Bar to rely on those opinions. In deciding the appPropriate discipline of any lawyer, his reliance on a given Ethics Opinion should, at the very least, be given consideration and, in fairness, should be given significant weight.

Furthermore, good faith reliance on Ethic's Opinions promulgated by the Bar should not result in a finding of an ethical violation and should certainly not result in the discipline of a lawyer. Lawyers who rely on the Ethic's Opinions to their detriment should not be sanctioned.

3. Ethic's Opinion 136 teaches that a totality of the circumstances test must be applied to determine whether a fee is reasonable under Rule 1.5. Rule 1.5 discusses eight factors for a lawyer to analyze when he is determining the fee to charge to a client. The eighth factor is whether the fee is "fixed or contingent." Ethics Opinion 136 shows how Rule 1.5 should be applied in the context of the eighth factor of Rule 1.5 – "whether the fee is fixed or contingent."

In the case at bar, in two matters, Jardine applied his knowledge of Rule 1.5 and Ethic's Opinion 136, charged a fixed fee, and was disciplined for the same. Six rule violations were charged to Jardine because the OPC and the Trial Court misapplied Rule 1.5 and did not properly read Ethic's Opinion 136.

In the Mecham matter, the fee agreement described the fee as a "non-refundable retainer." Therefore, in the words for Ethic's Opinion 136 and Rule 1.5, an element of the fee, was "non-refundable" or "fixed". In addition the fee agreement also allowed for additional charges under certain circumstances.

The OPC and the Court read the fee agreement to indicate that Ms. Mecham

would be billed hourly for the time spent by Jardine on her case. Instead, the agreement only indicated that Mecham would be charged additional fees if the time spent working of the case exceeded 66.67 hours ($10,000/150). The fee agreement was clear that the $10,000 not refundable. Therefore, part of the fee was fixed and part of the fee was not fixed. In the Gardner matter the fee was simply a fixed fee -- a non-refundable retainer.

Ethic's Opinion 136 addresses under what circumstances a lawyer will run afoul of Rule 1.5 if he characterizes a fee as fixed or non-refundable. According to the Ethic's Opinion 136, a lawyer must apply a "totality of the circumstances test" to determine when he can charge a non-refundable retainer without violating Rule 1.5. See last page of Ethic's Opinion 136, Addendum C to Appellant's Opening Brief.

As will be seen below, in the case at a bar the total fee charged to Mecham of $10,000 was reasonable in light of the results obtained and the time spent on the case. Also, as will be seen below, in the Gardner matter, the a total fee of $5,000 was charged to Ms. Gardner but $2,000 was refunded to her; therefore, the total fee of $3,000 that was ultimately charged to Ms. Gardner was reasonable in light of the results obtained.

4. The Trial Court committed Reversible Error in the Mecham matter

when it issued Conclusions of Law not Supported by Findings of Fact. Rule 52 of the Utah Rules of Civil Procedure states that, "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A." In *Bailey v. Bayles*, 18 P.3d 1129, (Utah 2001) the Utah Court of Appeals stated the following:

> Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are 'clear, uncontraverted, and capable of supporting only a finding in favor of the judgment." The finding must show that the court's judgment or decree 'follows logically from, and is supported by the evidence.' The findings 'should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.'

Id. p. 1135.

Of course, the case at bar was tried to the court without a jury. One of the "ultimate conclusion[s]" made by the court is that Nathan Jardine violated Rule 1.5 of the *Utah Rules of Professional Conduct* by charging an excessive fee in the Mecham matter.

To support the court's conclusion, the only finding that the Bar could point to is the finding that Mr. Jardine had not reimbursed Ms. Mecham for any "unearned fees." The court did not find that there were unearned fees, or the amount of the same. It merely found that no "unearned" fees had been returned.

This finding certainly does not contain any "subsidiary facts" and does not

show that he court's judgment follows logically from or is supported by the evidence. No one could possibly say that it supports the conclusion that Jardine charged an excessive fee in the Mecham matter.

In fact, the only evidence before the court was documentation from Jardine showing that if he had billed Ms. Mecham on and hourly basis the fees would have exceeded the retainer by about $3,500, and evidence that Ms. Mecham disagreed with some of the charges, although which charges she disagreed with was never identified. The Trial Court never made any Findings of Fact in this regard.

Furthermore, in order for the Conclusion of Law to stand without supporting findings, the record would have to be "clear, uncontraverted, and capable of supporting only a finding in favor of the judgment." The evidence supports exactly the opposite conclusion. The great weight of the evidence shows that Mr. Jardine more than earned his fee in the Mecham matter.

The record shows that Nathan Jardine represented Ms. Mecham with respect to three matters in the Vernal Area: 1) A criminal defense matter -- Aggravated Kidnaping, a First Degree Felony, 2) a divorce, and 3) a protective order hearing. The important evidence supporting Jardine's position will now be discussed:

A. Susan Mecham was charged with a First Degree Felony in the Vernal Area. ROA: 606: 21. Mr. Jardine persuaded the prosecutor to reduce the First

Degree Felony to a Third Degree felony by merely waiving her right to a preliminary hearing. ROA: 606:23. This was a result that is hardly ever obtained by a defense lawyer in the Vernal Area. *Id.*

B. In the divorce matter, Mr. Jardine was able to obtain $5,000 for Ms. Mecham by way of a temporary order, kept Ms. Mecham from testifying to avoid possible inconsistent statements in the criminal trial, and left the matter open so that Ms. Mecham could pursue the matter after the criminal matter ended. ROA: 605-173-175.

C. In the protective order hearing, during cross examination, Mr. Jardine, according to Ms. Mecham made the witness out to be the "fool" that he was. ROA: 605-148.

D. Addendum "L" to Appellant's Opening Brief is Exhibit 68 and is admitted into evidence. It shows that Nathan Jardine's time in this matter exceeded by at least $3,000 the amount that Susan Mecham paid him. Additionally, Mr. Jardine testified that his true billable time in this matter was approximately $20,000 to $30,000. ROA: 605-175.

E. The record showed that Nathan Jardine traveled to the Vernal Area five times, prepared for five different hearings, spent another day in preparation of the Temporary Orders Motion, and spent additional time reviewing a "four inch" stack

of documents for Susan Mecham. Exhibit "68", Addendum "L", as well as Susan Mecham's testimony, ROA 605:149-153, and Mr. Jardine's testimony, ROA 605: 173.

F. Perhaps, retired Judge Rigtrup who served as trial counsel for Nathan Jardine best summarized the evidence in his closing argument where he said the following:

> On or about February 25th, 2006, Susan Mecham signed a non-refundable retainer agreement, providing for a fee of $10,000 to handle her divorce and criminal matter. The criminal matter was an aggravated First Degree Felony, Aggravated Kidnaping. Mr. Jardine's strategy was to keep Ms. Mecham from making any incriminatory statements that would endanger her in the criminal case. She acknowledged that Mr. Jardine traveled from Salt Lake City to Vernal on five different days in three matters in which he appeared for her.
>
> He was able to cross-examine Ms. Mecham's husband in a protective order case, the complaining witness in the criminal case, without exposing Ms. Mecham to the stand. Based upon that examination, Mr. Jardine was able to persuade the prosecutor to amend the criminal complaint to a Third Degree Felony, thus making it less risky to take the case to trial. Ms. Mecham demanded a $5,000 refund [which] he declined to make. Based upon his personal knowledge and review of the dockets in the three involved cases he reconstructed a time summary which indicated he expended just over $13,500 worth of time at $150 per hour. He never billed her for more than the $10,000 nor did he collect anything more.
>
> Considering the amendment reducing to a Third Degree Felony before he withdrew and the five full days traveling and appearing in Vernal, I submit the $10,000 was

fully earned. . . .

ROA: 606-63-64.

As shown above, the evidence was far from "clear, uncontraverted [or] capable of supporting only a finding in favor of the judgment." In fact, the evidence shows that Mr. Jardine was not guilty of charging an excess fee in the Mecham matter. The record shows that Jardine earned his fee in the Mecham Matter.

Rule 1.5 lists several factors for determining whether a fee is earned. The fourth factor of Rule 1.5 is the "results that were obtained." The trial court spent no time assessing this very important factor. The evidence was uncontraverted that Jardine was able to get a good results for Ms. Mecham, yet the only point the court analyzed was the first factor in Rule 1.5, "time spent" on the case; furthermore, the court failed to properly analyze that factor.

The fee paid to Jardine was earned by the results alone. However, a proper analysis of the "time spent" factor would also show that the fee was earned by the time spent on the case. No lawyer could say that "after reviewing all of the facts, that [she] would be left with a definite and firm conviction that the fee is not reasonable." Rule 1.5 of the *Rules of Professional Conduct.*

Conclusion. The solitary fact that Jardine did not return any "unearned"

fees is cited by the OPC in support of the conclusion that Mr. Jardine charged an unreasonable fee does not support the conclusion that Mr. Jardine violated Rule 1.5. No subsidiary facts were part of the court's findings of fact. The evidence, on the record, at trial, shows that the fee was earned. The OPC did not meet it's burden of proof at trial to show that an unreasonable fee was charged and the record does not support the finding made by the court.

5. Contrary to the position taken by the OPC, a non-refundable retainer can properly be deposited into a lawyer's operating account. On page 18 of Appellee's brief, the OPC discusses the Trial Court's Conclusions of Law that there were 1.15 Rule Violations in the Mecham matter. Whether or not Rule 1.15 is violated is a matter of law for this court to decide. It depends on whether a non-refundable fee is earned when it is received.

The OPC seems to think that the opinion states an attorney can only place a portion of the fee in his general account. However, the writers of the opinion, in the last paragraph of the opinion were clear when they said, "[S]ince the "non-refundable" portion is considered earned upon payment, it may be deposited into the attorney's general operating account rather than in his trust account."

6. Jardine did not violated Rule 1.15 in the Mecham matter since a non-refundable retainer may properly be placed in a lawyer's operating account.

The fee agreement in this matter is Addendum "K" to Appellant's Opening Brief, which was admitted into evidence as Exhibit 57. The fee agreement states as follows:

> Said retainer is earned at the moment Client signs this contract. The parties agree that **THIS RETAINER IS NON-REFUNDABLE**; however, the retainer may be refunded if attorney materially breaches this agreement. Nevertheless, Attorney has earned this retainer, and Client has paid this retainer for the following consideration: 1) Attorney has accepted this case; 2) Attorney has promised to do the work described herein, and 3) Attorney has reserved the time necessary to do the work described herein; Client agrees not to ask that the retainer be refunded. Client further agrees that said money belongs to Attorney and need not be deposited into his trust account, but shall be deposited into his operating account and that said funds shall be used for Attorney's immediate use and benefit.

Since the entire fee was characterized by Jardine in the fee agreement as non-refundable, the entire fee was rightfully placed into Jardine's operating account. No rule violation occurred when the money was placed into Mr. Jardine's operating account since, at the time it was deposited, all of the money belonged to Jardine subject to disgorgement.

For some unknown reason, the OPC argued that only a portion of a non-refundable retainer could be placed in an attorneys' operating account. On page 19 of his brief, the OPC addresses the following quote from Ethic's opinion 136:

> If a substantial "non-refundable retainer" which is in part a prepaid fee is paid to an attorney and, before the attorney performs any service under the contract, the client dies, or fires the attorney, or the services called for by the contract are no longer needed for some other reason, would the attorney be guilty of charging a clearly excessive fee under DR 2-106(A) if he

refused to refund any of the "non-refundable retainer"?

The court went on to analyze the question and conclude that such a fee was neither automatically prohibited or automatically permitted.

> Such a lawyer might, but would not necessarily be, guilty of charging an excessive fee. . . .We interpreted the question as referring to a payment by a client to a lawyer of a sum of money designated as "non-refundable retainer," part of which is intended to compensate the lawyer for being available but not for specific services, and part of which is intended as a present payment for legal services to be performed in the future. If the lawyer performs no legal services, obtains no benefits for the client and has not lost other employment opportunities as a result of agreeing to represent the client, we believe he might well be guilty of charging an excessive fee if he refused to refund part of it . . . On the other hand, a lawyer of towering reputation, just by agreeing to represent a client, may cause a threatened lawsuit to vanish and thereby obtain a substantial benefit for the client and be entitled to keep the entire amount paid to him particularly if he had lost or declined other employment in order to represent that particular client. . . .

Exhibit 83, Addendum C, Page 2.

The OPC seems to think that the opinion at this point is describing how much of the retainer can be placed in the Attorney's operating account. However, the opinion is really discussing how much of the retainer would have to be disgorged if the client died or no longer needed the services of an attorney.

The guidance of the opinion, on the last page of the opinion is that the entire amount of the non-refundable retainer may be placed in that attorney's Operating Account since it is earned upon receipt. However, in some cases, a portion of the fee will need to be disgorged.

Jardine applied this guidance in the Mecham matter by keeping all of the fee, and in the Gardner matter, by disgorging 40% of the fee.

7. Jardine did not charge an excessive fee in the Mecham matter. In the Mecham matter, Jardine was, five times, required to spend an entire day traveling to Vernal to assist Ms. Mecham in her cases. Certainly, during each of these five days, Jardine could not accept any new business and employment opportunities were, thereby, foreclosed upon. Furthermore, the fee agreement signed by Ms. Mecham acknowledges that one of the reasons the fee is earned upon receipt is that Mr. Jardine will have to "reserve" the time necessary to work on Ms. Mecham's cases. Mr. Jardine reserved the time, and in good faith spent the time for Ms. Mecham and got good results for his client; afterwards Ms. Mecham asked for $5,000 of the retainer back. Mr. Jardine refused, Ms. Mecham filed a bar complaint, and, ultimately, Mr. Jardine was suspended from the practice of law. A draconian result for a job well done.

For some reason OPC seems to think that Jardine would have to do something more than he did in order to place the non-refundable retainer into his general account. OPC ignores the fact that the fee is a non-refundable or, in the language of Rule 1.5, a "fixed" retainer and counsel assets that somehow it should be treated as a different type of fee.

Admittedly, the type of retainer normally charged by a non-criminal defense lawyer requires the attorney to place the money into her trust account instead of her general account because it is not earned when it is received. In that situation, the contemplation between the parties is that the attorney will place the money into his trust account and bill against the same.

Such was not the understanding between Jardine and his client in either the Mecham or Gardner matters. In both cases, the retainer charged was a non-refundable retainer. Since it was not a refundable retainer, it was, in the words of Ethic's Opinion 136, "earned when received".

8. The OPC does not address the arguments of the Appellant's Opening Brief regarding Mildred Gardner. Appellant's Opening Brief asserts, that in the Gardner matter the Findings of Fact should be reversed because the evidence does not support them. The court made two specific findings relative to its conclusion that Jardine violated Rule 1.5 in the Gardner matter. Each finding will be addressed in turn:

a. By failing to address the argument of the opening brief, the OPC admits that Jardine was only hired to assist Gardner with her will and trust documents. The court found that the scope of the representation in the Gardner matter was that Jardine was to assist Ms. Gardner with her financial

affairs. At trial, Jardine disputed this position and testified that he was only hired to assist Ms. Gardner with the revision of her will and trust. Jardine objected to the finding and, in Appellant's Opening Brief, Jardine asserted that the factual finding was not supported by the evidence.

The OPC brief does not address this issue other than to reassert that Jardine was hired to assist Ms. Gardner with respect to her financial affairs.

The Court of Appeals has stated the following:

> "If [a] contract is ambiguous, i.e., susceptible to varying interpretation, extrinsic evidence may be introduced to clarify the parties' contractual intent. . . . We review the trial court's construction based on extrinsic evidence under the more deferential clearly-erroneous standard. . . .
>
> A party challenging the court's interpretation of ambiguous terms of a contract faces a substantial appellate burden. We affirm the trial court's findings if they are based on sufficient evidence, viewing the evidence in the light most favorable to the trial court's construction. The challenging party must marshal all relevant evidence presented at trial which tends to support the findings and demonstrate why the findings are clearly erroneous. . . .

West Valley City v. Majestic Investment Company, 818 P.2d 1311, 1313 (Utah App. 1991) (citations omitted.)

Since Appellant has marshaled the evidence on this issue and hown that the finding is clearly erroneous, and the OPC does not address this argument, this Court should reverse the Trial Court's findings and find that the agreement between the parties was that Jardine would represent Ms. Gardner with respect to the will and

trust revision and not with respect to the larger question of helping her with her financial affairs. Moreover, the only evidence on this point is the handwritten note and Jardine's testimony that the word's "financial affairs" in the handwritten note meant the work on the revision of her will and trust documents. The court's findings were "clearly erroneous" since they were not supported by the evidence; therefore, they should be stricken and the Conclusion of Law reversed.

b. The court made a finding that "nothing" was done in furtherance of the representation; the OPC does not dispute that this finding should be overturned. On pages 35 and 36 of Appellant's Opening brief, fourteen items of evidence are presented to dispute the Trial Court's finding that "nothing" was done "in furtherance of the representation". Appellee's brief does not discuss, in any fashion, this Finding of Fact. Rather, appellee argues that the things that were "done in furtherance of the representation" were not sufficient to overcome the court's Conclusion of Law that Rule 1.5 was violated. The trial court did not make the findings that the OPC advances. The point of the opening brief was that the finding made by the Trial Court was not supported by the evidence. Appellee, is, therefore, arguing in support of a finding that was never made by the Trial Court.

The fourteen identified points certainly demonstrate that something was

done in furtherance of the representation. If Findings of Fact are not supported by evidence, as shown by the marshaling of the evidence, the Findings of Fact must be stricken and unsupported Conclusions of Law should be reversed. *Bailey*, paragraph 24. Therefore, the Finding of Fact that "nothing" was done in "furtherance of the representation, and the Conclusion of Law resting on that finding that Jardine charged an excessive fee in the Gardner matter, must be reversed since it was clearly erroneous.

c. The undisputed evidence at trial was that many things were done "in furtherance of the representation." Evidence was overwhelmingly presented that Jardine did many things in furtherance of the representation as indicated on pages 35 and 36 of the opening brief. Most importantly, conversations with Ms. Gardner occurred so that she would have peace of mind with respect to the annoying problem of her son; conversations with her son occurred to stop him from harassing her; and, a meeting between Jardine and Ms. Gardner occurred to begin the process of identifying her assets. No evidence was presented that these things did not occur or that any of the fourteen items listed in the opening brief did not occur. Furthermore, these actions, as analyzed in Appellant's Opening Brief, p. 36-42, show that an excessive fee was not charged in the Gardner matter. The results that were obtained justified Jardine in keeping 60% of the fee and refunding

40% of the fee and the OPC did not prove anything to the contrary nor did the OPC point to any fact supporting it's position in its brief. The Conclusion of Law should, therefore, be reversed.

c. Conclusion. In conclusion, with respect to this issue, Appellant's Opening Brief recites the fact that $5,000 was originally charged to Ms. Gardner and 40% of the fee was refunded upon request of Ms. Gardner's new counsel. At trial Jardine opined that he should have refunded more of the money. Appellee references this point, and Appellant simply incorporates by reference the argument found on pages 37 and 38 of the opening brief.

The Findings of Fact are not supported by the evidence. The contract between Jardine and Ms. Gardner should be interpreted in light of the fact that the only conversations Jardine had concerning this matter before he was hired were that he was being hired to assist Ms. Gardner with respect to a harassment problem she was having with her son, and he was being hired to revise her will and estate documents. The finding that Jardine did nothing in furtherance of the representation is clearly erroneous since Jardine showed in the opening brief fourteen points of things that were done in furtherance of the representation.

The OPC in the appellee's brief relies on those points to make its argument that the fee charged was clearly excessive. The OPC is wrong because the result

obtained of providing peace of mind to Ms. Gardner justified the fee by itself.

More importantly, the OPC misses the point. The point is first, that the evidence does not support the finding that nothing was done in furtherance of the representation. Second, the finding cannot support the Conclusion of Law that Jardine charged an excessive fee because the evidence does not support the finding itself. Therefore the judgment of the trial court on this issue should be reversed. The conclusions of law that Jardine charged a clearly excessive fee in the Gardner matter should be reversed.

9. This Court should rule as a matter of law that Rule 1.15 was not violated in the Gardner matter. Once again, under Rule 1.15, the trial court concluded that Jardine violated Rule 1.15 in the Gardner matter in two instances because Jardine deposited the money he received from Ms. Gardner into his trust account.

The facts are clear and undisputed. The fee agreement between Jardine and Gardner refers to the fee as a non-refundable fee. Jardine deposited the money into his general account. Therefore, the court may rule on this issue as a matter of law.

Once again, however, appellees brief shows a misunderstanding of the relationship between Ethics Opinion 136 and Rule 1.5. For some reason OPC thinks that Jardine should have to "demonstrate that he earned the fees" before he

deposited them into his account. Without a doubt, this position is clearly erroneous.

The ethics opinion states, a non-refundable fee is "earned upon payment" and "may be deposited into the attorney's general operating account rather than his trust account." All that need be demonstrated is that it was a non-refundable retainer. This was demonstrated. The handwritten note that served as the fee agreement in this matter referred to the retainer as "non-refundable." Addendum J, p. 1, Exhibit 7 at trial.

Since the retainer was non-refundable it was earned upon receipt and could properly be placed in Jardine's account. Both 1.15 rule violations as far as the Gardner matter should be reversed.

10. **This Court may rule as a matter of law that no violation of Rule 8.4 occurred.** The facts are not disputed. A trial in the Woods matter was set. Mr. Jardine received word from his secretary that the trial had been continued. Mr. Jardine failed to attend the trial. The court issued a bench warrant for Mr. Jardine's client and sent a letter of complaint to the bar.

a. The facts on the record show that there was no conduct that was prejudicial to the administration of justice. Besides those facts listed above, the following facts illustrate this point:

1. Retired Judge Rigtrup who served as trial counsel for

Nathan Jardine, and Judge Lindberg both agreed that the above-described mishap wouldn't have occurred in either one of their court rooms because they would have simply had their clerks call the attorney to find out why he wasn't in court. ROA 606-63. Judge Rigtrup said in his closing, "I strongly feel that Mr. Jardine did nothing in the Wood[s] case prejudicial to the administration of justice. *Id.*

2. Mr. Woods had a criminal history that was about four pages long and knew that if he was ever convicted of another crime he would most likely serve the maximum sentence allowable. ROA 605:177.

3. In analyzing her thought about sending this matter to the bar, Judge Ward was thinking in terms of the minimum mandatorys she normally give people in Mr. Woods position. ROA 605:163. She thought that the prosecution might offer Mr. Woods a deal of an Alcohol Related Reckless because they didn't have witnesses that could testify on the day the matter was set for trial. *Id.* An Alcohol Related Reckless, however, carries with it a maximum sentence of 6 months in jail and a fine of $1,850, just like a DUI. ROA:605-177. Therefore, because Mr. Woods was looking at the maximum sentence, not the minimum sentence any deal the prosecution might have offered would not have been acceptable to Mr. Woods given his extensive criminal history. *Id.*

4. The secretary who told Mr. Jardine that the matter had

been continued was a 55 year old woman who had graduated from paralegal school and had been with Mr. Jardine for about two weeks prior to this incident. ROA: 605:176. It was understandable that Mr. Jardine believed his secretary given her age, experience, and given the fact that he was aware that the court had about ten other matters (ROA 606:9) on its calendar that day.

b. The *Farmer* case cited by the OPC does not support its position. *In re Farmer*, 950 P.2d 713 (Kan. 1997) is an attorney discipline case out of Kansas. In that case the court found by clear and convincing evidence that the Attorney missed several court appearances, was called aside by several judges to talk about the problem, and continued to "miss court appearances and make mistakes in sending notices, filing pleadings and analyzing the law. These actions created more work and frustration for the courts, thereby prejudicing the administration of justice in the bankruptcy courts."

The OPC brief makes it appear, according to the case cited, that the fact that the court had to issue a warrant for Mr. Woods was "sufficient" to justify a violation of Rule 8.4. In fact, the conduct of the attorney in the *Farmer* matter was certainly a violation of Rule 8.4, but his conduct is a far cry from and compares in no way to the conduct of Jardine in the case at bar.

c. Conclusion. In 18 years of practice, with a practice devoted 70

percent to criminal practice (ROA 605:170) this case represents the only time Mr. Jardine has been cited for failure to attend a court appearance. In *Farmer,* the attorney missed court appearances on a regular basis and had other complicating issues.

The conduct in the case at bar caused little if any inconvenience to the court and no inconvenience to opposing counsel and was positive as far as Mr. Jardine's client was concerned. The problem could have been averted with a simple call to Mr. Jardine's office. The rule was not violated.

11. The OPC should have cited Jardine for a violation of Rule 5.3 instead of a violation of Rule 1.6; Jardine did not violate Rule 1.6. Without admitting that Jardine is in violation of Rule 5.3 the OPC brief makes it clear that the OPC does not dispute the fact that it is Jardine's secretary and not Jardine himself that sent confidential information to Jardine's client. Once again, the OPC brief does not even address the marshaling of the evidence challenging the finding of fact. The OPC merely argues that whether it was Jardine or his secretary that sent the confidential information, Jardine is in violation of Rule 1.6.

The finding of the court is clearly erroneous and against the great weight of evidence. The OPC cannot even argue that the finding is correct or supported by the evidence. It should be stricken and the court should find that Jardine did not

violate Rule 1.6.

In conclusion, Jardine admits that failing to supervise an employee can cause great harm. However, a great distance exists between failing to supervise a secretary and divulging confidential information.

Jardine did not divulge confidential information; his secretary divulged the information after Jardine told his 30-year-veteran secretary to send the client's file to the client. He didn't tell her to send someone else's file to the client. Giving an instruction to a secretary is not at all the same thing as divulging confidential information.

12. Competence.

a. The OPC cannot point to any evidence supporting the findings discussed in the opening brief. In his opening brief, Jardine pointed to two Findings of Fact and asserted that those findings were not supported by "any" evidence. The findings were as follows:

> 35. During the six years of representation, Mr. Jardine did little or no investigation into the facts of the case.
>
> 36. During the six years of representation, Mr. Jardine did little or no research regarding the substantive and procedural law applicable to the case.

Opening Brief, p. 46. In response, the OPC did not point to any evidence that these findings were supported by the evidence. Therefore, we must assume that the OPC could not find any evidence that supported those findings. Appellant asserted that there was no evidence to support these findings. This court, should, therefore, strike the findings since they were not supported by the evidence and since they were clearly erroneous.

b. The OPC misstates the Trial Court's Findings of Fact.

i. The court did not make a Findings of Fact that Jardine failed to move the Loomis matter forward in "any significant manner." ROA: 410, 411. In its brief, the OPC states that the court made the above-described finding, Appellee Brief, 26, 27, but nowhere in the Findings of Fact can this finding be found. The Conclusions of Law make this unsupported statement. ROA: 415, but Conclusions of Law are not Findings of Fact. Findings of Fact must be stated separately from Conclusions of Law. Rule 52, *Utah Rules of Civil Procedure.*

Furthermore, as stated above, "[t]he findings of fact must show that the court's judgment or decree follows logically from, and is supported by the evidence." *Bailey* at p. 1135. Moreover, a finding that a matter hasn't been moved forward, if it had been a Finding of Fact, is relevant to the conclusion that Jardine

failed to act with diligence; it does not necessarily mean that Jardine failed to act with competence. Other findings would have to be made before a Conclusion of Law based on this finding could be supported. For instance had the court found that Jardine did not research or have knowledge of the proper steps a reasonable lawyer would take in effectuating service and prosecuting the case, it could have then found that Jardine failed to properly effectuate service and failed to act with competence. However, the court made no such finding and no such evidence was introduced at trial.

In any event the Finding of Fact advanced by the OPC was not made by the Trial Court and the record was not "clear, uncontraverted, and capable of supporting only a finding in favor of the judgment. *Id.* At trial, the OPC never introduced evidence from other lawyers about how they would have prosecuted the Loomis case or what steps should have been taken to prosecute the case. The OPC did not meet its burden in this regard. Moreover, the OPC could not have met its burden because, although Jardine was not as diligent as he should have been in the Loomis matter, he did act with competence. Once again, the alleged Finding of Fact was contained in the Conclusions of Law and was not a Finding of Fact, at all and, in any event it wasn't supported by the evidence.

Had the court had made this Finding of Fact, Jardine would have marshaled

the evidence and illustrated how the finding was not supported by the evidence. In the Loomis matter, Jardine interviewed the client, sent a demand letter, filed a notice of claim, filed a complaint, moved to dismiss the complaint, filed a second complaint, served the complaint, and filed a motion for default judgment, waited for the court to make its ruling, and re-filed the complaint after it was dismissed. ROA 605: 57-72, 87-89, 102-109. This evidence and these actions show that the case was "moved forward" in a "significant manner."

ii. The Court did not make a finding that Jardine failed to follow through on the two Complaints he filed. Nowhere in the Findings of Fact is there a finding that states that Jardine failed to follow through with respect to the two complaints that he filed. ROA, 410-412. In reality, Jardine filed three complaints. The first was dismissed for failure to serve the complaint within 120 days as mandated by law. ROA: 605: 63. Jardine followed through on this complaint by moving to dismiss it and refiling the same within 3 days of the time it was dismissed. *Id.* The second was dismissed for lack of prosecution after Jardine filed a motion for default had which was set aside, and the Attorney General moved to dismiss the complaint because it was served on the highway patrol in Salt Lake City instead of Heber City, Utah. ROA: 605: 65. Jardine followed through on the complaint by refiling it within the one-year period required by the Savings

Statute. ROA: 605:87. Jardine then withdrew and gave instructions to his client to serve the matter. *Id.*

Notwithstanding the foregoing, the court did not make the indicated finding. As indicated, the only thing close to such a finding is contained in the Conclusions of law. But, even if it did make the finding it would not have been supported by the record. Had it made the finding, Jardine would have marshaled the evidence in his opening brief to refute the finding, but the court did not make as finding that "Jardine failed to following through" on any of the complaints that were filed.

Furthermore, the record is not clear or "uncontraverted" on this point, and it is not capable of supporting a "finding in favor of the judgment." Therefore, the Conclusion of Law that Jardine was incompetent with respect to the Loomis matter cannot be supported by this assertion erroneously made by the OPC.

iii. The Court did not make a finding that Jardine lacked the legal knowledge necessary to handle the Loomis case. The OPC asserts that the Court "found" that Jardine "lacked the legal knowledge necessary for that type of case." Brief of Appellee p. 27. No where in the Trial Court's Findings of Fact is this assertion made. ROA: 410-412.

As indicated previously, the Trial Court did make a finding that "Jardine did little or no research regarding the substantive and procedural law applicable to the

case." This finding is the closest thing which corresponds to the above-stated assertion. Nevertheless, at trial, there was no evidence presented as to Jardine's knowledge or lack thereof, and no evidence of a need for any particular research. The assertion should be disregarded.

c. The Court did make a finding that Jardine failed to effectuate service, but this does not support the conclusion of incompetence. The court did make one finding that, Jardine "failed to serve the second Complaint on all of the parties in the case." ROA: 411. Jardine does not dispute this finding.

Nevertheless, the finding does not support the conclusion that Jardine was incompetent. The law is clear that "[t]he findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each actual issue was reached." *Bailey*, p. 1135. In this instance, the court makes a finding; however, in order to tie the finding to the conclusion that Jardine acted incompetently, it would have to find some subsidiary facts. The Court made no findings as to why the Complaint was not served on all of the parties. The Court did not make a finding that Jardine did not have the knowledge to serve the complaint properly. In any event, the finding would not have followed logically from the evidence or been supported by the evidence and there were no subsidiary findings to support it.

d. Jardine did not give up on the Loomis. The OPC asserts that Jardine characterizes his performance in the Loomis case as tenacious and unrelenting (Appellee Brief p.27). The opening brief simply states that it was the "plan of Mr. Jardine to be tenacious and unrelenting as far as the Loomis matter was concerned.

To be tenacious means that you are persistent. Jardine never gave up on the Loomis case. Its true that there were some set backs and that Loomis eventually gave up on his own case, but Jardine continued to do the things that were necessary to keep the case alive. Each time the case was dismissed, Jardine re-filed the case, at his own expense. Each of the filings was done within the time allowed by the Savings Statute. Jardine never gave up on the Loomis matter until Loomis fired him and filed a bar complaint.

e. *Green* does not support a Conclusion of Law of incompetence in the case at bar. The OPC cites the case of *In re: Green*, 156 P.3d 628 (Kan. 2007) in support of its position that Jardine acted incompetently in the Loomis matter. Brief of Appellee p. 28. In *Green*, the disciplined attorney represented a plaintiff in a matter where the EEOC investigated an incident and gave the plaintiff 90 days to file a lawsuit. *Green, p.* 632. The attorney filed the lawsuit but failed to serve the lawsuit and the complaint was dismissed. However, the dismissal occurred after the

90 day period allowed by the EEOC, and, therefore, when the attorney re-filed the lawsuit after the 90 day period, his complaint was subject to dismissal and would certainly have been dismissed for that reason. Therefore, the defense filed a motion to dismiss. The disciplined-attorney didn't respond to the motion to dismiss, the lawsuit was dismissed, and the court filed an OSC for the attorney to explain his actions to which he did not respond.

Clearly there is a difference between a lawyer who performs his duty in such a way that his client is deprived of his or her cause of action as compared to a lawyer whose client has his case dismissed, but the client continues to have a cause of action that is pursued by the attorney. Jardine did not deprive Loomis of his cause of action. As of the day Jardine withdrew from representing Loomis, Loomis continued to have a cause of action. No evidence was presented to the contrary.

f. Conclusion. The OPC presented no evidence to support the Findings of Fact quoted above. No evidence was presented because there was no evidence to support those findings. The findings should, therefore, be stricken. The Trial Court's conclusion that Jardine was incompetence in the Loomis matter should be reversed.

Appellee's opening brief makes two untrue assertions regarding the Findings of Fact. First, it asserts that the court made a finding that Jardine failed to follow

through on the two complaints that he filed. Secondly, it asserts that the court made a finding that Jardine lacked the legal knowledge necessary to represent Loomis. The court made neither finding. The evidence does not support these assertions and they should be disregarded.

Appellee correctly asserts that the court found that Jardine failed to effectuate service, but that finding, without more, does not support the Court's Conclusion of Law that Jardine was incompetent in the Loomis matter. Findings of fact "must show that the court's judgment or decree 'follows logically' from, and is supported by, the evidence." *Bailey*, p. 1135. This finding accomplishes neither of these directives. Incompetence could be one reason, but there are other reasons why Jardine failed to effectuate service in the Loomis matter. Lack of diligence is the more likely reason. Jardine has admitted that he wasn't diligent in the Loomis matter.

Finally, Jardine was tenacious in handling the Loomis matter, and *Green* is easily distinguishable from the case at bar and does not support the position championed by the OPC.

13. Scope.

a. Appellee is correct in asserting that two Findings of Fact are relevant to the Conclusion of Law that Jardine violated Rule 1.2. Contrary to

the argument contained in Appellant's Opening Brief, Appellee is correct in asserting that two of the court's Findings of Fact are relevant to the Trial Court's Conclusion of Law that Jardine violated Rule 1.2, Scope of Representation in the Garner Matter. The findings were as follows:

> 49. Mr. Jardine did not contact Ms. Gardner nor anyone in Ms. Gardner's family to assess her capacity or her financial affairs.
>
> 55. Mr. Jardine did nothing in furtherance of the representation and did not meet with Ms. Gardner until on or after March 31, 2006, when Mr. Jardine was formally notified by a representative of JP Morgan Chase Bank that Ms. Garner's accounts were being drained.

ROA: 413, 414.

b. The findings of fact are not sufficient to support the Conclusion of Law that Jardine violated Rule 1.2 in the Gardner matter. "The findings of fact must show that the court's judgment or decree follows logically from, and is supported by the evidence. The findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion in each factual issue was reached." *Bailey*, p. 1135. Here, the findings do not contain enough subsidiary facts to logically support the conclusion, and therefore, the conclusion should be reversed.

Mildred Gardner's handwritten note indicated that she was retaining Jardine. It said the following: "I understand that Mr. Jardine is accounting for my physical

limitations at this time and I hereby agree to meet with him formally as soon as I am feeling better." Exhibit 7 p. 2, Addendum J to Appellant's Opening Brief. Jardine was hired on or about December 24, 2005. From January through February of 2006, Jardine set three or four appointments for Ms. Gardner to come into the office so that Ms. Gardner and Jardine could do as the handwritten note suggested – "formalize" the agreement, but Ms. Gardner did not keep any of the appointments. ROA 605:76.

Rule 1.2 of the Rules of Professional Conduct states that the lawyer is to "abide by a client's decisions" concerning the objectives of the representation and the means by which the representation is to be carried out. Ms. Gardner's express direction in her handwritten note was that she was going to visit Mr. Jardine when she was feeling better and she acknowledged and supported the fact that Jardine was taking into account her "physical limitations."

It is true that Ms. Gardner was an 87 year old woman, but at the time representation commenced in this matter, she was of sound mind. She had already made the decision to hire Mr. Jardine instead of another, more experienced wills and trusts lawyer to assist her with respect to the revision of her trust and will. She made the decision that she would meet with Mr. Jardine when she was "feeling better." She acknowledged that Jardine was taking into account her "physical

limitations" in representing her. Although Jardine attempted to set three or four appointments with her, she did not keep the appointments. Her failure to keep the appointments also sent a message to Jardine that she was not yet ready to pursue the will and trust revisions for which she had hired him to assist her. By her failure to keep the appointments she was sending a message to Jardine about the scope of representation and the means by which the representation was to be carried out. Jardine followed her directions.

Jardine abided by the directive he received in the retainer agreement/handwritten note and did not violate Rule 1.2 Scope. The Findings of Fact did not logically support the Conclusions of Law. Nor did the findings contain "enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." The findings did not address the statement in the retainer agreement indicating that Jardine was to take into account Ms. Gardner's physical limitations. The findings did not address the statement that Ms. Gardner would meet with Jardine when she was "feeling better." Since the Conclusion of Law was not supported by the findings, it must be reversed.

Furthermore, Jardine, in his opening brief, disputed, and continues to dispute, the finding contained in paragraph 55 quoted above that he "did nothing in furtherance of the representation." As indicated above in the section discussing the

alleged violation of Rule 1.5 in the Gardner matter, the facts were marshaled in the opening brief and Appellee did not dispute the marshaling of the facts. The finding in paragraph 55 should be stricken because it is not supported by the evidence and is clearly erroneous.

c. Jardine's conversations with Ms. Gardner's agent satisfied Rule 1.2. Although Jardine didn't speak with Gardner directly about the objectives of the representation and the means by which they were to be carried out, Jardine had several conversations with Kelli Hatch, his ex-employee, about those matters. ROA: 605: 13-15. Kelli Hatch was the one who Mildred Gardner consulted with in order to hire Jardine. *Id.* When Kelli Hatch appropched Jardine to hire him for Ms. Gardner, Jardine told her of another attorney that practiced in the area of wills and trusts. *Id.* Kelli Hatch and Gardner weighed the options and Ms. Gardner decided to hire Jardine. *Id.* Jardine then followed the directives given to him from Ms. Gardner through Ms. Hatch, and the directives contained in the retainer agreement. The findings don't address any of these subsidiary facts. Therefore, for this reason and for the other above-stated reasons, the Conclusion of Law that Jardine violated Rule 1.2 should be reversed.

d. *Favors* does not support the OPC position. In support of its position that Jardine violated Rule 1.2, the OPC cites the case of *In re: Favors*, 938

So.2d 677 (2006 La.). Favors involved an attorney who was disbarred for his many indiscretions. In one matter, the attorney didn't meet with a client to prepare bankruptcy schedules "despite the numerous attempts by his client to contact him." *Id.* p. 678. The court found the attorney, therefore, violated Rule 1.2.

In *Favors*, the client attempted to contact the attorney to meet and discuss matters. In the case at bar the attorney, Jardine, attempted three or four times to arrange a meeting with the client to meet and discuss matters. The case at bar presents nearly the opposite set of facts as does the *Favor's* case. *Favors* does not support the OPC position.

14. Communication.

a. Loomis. Appellant's Opening Brief challenges various findings made by the district court and marshals the facts associated with those findings. Essentially, the argument is that the Findings of Fact are not supported by the evidence and the Findings of Fact do not support the Conclusions of Law.

To support the argument, Appellant, as was his duty, marshaled the evidence. The OPC did not offer any opposition to Appellant's Argument. In the opening brief, Appellant argues that this court should not believe the testimony of Jorie Loomis because on one hand he testifies that he was not aware that the complaint in his matter had been dismissed and re-filed, but on the other hand he

admits that he received a letter which was a cover letter enclosed with the two complaints. Loomis also complained that he didn't know what was going on in the case, yet he signed an affidavit setting forth the facts showing that he did know what was going on when Jardine moved for a default judgment. Loomis testimony was not credible and the factual findings supported by it should be reversed as indicated in the opening brief. Appellee has not disputed this challenge to the Findings of Fact. The argument of the OPC does not address the argument discussed in the opening brief. Clearly, if the disputed factual findings are discarded, the Conclusion of Law must be reversed.

Jardine asserts that Mr. Loomis did not remember the things that were told to him because a few events were spread out over a six-year period. Instead of addressing the important issues of the opening brief, the OPC addresses this argument.

A list of the events of the case was discussed in the opening brief. To dispute the factual findings Jardine showed how all of the events were discussed with Mr. Loomis. Mr. Loomis admitted that he received a copy of the demand letter. Letters were sent giving Mr. Loomis a copy of the first, second, and third complaints. Mr. Loomis signed an affidavit supporting a default motion. Jardine testified that Loomis was informed of these events. Instead of addressing the

arguments, the OPC merely assumes Jardine didn't communicate with Mr. Loomis and argues that Jardine violated the rule. If the evidence doesn't support the factual findings, they must be reversed. Here, the evidence didn't support the findings and the findings were clearly erroneous so they should be reversed.

b. Gardner. Once again, in the Gardner matter, Jardine asserts in his opening brief that "[n]one of the Findings of Fact address" the Conclusion of Law that Jardine violated Rule 1.4 in Gardner's case. OPC's brief does not, on this issue, reference any Finding of Fact that would support the Conclusion of Law. Once again, the silence of the OPC must be a signal of their inability to point to any such finding.

However, the OPC does, along the way misstate the facts. The OPC indicates that Jardine didn't talk to Gardner until "several" months after the representation commenced, but the record shows that shortly after the representation commenced, he did talked to Ms. Gardner on the phone. See Appellant's Opening Brief, p. 35, 36.

After three months of representing Ms. Gardner where Gardner failed to keep three or four appointments, Jardine went to see her upon receiving a call from a bank representative and learning that there might be trouble. Although Jardine was not hired to assist Gardner with any financial affair except for the revising of

her will and trust documents he went to see her to check on her welfare. Any assertion that Jardine was hired for some other reason is simply wrong and cast's Jardine in an improper light.

Since there are no Findings of Fact to support the Conclusion of Law that Jardine violated Rule 1.4 in the Gardner matter, the Conclusion of Law must be reversed.

15. Punishment.

a. State of Mind. Jardine never intended to violate the Rules of Professional Conduct. However, he may have negligently done so. Suspension is only appropriate for knowing conduct. Jardine's conduct with respect to each of the alleged rule violations was not knowing. It was negligent.

b. Equal Punishment. The OPC did not respond to the argument in the opening brief that the punishment issued in other cases before this court has been more mild even though the wrongs perpetrated were more serious. A few of those will be listed here:

1. In *Knowlton*, the attorney converted money and was given a six month suspension with 5 months suspended;

2. In *Stoddard*, the attorney failed to file an appeal and a bankruptcy for almost 3 years after being paid to do so and received a six month

suspended sentence that was stayed;

3. In *Lund* the attorney intentionally commingled funds and received a year suspension;

4. In *MacFarlane*, the attorney committed fraud on his client and was suspended for a year;

5. In *Johnston*, the attorney was involved in conduct involving dishonesty or fraud and received a year suspension;

6. In *Crawley*, the attorney lied to his clients and lied to an insurance carrier and received a year suspension which was stayed in favor of probation;

7. In *Henderson*, the attorney lied to the court and received a one year suspension; and finally,

8. In *Cassity*, the attorney converted his clients property and received a six month suspension.

Even if the OPC and the Trial court was correct, (this brief shows that in many instances they clearly were not correct), the punishment should be more in line with the punishment that has previously been issued, for transgressions that are more serious than the transgressions the Trial Court found in this matter.

c. Probation should have been the punishment. The case of *In*

Re Green, 156 P.3d 628 (2007 Kan.) describes a system of probation the State Bar of Kansas has developed. If the candidate provides the Hearing Panel and the disciplinary Administrator with a plan of probation, the Hearing Panel can recommend probation.

> The Hearing Panel shall not recommend that the Respondent be placed on probation unless:
>
> > (I) the Respondent develops a workable, substantial, and detailed plan of probation and provides a copy of the proposed plan of probation to the Disciplinary Administrator and each member of the Hearing Panel at least ten days prior for the hearing on the Formal Complaint;
> >
> > (ii) the Respondent puts the proposed plan of probation into effect prior to the hearing on the Formal Complaint by complying with each of the terms and condition of the probation plan;
> >
> > (iii) the misconduct can be corrected by probation; and,
> >
> > (iv) placing the Respondent on probation is in the best interests of the legal profession and the citizens of the State of Kansas.

Id. pp. 907, 908.

Jardine, like others lawyers has devoted a lifetime to the legal profession. At his own expense he worked his way through school to become a lawyer. He has devoted 18 years to practicing law. He doesn't have any drug or alcohol problems and is not dishonest. He is highly motivated make changes, if necessary.

Jardine is an excellent candidate for probation, and given the chance he would be an exemplary probationer.

Unfortunately, the State of Utah has no program in place for probation as does the State of Kansas. Trial courts have the discretion to order probation, but no real direction from this Court regarding when it is appropriate and how it should be implemented. Had Jardine been allowed the opportunity of probation, the devastation that has occurred in his life could have been avoided.

This court should adopt a program similar to that of the State of Kansas. The public would benefit by having better lawyers. The lawyers would benefit from averting devastation. The courts would benefit from having less problems to solve. All would win.

c. Aggravating Factors. The court pointed to a number of aggravating factors in considering the discipline to be imposed. The OPC has listed those factors on page 37 of its brief. Jardine has the following comments to make with respect to those factors: Jardine's prior record of discipline involved a charge for having sex with a client. No such charge was duplicated here. Jardine's prior record of discipline in involved a fee dispute where Jardine charged a non-refundable retainer and kept the entire retainer after having done very little work. In both of the fee disputes in this matter Jardine could show results and work done,

and in the Gardner matter Jardine refunded 40% of the fee. Obviously, Jardine learns from his mistakes.

The court assigned a selfish or dishonest motive for Jardine's interaction with Mecham and Gardner. The reality was Jardine believed his fee agreement was in the best interest of his client and in his best interest. It provided the proper financial incentive to inspire the best work by a lawyer for his client. There was not dishonest or selfish motive involved.

d. Remorse/Responsibility.

The OPC, many times throughout its brief, remarked that Jardine has not taken responsibility for his actions. This brief has not been the place for Jardine to take that responsibility. This brief is the place to argue the correctness of the Trial Court's rulings, and the law that applies to the same.

Furthermore, with respect to some issues, its difficult to express remorse when Jardine simply disagrees with the position taken by the Trial Court and the OPC. This court is the final arbiter of the practice of law in the State of Utah. This court is the final decision maker as to what is right and what is wrong concerning the practice of law.

In the Gardner and Mecham matters, Jardine charged a non-refundable retainer as do most criminal law practitioners in the State of Utah. Jardine placed

the money into his general account instead of his trust account and did not keep track of his time. These practices are common among Criminal Defense Lawyers in Utah. Furthermore, Jardine's understanding of Rule 1.5 and of Ethic's Opinion 136 lead him to believe those practices are ethical.

How can Jardine be sorry for engaging in a practice that appears ethical and a practice in which many other lawyers are engaged. If this court determines the practice is ethical or unethical, then all lawyers will have the benefit of the court's written opinion and will be able to conform their practices to the law as enunciated by this court. In either event, Jardine should not be punished for his good faith reliance on Ethics Opinion 136 and this court should, at the very least, shorten the punishment levied upon Jardine which was based on that reliance.

Similarly, how can Jardine be sorry for relying on his experienced staff. He told one secretary to send Susan Mecham's file to her. The secretary had 30 years experience, but she inadvertently sent file materials belonging to another client to Susan Mecham. Jardine was reasonable in relying on his secretary. Jardine was charged with divulging confidential information, but it was his secretary who divulged the information without Jardine's knowledge or consent. Jardine is sorry that the information was divulged and will not allow this to happen again.

Similarly, in the OPC matter, Jardine relied on a different secretary to his

detriment. He relied on the word of a 55 year old trained paralegal to give him accurate information about a continuance. Given these proceedings and the discipline that has been imposed upon him, it would be a safe bet that Jardine will not allow this to happen again.

Furthermore, the discipline Jardine has already suffered is sufficient to correct any problems he may have in the future. Jardine has lost his office, reputation, personal injury and other cases he was working on and that he would have worked on, and his income. His losses have been great. Given the opportunity to practice law again, Jardine would certainly be more careful.

CONCLUSION

Judge Kenneth Rigtrup spent seventeen years on the bench of the Third District Court before he retired. He didn't know me at all, but when I told him about my case he agreed to come out of retirement and represent me for free because he believed in my case. He did an outstanding job. I've never had anyone outside of my family treat me with such kindness.

In his closing statement, Judge Rigtrup said the following:

> . . . [J]ustice without mercy is not justice. . . . I would suggest that history has taught us this lesson over and over again. The most striking example that comes to mind is what transpired in post-World War II Germany. West Germany was occupied by the United States and as freedom loving allies rebuilt and prospered.

> On the other hand, East Germany occupied by the repressive Russian Regime stagnated and did not regain its vitality until . . . after East Germany finally – until after the East German wall finally came down during the presidency of Ronald Regan. The Utah courts have experienced the positive results that flow from positive programs. . . .

ROA 607: 61. The retired judge went on to recite the positive results the courts have made in the lives of the citizens of our state in mediation, drug court and mental health court. He rightly said, "sometimes angry people may wrongly direct their anger at lawyers, and yes, sometimes at judges. . . . [T] purpose of sanctions is clearly not punitive." *Id.* p. 62. He went on to say, the following:

> Mr. Jardine's over-reliance on Ethic's Advisory Opinion No. 136 which is the non-refundable retainer provision, his lack of record keeping and lack of diligence account for the most part in getting us here. These problems need attention and correction. He has implemented time records and plans on keeping documentation of when documents come in and out of his office. He will assume greater responsibility for his office help to see that they don't make mistakes that compromise the interest of his clients. . . . [H]e is willing and anxious to modify his agreements in any way directed. **He is extremely sorry for any inconvenience, injury or any other consequence of his conduct that may have negatively impacted his clients or have reflected negatively on the administration of justice.** . . [H]e is willing to submit to any ongoing supervision and follow all directions of the court

Id. p. 66, 67 (emphasis added).

Comparing the case of In Re: Crowley, Judge Rigtrup said, "That case involved actually dishonesty. I submit that in Mr. Jardine's case probation is in order." Judge Rigtrup is right. I would benefit from probation and be a model probationer. I ask this Court for that privilege. I ask this court to change the order

from an order of suspension for three years to an order indicating that any order is stayed in favor of probation and that the order be retroactive to Judge Lindberg's order so that I am not required to take the MPRE or overcome any other obstacles prior to the time that I commence practicing law again.

In my practice I have always attempted to attack only the position of opposing counsel and not opposing counsel. I have acted as a gentleman in all that I've done and I've been civil. I hope this brief has been no different. However, I must say simply that the Findings of Fact generally do not support the Conclusions of Law in this matter. Furthermore, the arguments submitted in Appellee's brief generally do not address the issues set forth in Appellant's Opening Brief.

The biggest issue for this court to decide is the appropriate punishment given the facts as they have been set forth. Next to this issue, is the issue of the non-refundable retainer and what should be done with a lawyer that relies on an ethics opinion in good faith. Direction from this court to the trial courts and to all of the lawyers in this state is needed on these issues.

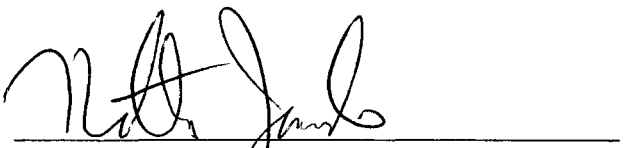
Any ethic's violation is serious. However, I did not intentionally violate any rule of ethics. In the Loomis matter I did not act with diligence. In Mecham I didn't return her file as soon as I should have. In the Loomis matter, if I had been more communicative with my client he would have held on, and we would have

eventually got a settlement for him, but I didn't communicate with him as well as I should have. I believe my communication fell at the minimum of what is expected of a lawyer, but I am sorry that I didn't do a better job in that regard.

I feel that I acted appropriately as far as the fee issues were concerned. I also feel that I had a right to rely on my staff to tell me if a matter had been continued and to rely on them to send out proper file materials, but, in the future, I will certainly be more careful when dealing with staff that are new.

In Gardner, I feel that I did what I should have done given my circumstances. She was an elderly lady. I was being patient with her. I did not know her funds were being drained or have any reason to suspect the same, and she didn't hire me to help safeguard her assets.

I am most hopeful that his court will grant me the privilege of probation.



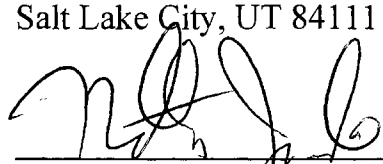
Dated: June 30, 2011 Nathan N. Jardine

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2011, I caused a true and correct copy of the foregoing to be served by personally delivering the same to the following:

Barbara L. Townsend, Esq.
Office of Professional Conduct

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



Nathan N. Jardine

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