

2016

## In the Matter of the Discipline Of: Joseph P. Barrett v. State of Utah

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

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<b>In the Matter of the Discipline of:</b>	
<b>Joseph P. Barrett, #8088</b>	<b>Supreme Court Case No. 20150190</b>
<b>Respondent/Appellee</b>	<b>District Court Case No. 130907818</b>

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**APPELLANT'S BRIEF**

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**FILED**  
**UTAH APPELLATE COURTS**

**JAN - 7 2016**



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## **TABLE OF CONTENTS**

JURISDICTIONAL STATEMENT .....	1
STATEMENT OF ISSUES.....	1
ISSUE I: Did the trial court err in ordering a suspension, rather than disbarment, for an attorney found to have engaged in intentional misappropriation of firm funds? .....	1
STANDARD OF REVIEW.....	1
DETERMINATIVE LAW.....	2
STATEMENT OF RELEVANT FACTS .....	3
ADDENDUM .....	7
SUMMARY OF THE ARGUMENT.....	7
ARGUMENT .....	8
I. Stealing From One's Firm Is No Different Than Stealing From A Client. ....	8
II. Mr. Barrett Intentionally Misappropriated Firm Funds. ....	10
III. Disbarment Is The Presumptive Sanction For Misappropriation.....	12
IV. There Is No Mitigation That Would Justify A Departure From The Sanction of Disbarment.....	15
CONCLUSION.....	18

## **TABLE OF AUTHORITIES**

### **Cases**

<u>Attorney Grievance Commission of Maryland v. Nothstein</u> , 480 A.2d. 807 (Md. 1984) ...	9
<u>In Office of Disciplinary Counsel v. Yajko</u> , 674 N.E. 2d 684, 687 (Ohio 1997) .....	9, 16
<u>In re Babilis</u> , 951 P.2d 207 (Utah 1997).....	2, 14
<u>In re Jardine</u> , 2012 UT 67 .....	1
<u>In re Johnson</u> , 48 P.3d 881, 885 (2001) .....	14
<u>In re Seldon</u> , 728 P.2d 1036 (Wash. 1986) .....	10
<u>In the Matter of Grimes</u> , 2012 UT 87 .....	16
<u>In the Matter of Siegel</u> , 627 A.2d. 156, 159 (N.J. 1993).....	8, 9, 16
<u>In the Matter of the Discipline of Lundgren</u> , 2015 UT 58 .....	18

### **Other Authorities**

Utah Constitution article VIII, section 4.....	1
--	---

### **Rules**

Rules of Professional Conduct, Rule 8.4(c).....	2, 6
Standards for Imposing Lawyer Sanctions, Rule 14-601(e).....	10
Standards for Imposing Lawyer Sanctions, Rule 14-605(a) .....	12, 13, 14

## **JURISDICTIONAL STATEMENT**

The Utah State Bar's Office of Professional Conduct ("OPC") appeals from a final judgment of the Third District Court suspending Joseph P. Barrett from the practice of law in Utah for violations of the Rules of Professional Conduct. The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Constitution article VIII, section 4, which provides that, "the Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law."

## **STATEMENT OF ISSUES**

**ISSUE I:** Did the trial court err in ordering a suspension, rather than disbarment, for an attorney found to have engaged in intentional misappropriation of firm funds?

This issue was preserved through closing argument and through the Sanctions Hearing Brief submitted to the District Court. [R. 399]

## **STANDARD OF REVIEW**

While this Court will ordinarily presume the district court's findings to be correct, it "reserves the right to draw inferences from basic facts which may differ from the inferences drawn by the lower tribunal." In re Jardine, 2012 UT 67 ¶ 26. The standard of review for sanctions imposed for professional misconduct in attorney discipline actions is a correctness standard, but the Utah Supreme Court may make an independent judgment regarding the appropriate level of discipline if the evidence warrants it. See In re Babilis, 951 P.2d 207 (Utah 1997).



### **DETERMINATIVE LAW**

The following rules are fully set forth in the Addendum to Brief of Appellant, submitted herewith:

Rule 14-601	Definitions; Standards for Imposing Lawyer Sanctions
Rule 14-602	Purpose and Nature of Sanctions
Rule 14-603	Sanctions, Standards for Imposing Lawyer Sanctions
Rule 14-605	Imposition of Sanctions
Rule 14-607	Aggravation and Mitigation
Rule 8.4	Rules of Professional Conduct (with comments)

### **STATEMENT OF THE CASE**

**Nature of the Case:** This is an attorney discipline case. The district court suspended Mr. Barrett for a period of 150 days for violating rule 8.4(c) of the Rules of Professional Conduct in three separate matters. The OPC appeals the district court's decision and urges the Court, pursuant to its inherent authority to govern the practice of law, to impose the more appropriate sanction of disbarment.

**The Course of Proceedings:** The OPC filed a Complaint against Mr. Barrett pursuant to a directive of a screening panel of the Utah Supreme Court's Ethics and Discipline Committee. [R. 1] On January 27, 2015, the district court presided over an adjudication trial to determine whether Mr. Barrett violated the Rules of Professional Conduct ("Rules"). [R. 321] On February 11, 2015, the court

issues its Findings of Fact and Conclusions of Law, finding that Mr. Barrett violated rule 8.4(c) of the Rules. (R. 365) Accordingly, a sanctions hearing was held on March 2, 2015. [R. 426] On March 3, 2015, the court entered its order suspending Mr. Barrett for 150 days. [R. 429] The OPC filed its Notice of Appeal on March 5, 2015. [R. 484]

### **STATEMENT OF RELEVANT FACTS**

Mr. Barrett was employed at the firm of Snow, Christensen and Martineau ("the Firm") from 2003 until February 2012. [R. 366]

#### **Williams' Matter:**

In July 2007, the Firm and Mr. Barrett were hired by Dick Williams to represent Mr. Williams' son in a criminal matter. (R. 367) Mr. Williams paid a \$1,000 retainer to the firm. The criminal matter was closed in December 2007 without Mr. Barrett billing any time against the retainer. (R. 367) In 2008, Mr. Williams asked Mr. Barrett to assist him in a collections matter for his company, Dick's Backhoe and Sewer. Between April 2008 and September 2008, three charges totaling \$460 were charged to Mr. Williams' account, but not billed against the retainer at that time. (R. 367) In the summer of 2008, Mr. Williams performed construction work at Mr. Barrett's personal residence. (R. 367) In August and September of 2008, Mr. Barrett requested all of the charges on Mr. Williams' account to be written off by the Firm. (R. 367)

In February 2010, Mr. Williams' son was charged in several new criminal matters. (R. 367) Mr. Williams contacted Mr. Barrett about representing him, and Mr. Barrett entered his appearance in the cases. (R. 368) Mr. Williams retained the Firm to represent his son. (R. 369) In March 2010, Mr. Williams paid \$300 to the Firm. (R. 368) At some point, Mr. Williams and Mr. Barrett reached an agreement whereby Mr. Barrett would provide legal services to Mr. Williams' son in exchange for construction work performed by Mr. Williams at Mr. Barrett's personal residence. (R. 369) The Firm was unaware of the agreement. (R. 369) Between March 2010 and July 2010, Mr. Barrett billed \$7,665 to Mr. Williams' account. Around June or July 2010, Mr. Williams provided construction services to Mr. Barrett at his personal residence in the form of a wrought iron railing. (R. 368) Between June 14 and June 25, Mr. Barrett requested that the firm write off a total of \$7,446.57 in fees, costs, and interest from Mr. Williams' account. (R. 368)

Mr. Williams was unable to complete the railing project at Mr. Barrett's home. (R. 368) The value of the construction services provided by Mr. Williams up to that point did not equal the value of the legal services provided by Mr. Barrett. (R. 369) So, on July 21, 2010, Mr. Williams, or his wife, wrote a check for \$3,500 made out to Mr. Barrett personally, which represented the difference between the value of the legal services and the value of the construction work. (R. 370) Mr. Barrett deposited the check into his personal account. (R. 368) The Firm was unaware



that Mr. Williams paid \$3,500 directly to Mr. Barrett for legal services. (R. 368) In 2011, Mr. Barrett billed \$400 to Mr. Williams' account, which was billed against the \$1,000 retainer that had been paid in 2007. In April 2012, after Mr. Barrett left the Firm, the Firm refunded the remaining \$600 of the retainer. (R. 368). Of the \$8,612.07 billed to Mr. Williams' account, he only paid the Firm \$700. Mr. Barrett requested that the remaining \$7,912.07 be written off. (R. 369)

Petersen Matter:

Mr. Petersen was an owner of D&T Landscaping ("D&T"). Between 2006 and 2009, D&T provided various landscaping services to Mr. Barrett at his personal residence, for which Mr. Barrett paid the company. (R. 370) In November 2010, Mr. Petersen retained the Firm and Mr. Barrett to represent him in a custody modification matter. (R. 370) Mr. Barrett and Mr. Petersen reached an agreement whereby Mr. Barrett would provide legal services in exchange for Mr. Petersen building a shed at Mr. Barrett's personal residence. (R. 372) The Firm was unaware of the agreement between Mr. Barrett and Mr. Petersen. (R. 373) On November 2, 2010, Mr. Petersen paid a \$2,500 retainer to the Firm. (R. 370) Mr. Barrett and Mr. Petersen had an agreement that Mr. Petersen would pay the \$2,500 up front, but Mr. Barrett would have the Firm refund it later. (R. 372) Between November 2010 and August 2011, the Firm billed \$8,801.10 in fees, costs and interest to Mr. Petersen's account. (R. 370) Mr. Petersen received regular

bills from the Firm but did not pay them because Mr. Barrett told him not to worry about them. (R. 373) Mr. Barrett concluded Mr. Petersen's custody case on or about July 20, 2011, and Mr. Petersen began construction on Mr. Barrett's shed on August 9, 2011. (R. 371) On August 25, 2011, Mr. Barrett requested that the Firm write off approximately half of Mr. Petersen's bill. (R. 371) On September 20, 2011, Mr. Barrett requested that the Firm write off half the remaining balance on Mr. Petersen's bill. (R. 371) On November 22, 2011, Mr. Barrett requested that the Firm write off the remaining balance on Mr. Petersen's bill. (R. 371) In total, Mr. Barrett requested that the Firm write off \$8,913.54 in fees, costs and interest from Mr. Petersen's account. (R. 371) Mr. Petersen finished Mr. Barrett's shed by December 2011, and on December 13, 2011, Mr. Barrett requested that the Firm refund the \$2,500 retainer, which it did. (R. 371) Mr. Petersen did not pay the Firm for any of the legal services provided. (R. 371) Mr. Barrett paid approximately \$5,000 for the shed, which cost Mr. Petersen \$15,170.63 to build. (R. 373)

In February 2012, after the Firm became concerned about Mr. Barrett seeking reimbursement for questionable business expenses, Mr. Barrett was confronted by the Firm and his employment with the Firm ended. (R. 373)

Based on the above facts, the trial court concluded that Mr. Barrett violated rule 8.4(c) of the Rules of Professional Conduct by misappropriating \$3,500 of firm

funds in the Williams matter, and by engaging in conduct involving dishonesty and deceit in both the Williams and Petersen matters.<sup>1</sup>

### **ADDENDUM**

The following documents are attached as Addenda to this Brief:

- Findings of Fact and Conclusions of Law, and Order.
- Order of Suspension.

### **SUMMARY OF THE ARGUMENT**

Intentional misappropriation is indefensible, regardless of whether the victim is a client of the attorney's or the partners in his firm. Stealing is no less wrong, simply because it does not involve client funds.

Mr. Barrett intentionally stole firm funds when he reached secret agreements with clients of the Firm to provide legal services in exchange for construction work to be performed by the clients at his personal residence.

The same standard this Court applies to the intentional misappropriation of client funds should be applied to the intentional misappropriation of firm funds. Disbarment should be the presumptive sanction, regardless of the victim.

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<sup>1</sup> The trial court also found that Mr. Barrett violated rule 8.4(c) by engaging in conduct involving dishonesty and deceit in another matter related to reimbursement for business expenses (the "California Matter"), but because the Williams and Petersen matters warrant disbarment on their own, it is not necessary to brief issues related to this third charge of misconduct.



In the present case, the mitigating factors are not truly compelling, and therefore, do not justify a departure from the presumptive sanction.

### ARGUMENT

#### **I. Stealing From One's Firm Is No Different Than Stealing From A Client.**

Although this Court has not addressed the issue of an attorney stealing from his or her own firm, other jurisdictions have. The Supreme Court of New Jersey stated:

We see no ethical distinction between a lawyer who for personal gain willfully defrauds a client and one who for the same untoward purpose defrauds his or her partners.

In the Matter of Siegel, 627 A.2d. 156, 159 (N.J. 1993)

In Siegel, the attorney was disbarred after submitting false expense reports to his firm and withdrawing firm funds claiming it was a gift from the client. The Siegel court went on to explain the rationale for placing theft from a firm on the same level as theft from a client:

[A]lthough the relationship between lawyers and clients differs from that between partners, misappropriation from the latter is as wrong as from the former. A plainly-wrong act is not immunized because the victims are one's partners.

(Id.)

In, In Office of Disciplinary Counsel v. Yajko, 674 N.E. 2d 684, 687 (Ohio 1997), an attorney was disbarred after accepting payments from clients but only

depositing a portion of the funds into the firm's trust account, then keeping the balance and preparing false receipts and altering accounting records. The Ohio court adopted the following principle:

It should matter little whether the theft or misappropriation is from an attorney's partners, associates, clients, family or friend; or whether the thefts were committed brazenly or deceptively, or whether tens of thousands of dollars or a relatively small amount was misappropriated.

Other courts have also concluded that stealing from a firm is no different than stealing from a client. See, Attorney Grievance Commission of Maryland v. Nothstein, 480 A.2d. 807 (Md. 1984); In re Salinger, 88 A.D.2d 133 (N.Y.S.2d 1982); In re Seldon, 728 P.2d 1036 (Wash. 1986).

This Court should hold that an attorney engages in misappropriation when he takes money that belongs to his firm or partners. This Court should further hold that an attorney engages in misappropriation when, without the knowledge of his firm or partners, he personally accepts services or property from a client in exchange for legal services performed by the firm for the client.

In this case, Mr. Barrett engaged in misappropriation when he accepted \$3,500 from Mr. Williams that belonged to the Firm and deposited it into his personal account. He further engaged in misappropriation when he provided legal services for Mr. Williams and Mr. Petersen in exchange for construction

work at his personal residence. It was the Firm, not Mr. Barrett, that was entitled to the value of the work performed by Mr. Williams and Mr. Petersen.

## **II. Mr. Barrett Intentionally Misappropriated Firm Funds.**

Rule 14-601(e) defines "intent" as, "the conscious objective or purpose to accomplish a particular result." The evidence found by the trial court establishes that Mr. Barrett engaged in an intentional and calculated plan to misappropriate funds belonging to the Firm.

When Mr. Williams retained Mr. Barrett to represent his son, Mr. Barrett tracked the work performed on the case, which resulted in bills being generated by the Firm. (See, Trial Exhibit #11 - Open Invoice, attached hereto as Exhibit 1) The trial court found that, in total, Mr. Barrett billed \$8,612.07 to Mr. Williams' account. (R. 369). However, Mr. Williams only paid \$700 to the Firm because Mr. Barrett caused the remaining \$7,912.07 to be written-off. As a member of a firm committee dealing with such policies, Mr. Barrett was aware of the Firm's requirement that write-offs exceeding \$4,000 be approved by the Firm's Executive Committee. (R. 375) Therefore, rather than write-off Mr. William's entire bill all at once, Mr. Barrett requested separate, smaller write-offs over several months, thus avoiding any firm oversight that would expose his plan. This conduct evidences a conscious objective to keep for himself the value of the construction work



performed by Mr. Williams in exchange for the legal services provided by the Firm through Mr. Barrett.

Mr. Barrett engaged in the same scheme with regard to the legal services provided to Mr. Petersen. Although Mr. Barrett's work generated \$8,801.10 in fees, costs, and interest billed to Mr. Petersen's account, which in turn resulted in monthly bills sent to the client, the Firm did not receive any payments from Mr. Petersen. That is because Mr. Barrett, again avoiding the threshold limit that would trigger any review by the Firm's Executive Committee, wrote-off Mr. Petersen's bill over a period of several months. (R. 371) Then, when the shed was finally completed in Mr. Barrett's backyard, he requested that the Firm refund the \$2,500 retainer Mr. Petersen had originally paid to the Firm. Again, this conduct evidences a conscious objective to keep for himself the value of the construction work performed by Mr. Petersen in exchange for the legal services provided by the Firm.

Additionally, when Mr. Williams gave a \$3,500 check to Mr. Barrett to make up the difference between the value of the legal services and the construction work, Mr. Barrett intentionally concealed that fact from the Firm and deposited the money into his personal account.

The trial court found that Mr. Barrett entered into agreements with both Mr. Williams and Mr. Petersen to exchange legal services for construction work and that the agreements were entered without the Firm's knowledge or consent. The

trial court further found that the Firm was entitled to the value of the construction work performed by both clients at Mr. Barrett's personal residence. The evidence clearly established that Mr. Barrett had an intent to keep for himself the value of payments which rightfully belonged to his Firm and to conceal that fact from the Firm. This Court should conclude that Mr. Barrett's conduct amounts to intentional misappropriation.

### **III. Disbarment Is The Presumptive Sanction For Misappropriation.**

Pursuant to rule 14-605(a) of the Standards for Imposing Lawyer Sanctions, disbarment is generally appropriate when a lawyer:

(a)(1) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct with the intent to benefit the lawyer or another or to deceive the court, and causes serious or potentially serious injury to a party, the public, or the legal system, or causes serious or potentially serious interference with a legal proceedings; or

(a)(2) engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft, or the sale, distribution, or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(a)(3) engages in any other intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.

Misappropriation can fall into any of these three broad categories. Even without a criminal conviction for misappropriation under paragraph (a)(2), misappropriating firm funds will still warrant disbarment under paragraphs (a)(1) or (a)(3).

In the case of In re Johnson, 48 P.3d 881, 885 (2001), this Court found that disbarment was appropriate under both paragraphs (a)(1) and (a)(3) because misappropriation is conduct involving dishonesty that seriously reflects on the lawyer's fitness to practice law. This Court has been unequivocal in its declarations that, "an intentional act of misappropriation of a client's funds is an act that merits disbarment." In the Matter of the Babilis, 951 P.2d 207, 217 (Utah 1997). The OPC respectfully asks the Court to hold that intentional misappropriation of firm funds is an act that likewise merits disbarment.

Mr. Barrett's conduct clearly satisfies the elements of 14-605(a)(1). He knowingly engaged in the misconduct when he entered into the agreements with the Firm's clients to trade legal services for construction work. Mr. Barrett's intent was to benefit himself inasmuch as the construction work was performed at his personal residence. The Firm was injured by Mr. Barrett's conduct because he, not the Firm, received the benefit of the wrought iron railing and the shed in his back yard. Additionally, Mr. Barrett, not the Firm, received the \$3,500 paid by Mr. Williams for the legal services performed on his behalf.

The misconduct also satisfies the elements of 14-605(a)(3). Entering into the secret agreements with the Firm's clients was intentional misconduct that involved dishonesty and deceit. And stealing money, whether from a client or a firm, is something that seriously adversely reflects on a lawyer's fitness to practice law.

Whether under 14-605(a)(1), (a)(2) or (a)(3), Mr. Barrett's misconduct warrants the sanction of disbarment. An attorney who is willing to deceive his partners and keep for himself property which belongs to his firm is one who has "demonstrated by [his] conduct that [he] is unable or unlikely to be unable to discharge properly [his] professional responsibilities." (Rule 14-602(b), Standards for Imposing Lawyer Sanctions)

In the present case, the trial court appears to have reached its conclusion that suspension was an appropriate sanction because this Court's prior holdings only dealt with misappropriation of client funds. In fact, the trial court stated, "the court does not find that client funds were taken and that disbarment is not mandated in this case." (R. 430)

This Court should hold that intentional misappropriation, from anyone, merits disbarment. As stated above, "it should matter little whether the theft or misappropriation is from an attorney's partners, associates, clients, family or

friends.”<sup>2</sup> “A plainly-wrong act is not immunized because the victims are one’s partners.”<sup>3</sup>

#### **IV. There Is No Mitigation That Would Justify A Departure From The Sanction of Disbarment.**

In cases involving the intentional misappropriation of client funds, this Court has held that, “a downward departure from the presumptive sanction of disbarment is appropriate only when a lawyer demonstrates truly compelling mitigating circumstances.” In the Matter of Grimes, 2012 UT 87 ¶ 15. The same standard should apply to all cases of intentional misappropriation, regardless of the victim. In the present case, the mitigating circumstances are not truly compelling and do not justify a downward departure from disbarment. The trial court found the following mitigating factors: absence of prior record; restitution and efforts to rectify the consequences of the misconduct involved; cooperation with the OPC throughout the proceedings; and “a partial understanding of actions [Mr. Barrett] should have taken with his firm to avoid the problems.” (R. 430)

With regard to aggravating circumstances, the trial court found: dishonest or selfish motive; multiple offenses; and refusal to acknowledge the wrongful nature of the misconduct. (R. 430)

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<sup>2</sup> In Office of Disciplinary Counsel v. Yajko, 674 N.E. 2d 684, 687 (Ohio 1997).

<sup>3</sup> In the Matter of Siegel, 627 A.2d. 156, 159 (N.J. 1993).

When weighed against the aggravating factors, there is nothing truly compelling about the mitigating circumstances that would warrant a departure from the presumptive sanction. There is nothing remarkable about Mr. Barrett's absence of a prior record of discipline or his cooperation with the OPC, and they do not ameliorate the theft of funds belonging to his partners.

While the trial court did not elaborate on its finding that Mr. Barrett had, "a partial understanding of actions he should have taken with his firm to avoid the problems," it is likely this factor is related to the California Matter. In that matter, Mr. Barrett sought reimbursement from the Firm for a meal he claimed was for business development. (R. 374) However, Mr. Barrett was not actually in attendance at the meal. Rather, it was Mr. Barrett's wife and a friend of hers who had lunch together in California, and Mr. Barrett only spoke to his wife's friend over the phone about a legal issue. At trial, Mr. Barrett acknowledged he could have provided more information to the Firm, and the trial court found that Mr. Barrett "withheld information that would allow the Firm to properly evaluate whether the expense was legitimate." (R. 377) It is not likely the trial court intended this mitigating factor to apply to Mr. Barrett's agreements to exchange legal services for construction work because Mr. Barrett has denied that any such agreements existed. Regardless, having a partial understanding of what



could have been done differently is not a truly compelling mitigating factor when the misconduct involves stealing funds.

The trial court's finding of, "restitution and efforts to rectify the consequences of the misconduct involved," is likewise not a truly compelling circumstance. After Mr. Barrett's employment with the Firm was terminated following a confrontation regarding his reimbursement practices, Mr. Barrett and the Firm reached an agreement. The Firm agreed to not seek repayment from Mr. Barrett for the funds it believed were improperly reimbursed, and Mr. Barrett agreed to waive his claim that his partnership shares be repurchased by the Firm. (See Settlement Agreement, Trial Exhibit 66, not attached hereto)

To the extent the agreement between Mr. Barrett and the Firm could be considered "restitution," it is not the type of restitution that would mitigate the offense. This Court addressed a similar situation in In the Matter of the Discipline of Lundgren, 2015 UT 58 ¶22:

It is true that Mr. Lundgren ultimately restored Ms. Best's funds, but this factor is not mitigating where there is no evidence to show that remorse was his motivation for restoring the funds. Tellingly, Mr. Lundgren did not self-report his unethical conduct or restore the funds to Ms. Best until after she had lodged a complaint with the OPC. Thus, it seems likely that his restoration of the funds was merely an attempt to avoid punishment. Under rule 14-607(c)(1) of the Supreme Court Rules of Professional Practice, "compelled restitution" cannot be considered a mitigating factor.

Similarly, Mr. Barrett did not self-report his misconduct, which is consistent with his denial of the existence of any agreement to trade legal services for the construction work. Therefore, any restitution that might have occurred is not a mitigating factor that warrants a departure from the presumptive sanction of disbarment.


In sum, none of the mitigating factors found by the trial court are truly compelling and this Court should impose the presumptive sanction of disbarment for Mr. Barrett's intentional misappropriation of firm funds.

### **CONCLUSION**

Intentional misappropriation is an act that warrants disbarment, regardless of whether the victim is a client or a partner. Mr. Barrett engaged in intentional misappropriation when he accepted the \$3,500 check from Mr. Williams and when he entered into secret agreements with Mr. Williams and Mr. Petersen to trade legal services for construction work at his personal residence. Disbarment is the presumptive sanction for such misconduct and there are no truly compelling mitigating factors that would justify a departure from the presumptive level of discipline. Therefore, this Court should exercise its inherent authority and disbar Mr. Barrett from the practice of law in Utah.

Dated: January 7th, 2015.

OFFICE OF PROFESSIONAL CONDUCT



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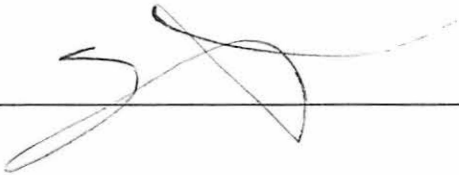
Todd Wahlquist  
Deputy Senior Counsel

## CERTIFICATE OF MAILING

I hereby certify that on this 7<sup>th</sup> day of January, 2016, I caused to be mailed via U.S. first-class mail, postage pre-paid, two true and correct copies of the foregoing Appellant's Brief to:

Robert K. Hilder  
Hilder McCosh  
1491 Fletcher Court  
Park City, Utah 84098

Counsel for Appellee



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Todd Wahlquist  
Deputy Senior Counsel  
Office of Professional Conduct

Dated: January 7, 2016

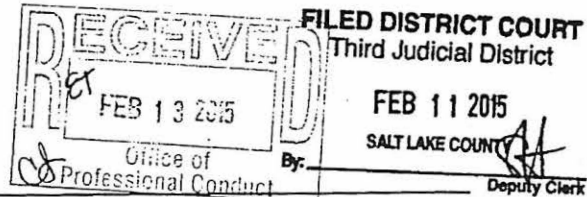
## **ADDENDUM**

### **Table of Contents**

Addendum Exhibit 1 -	Findings of Fact and Conclusions of Law, and Order
Addendum Exhibit 2 -	Order of Suspension
Addendum Exhibit 3 -	Rule 14-601 Definitions; Standards for Imposing Lawyer Sanctions
Addendum Exhibit 4 -	Rule 14-602 Purpose and Nature of Sanctions
Addendum Exhibit 5 -	Rule 14-603 Sanctions, Standards for Imposing Lawyer Sanctions
Addendum Exhibit 6 -	Rule 14-605 Imposition of Sanctions
Addendum Exhibit 7 -	Rule 14-607 Aggravation and Mitigation
Addendum Exhibit 8 -	Rule 8.4 Rules of Professional Conduct (with comments)



Addendum Exhibit 1



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

**In the Matter of the Discipline of:**  
**JOSEPH P. BARRETT #8088**  
**Respondent.**

**FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER**

**CASE NO. 130907818**

**Judge Robert P. Faust**

This matter came before the Court on January 27, 2015, for an Adjudication Trial pursuant to Rule 14-511(e) of the Rules of Lawyer Discipline and Disability ("RLDD"). The Utah State Bar's Office of Professional Conduct was represented by Todd Wahlquist, Deputy Senior Counsel, and Respondent, Joseph P. Barrett, was represented by counsel, George M. Haley and J. Andrew Sjoblom, of Holland and Hart. Prior to trial, both counsel stipulated to undisputed facts which are set forth below.

Further, having heard the evidence and the arguments of counsel, the Court hereby makes the following Findings of Fact, Conclusions of Law, and Order:

**STIPULATED FACTS**

1. Joseph P. Barrett, who is an attorney in the State of Utah and a member of the Utah State Bar, is charged with unprofessional conduct. The Utah State Bar's Office of Professional Conduct in its Amended Complaint brought three counts of violation of Rule 8.4(c) – Misconduct. Count I – Williams Matter, Count II – Petersen matter and Count III – California Matter. Rule 8.4(c) (Misconduct) states:

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

2. According to the records of the Executive Director of the Utah State Bar, Joseph P. Barrett's address is in Salt Lake City, Utah 84103. Venue is proper in this Court pursuant to Rule 14-511(b) of the RLDD, in that, at all relevant times, Respondent resided in Salt Lake County and the alleged misconduct originated in Salt Lake County. Jurisdiction is proper in this Court pursuant to Rule 14-511(a), Rules of Lawyer Discipline and Disability (amended January 1, 2003) ("RLDD").

3. The Complaint was brought pursuant to a directive of a Screening Panel of the Ethics and Discipline Committee of the Utah Supreme Court, and is based upon an Informal Complaint submitted by Andrew Morse against Joseph P. Barrett.

4. On February 15, 2013, the OPC sent Mr. Barrett an Amended Notice of Informal Complaint ("NOIC").

5. On September 5, 2013, a Screening Panel of the Ethics and Discipline Committee of the Utah Supreme Court ("the Screening Panel") heard the matter.

6. At the conclusion of the hearing on September 5, 2013, the Screening Panel directed the OPC to file a formal complaint against Mr. Barrett.

7. Joseph Barrett was employed at the firm of Snow, Christensen & Martineau ("the Firm") from 2003 until February 2012.

#### **WILLIAMS MATTER**

#### **STIPULATED FACTS**

8. Richard Williams is the owner of Dick's Backhoe and Sewer Connection.

9. In June 2007, Mr. Williams' son was charged in a criminal matter.

10. On June 15, 2007, Mr. Barrett appeared in the criminal matter.

11. On July 30, 2007, Mr. Williams paid a \$1,000.00 retainer that was deposited into the Firm's trust account under the name Dick's Backhoe and Sewer.
12. This criminal matter was closed in December 2007.
13. Mr. Barrett did not bill any time against the retainer in this first criminal matter in 2007.
14. In 2008, Mr. Williams asked Mr. Barrett to assist him in a collections matter for his company.
15. A small amount of work was performed by Mr. Barrett on behalf of Dick's Backhoe and Sewer.
16. On April 3, 2008, \$175 in legal fees were charged to Mr. Williams' account.
17. On August 1, 2008, Mr. Barrett requested the \$175 charge to be written-off Mr. Williams' bill.
18. On August 7, 2008, \$60 in legal fees (without interest) were charged to Mr. Williams.
19. On August 29, 2008, Mr. Barrett requested the \$60 charge to be written-off Mr. Williams' bill.
20. In the summer of 2008, Mr. Williams performed construction work at Mr. Barrett's personal residence.
21. On September 5, 2008, \$225 in legal fees were charged to Mr. Williams.
22. On September 5, 2008, Mr. Barrett requested the \$225 charge to be written-off Mr. Williams' bill.
23. In February 2010, Mr. Williams' son was charged in several new criminal matters, including a felony.

24. Mr. Williams contacted Mr. Barrett about representing his son again.
25. In March 2010, Mr. Barrett filed appearances in the criminal matters.
26. Between March 2010 and July 2010, Mr. Barrett billed \$7,665 to Mr. Williams' account.
27. In March 2010, Mr. Williams paid \$300 to the firm by credit card.
28. In or around June or July 2010, Mr. Williams provided construction services to Mr. Barrett at his personal residence in the form of a wrought iron railing.
29. Between June 14 and June 25, Mr. Barrett requested a total of \$7,446.57 in fees, costs, and interest to be written-off Mr. Williams' bill.
30. Mr. Williams was not able to complete the railing project.
31. On July 21, 2010, Mr. or Mrs. Williams wrote a check for \$3,500 made out to Mr. Barrett personally.
32. Mr. Barrett deposited the \$3,500 into his personal account.
33. The Firm was unaware that Mr. Williams paid \$3,500 directly to Mr. Barrett for legal services.
34. Between June 3, 2011 and August 3, 2011, Mr. Barrett billed \$400 in legal fees to Mr. Williams' account.
35. On December 27, 2011, \$400 was billed against the \$1,000 retainer that had been deposited in 2007.
36. On April 26, 2012, after Mr. Barrett left the Firm, the Firm refunded \$600 to Mr. Williams, representing the balance of the trust account.

37. Of the \$8,612.07 in total fees, costs and interest billed to Mr. Williams, he only paid \$700 to the firm, and the remaining \$7,912.07 was written-off.

**ADDITIONAL FINDINGS OF FACT FROM TRIAL**

38. Mr. Williams retained the Firm through Mr. Barrett to represent his son.

39. The Court, after hearing the testimony of Mr. Barrett, does not give much weight to the same. Mr. Barrett testified the railing installed at his house by Mr. Williams was a gift and he wrote-off the retainer and bills to help Mr. Williams, in contrast to the testimony of Mr. Williams, who clearly and without hesitation admitted he traded the iron work at the home of Mr. Barrett in exchange for the legal fees relating to his son's criminal matter. Mr. Williams further testified he was the one who suggested the trade. Further, Mr. Williams testified since the railing was not completed, he determined how much he had personally already paid out in costs on the railing work to third parties and then determined how much he owed Mr. Barrett for the balance of the legal work for his son and sent a check of \$3,5000 for the difference to Mr. Barrett. Mr. Williams also testified the person working on the railing was not his brother-in-law, which is contrary to Mr. Barrett's testimony.

40. Mr. Barrett and Mr. Williams reached an agreement whereby Mr. Barrett would provide legal services in exchange for construction services performed by Mr. Williams at Mr. Barrett's personal residence. Mr. Williams testified this agreement was an oral agreement and nothing was in writing between he and Mr. Barrett.

41. The Firm was unaware of the agreement between Mr. Barrett and Mr. Williams.

42. The value of the construction services did not equal the value of the legal services.



43. Mr. Williams, or his wife on his behalf, directly paid Mr. Barrett \$3,500 which Mr. Williams testified was the difference between the value of the legal services and the value of the construction services since they were not equal amounts.

44. The \$3,500 paid by Mr. Williams to Mr. Barrett belonged to the Firm.

45. Of the \$8,612.07 in total fees, costs and interest billed to Mr. Williams, he only paid \$700 to the firm, and the remaining \$7,912.07 was written-off by Mr. Barrett and thus by Mr. Barrett's firm.

46. The Firm was entitled to the value of the construction services performed by Mr. Williams at Mr. Barrett's personal residence.

#### **PETERSEN MATTER**

#### **STIPULATED FACTS**

47. Dave Petersen is one of the owners of D&T Landscaping.

48. Between 2006 and 2009, D&T provided various landscaping services to Mr. Barrett at his personal residence.

49. Mr. Barrett paid D&T for these landscaping services.

50. In November 2010, Mr. Petersen retained Mr. Barrett and the Firm to represent him in a custody modification matter.

51. On November 2, 2010, Mr. Petersen paid a \$2,500 retainer to the Firm that was deposited into the Firm's trust account.

52. Initially, it was anticipated that a shed would be built for approximately \$5,000.

53. Between November 2010 and August 2011, the Firm billed \$8,801.10 in fees, costs and interest to Mr. Petersen's account.

54. Mr. Petersen received regular bills from the Firm.
55. Mr. Petersen's modification case was concluded on or about July 20, 2011.
56. On or about August 9, 2011, Mr. Petersen or D&T started construction on the shed at Mr. Barrett's personal residence.
57. On August 25, 2011, Mr. Barrett requested the accounting department at the Firm to write-off approximately half of Mr. Petersen's bill.
58. On September 20, 2011, Mr. Barrett requested the accounting department at the Firm to write-off half of the remaining balance on Mr. Petersen's bill.
59. On November 22, 2011, Mr. Barrett requested the accounting department at the firm to write-off the remaining balance on Mr. Petersen's bill.
60. In the end, Mr. Barrett requested to be written-off a total of \$8,913.54 in legal fees, costs and interest on Mr. Petersen's account.
61. Mr. Petersen finished most of the construction on Mr. Barrett's shed by December 2011.
62. On or about December 13, 2011, Mr. Barrett requested the accounting department to refund the \$2,500 retainer paid by Mr. Petersen.
63. The Firm refunded the \$2,500 to Mr. Petersen.
64. On December 14, 2011, Mr. Barrett wrote a letter to Mr. Petersen stating that the Firm had provided \$10,577.25 in legal services to Mr. Petersen.
65. Mr. Petersen did not pay the Firm for any of the legal services provided.
66. In February 2012 Mr. Barrett's employment with the Firm ended.
67. In April 2012, Mr. Barrett made two payments to D&T for the shed totaling \$3,030.

68. In addition, in November 2011, Mr. Barrett paid \$758 directly to the company that painted the shed, and in September 2011 paid \$1,204 to Home Depot for doors and windows for the shed.

69. For the shed, Mr. Barrett paid approximately \$5,000.

#### ADDITIONAL FINDINGS OF FACT FROM TRIAL

70. Mr. Barrett and Mr. Petersen reached an agreement whereby Mr. Barrett would provide legal services to Mr. Petersen for his custody matter in exchange for a shed to be constructed by Mr. Petersen at Mr. Barrett's personal residence.

71. Mr. Petersen testified there was an oral agreement, not a written agreement between Mr. Barrett and himself to build the shed in exchange for Mr. Barrett's legal work. Mr. Petersen testified this agreement was made before the work on the shed began. Mr. Petersen testified his first estimate for the shed was \$5,000 as a starting point and they would go from there. Mr. Petersen testified it was not a flat rate contract.

72. Mr. Petersen testified the agreement with Mr. Barrett included his paying a \$2,500.00 retainer up front and he would get the \$2,500.00 at the end of their agreement. The Court finds the testimony of Mr. Barrett that he refunded the \$2,500.00 retainer because Mr. Petersen wanted to visit his son in Hawaii and he had no money misleading, and an attempt to explain the refund of the retainer to Mr. Petersen without admitting there was an agreement in advance to return the \$2,500 retainer to Mr. Petersen. Mr. Petersen did not testify as to what reason he gave or what was stated to Mr. Barrett when he got his retainer back, other than the refund of the \$2,500 was part of their agreement. Despite Mr. Petersen not so testifying, he very well may have needed his retainer money to fund his travel to Hawaii to see his son and may have indicated the same to Mr. Barrett. Thus, the Court cannot definitively

determine Mr. Barrett falsely testified to the Court that Mr. Petersen asked for a retainer refund and the reason why he needed the money. The Court, however, finds the return of the retainer funds was not for the reason stated by Mr. Barrett, i.e. he was attempting to help Mr. Petersen, but rather was a return of Mr. Petersen's funds as they had agreed.

73. Mr. Petersen received regular bills from the Firm, but did not pay them because Mr. Barrett told him not to worry about them. Mr. Petersen testified he was going to take care of the bills and costs at D&T and Mr. Barrett would take care of the bills incurred by him.

74. On December 14, 2011, Mr. Barrett wrote a letter to Mr. Petersen stating that the Firm had provided \$10,577.25 in legal services to Mr. Petersen. Mr. Barrett stated he had been asked to provide this letter by Mr. Petersen and he did not know the reason why Mr. Peterson needed the letter. However, Mr. Petersen testified he was surprised to get this letter from Mr. Barrett.

75. In constructing the shed, Mr. Petersen incurred approximately \$8,700 in time and labor costs.

76. In February 2012, after being confronted by the Firm regarding other accounting issues, Mr. Barrett's employment with the Firm ended.

77. For the shed, which has an asserted value or cost of approximately \$23,700, Mr. Barrett paid approximately \$5,000. Mr. Petersen testified he would have reduced the January 2, 2012 invoice by \$1,000.00 and the rest of the invoice is correct. See Exhibit 38 pp. 7-8. Mr. Petersen testified the actual cost of the shed, without the costs paid by Mr. Barrett himself is \$15,170.63 as reflected on Ex. 38 p. 6.

78. The Firm was unaware of the agreement between Mr. Barrett and Mr. Petersen to trade legal services for a shed.

79. The Firm was entitled to the value of the construction services performed by Mr. Petersen at Mr. Barrett's personal residence equal to the value of the legal services provided by the Firm to Mr. Petersen.

#### **CALIFORNIA MATTER**

##### **STIPULATED FACTS**

80. On January 25, 2012, Mr. Barrett submitted an expense report seeking reimbursement from the Firm for \$123.54 for a meal that he claimed was for business development.

81. The receipt attached to the expense report showed that the meal was at a restaurant in Los Angeles, California, on January 5, 2012.

82. The meal was charged to the credit card of Mr. Barrett's wife.

83. The Firm reimbursed Mr. Barrett for the cost of the meal.

84. The court docket shows that Mr. Barrett appeared in person in Wasatch County Justice Court at a pretrial conference on January 5, 2012.

85. Mr. Barrett's billing records show that he billed for 6.5 hours of work on January 5, 2012, and there are no references to a meeting or phone call with anyone in Los Angeles that day.

86. The lunch guest never retained the Firm.

##### **ADDITIONAL FINDINGS OF FACT FROM TRIAL**

87. Mr. Barrett testified he discussed a legal issue with his wife's lunch guest over the phone and no evidence to the contrary was provided.

88. The manner in which Mr. Barrett sought reimbursement was deceptive in that the information provided to the Firm gave no indication that Mr. Barrett was not actually at the lunch meeting.

and was contrary, according to the testimony of Mr. Morris, to the informal understanding among the members of the Firm that a face-to-face meeting with a client was needed in order to be a legitimate business development cost which would be paid by the firm.

#### General Facts

89. The Policy at the firm from 2005 to 2011 required amounts above \$4,000 which the partners wanted to write-off or write-down required Executive Committee approval. See Exhibit 58, Bates 485. Mr. Barrett was a member of a committee at the Firm which would have given him knowledge of the threshold amount and Mr. Barrett was aware of a threshold amount. It was admitted by Mr. Morris, President of the Firm, this policy threshold level was not enforced and in January 2012 a new policy went into effect.

90. Mr. Morris further testified there was no oversight by the Firm on costs and business development costs and it was the honor system that was in place amongst the attorneys.

91. Mr. Morris testified it was the business expense reimbursement request form admitted as Ex. 56 page 236 which caused concern and led to further review of Mr. Barrett's cost requests. The concerns included the fact most of the dates on the request form were on a weekend and Item 3 was for skiing at Soldier Hollow, with the "entertained" or person with whom business development was done had Mr. Barrett's wife's family name of "Roegiers". Mr. Morris testified a further review by him and the Firm was done into the expenses and cost reimbursement request submitted by Mr. Barrett. This



review led to the discovery of the information and issues of the California Meal reimbursement which became Count III of the complaint against Mr. Barrett.

92. Mr. Morris testified all legal services performed by the attorneys at the Firm, belong to the Firm according to their employee contracts. No attorneys are allowed to do legal work outside the Firm.

#### CONCLUSIONS OF LAW

The Court concludes as a matter of law that Mr. Barrett violated the following rules:

#### WILLIAMS MATTER

93. Rule 8.4(c) (Misconduct) states:

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

94. Mr. Barrett engaged in conduct involving dishonesty and deceit when he accepted payment directly from the client without the Firm's knowledge, thereby misappropriating \$3,500 in legal fees that belonged to the Firm.

95. Mr. Barrett further engaged in conduct involving dishonesty and deceit when he wrote-off bills that were due to the Firm in exchange for receiving construction services from Mr. Williams at his personal residence without the Firm's knowledge.

96. By engaging in conduct involving dishonesty and deceit, Mr. Barrett violated Rule 8.4(c).

97. Mr. Barrett's violation of the rule with regard to the Williams matter was intentional and done with the intent to personally benefit himself. Mr. Barrett's conduct resulted in harm to the Firm and the profession.

**PETERSEN MATTER**

98. Rule 8.4(c) (Misconduct) states:

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

99. Mr. Barrett engaged in conduct involving dishonesty and deceit when he wrote-off bills that were due to the Firm in exchange for a shed constructed by Mr. Petersen at his personal residence without the Firm's knowledge.

100. By engaging in conduct involving dishonesty and deceit, Mr. Barrett violated Rule 8.4(c).

101. Mr. Barrett's violation of the rule with regard to the Petersen matter was intentional and done with the intent to personally benefit himself.

102. Mr. Barrett's conduct resulted in harm to the Firm and the profession.

**CALIFORNIA MATTER**

103. Rule 8.4(c) (Misconduct) states:

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

104. Mr. Barrett engaged in conduct involving dishonesty and deceit by seeking reimbursement for client development expenses for a meal in Los Angeles when, in fact, he was in Utah on that day attending to other matters. Mr. Barrett withheld information that would allow the Firm to properly evaluate whether the expense was legitimate. By engaging in conduct involving dishonesty and deceit, Mr. Barrett violated Rule 8.4(c).

105. Mr. Barrett's conduct was intentional and done with the intent to benefit himself.

106. Mr. Barrett's conduct resulted in harm to the Firm.

**ORDER**

Because the Court finds that Mr. Barrett has violated Rule 8.4(c) of the Rules of Professional Conduct, the Court shall conduct a sanctions hearing. That hearing is set for March 3, 2015, at 1:00 p.m. to 2:00 p.m., in Courtroom N41.

Entered this 11th day of February, 2015.

BY THE COURT:

  
ROBERT P. HANKS  
DISTRICT COURT JUDGE




CERTIFICATE OF SERVICE

I hereby certify that I mailed/mailed a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Order, to the following, this 11th day of February, 2015:

Todd Wahlquist  
Deputy Senior Counsel  
Office of Professional Conduct  
Utah State Bar  
645 South 200 East  
Salt Lake City, Utah 84111  
[opcfileing@utahbar.org](mailto:opcfileing@utahbar.org)

George M. Haley  
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[JASjoblom@hollandhart.com](mailto:JASjoblom@hollandhart.com)

*Shawn M. Mark*

The seal is circular with a double border. The outer border contains the text "STATE OF UTAH" at the top and "10th DISTRICT COURT SALT LAKE CITY" at the bottom. The inner circle features a central emblem depicting a mountain, a river, and a tree, surrounded by a wreath.

Addendum Exhibit 2



FILED DISTRICT COURT  
Third Judicial District

MAR 03 2015

SALT LAKE COUNTY

By: \_\_\_\_\_

Deputy Clerk

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

In the Matter of the Discipline of:

JOSEPH P. BARRETT #8088

Respondent.

ORDER OF SUSPENSION

CASE NO. 130907818

Judge Robert P. Faust

This matter came before the Court on March 2, 2015, for a Sanctions Hearing. The Office of Professional Conduct ("OPC") was represented by Todd Wahlquist. The Respondent, Joseph Barrett, was represented by George M. Haley. Testimony was given by various witnesses. The Court having considered the evidence, testimony, and aggravating and mitigating circumstances presented, finds and concludes as follows:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On February 11, 2015, the Court entered its Findings of Fact, Conclusions of Law, and Order, finding that Mr. Barrett had violated the following Rule of Professional Conduct on three occasions identified as the Williams matter, Petersen matter and the California matter:

**Violation of Rule 8.4(c) (Misconduct)**

Rule 8.4 (Misconduct), Rules of Professional Conduct, provides as follows:

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Further, the above Findings and Conclusions are referred to and incorporated herein, with the Court now amending the signed findings by moving paragraph Nos. 33 and 52 from the section of stipulated findings to the section on additional findings of fact from trial by this reference.

**DISCIPLINE**

Based upon Mr. Barrett's violation of the Rules of Professional Conduct, a Sanctions Hearing was held on March 2, 2015. After hearing evidence and argument, the Court finds and concludes as follows:

1. Mr. Barrett violated the Rules of Professional Conduct as outlined in the Findings and Conclusions.
2. Mr. Barrett violated the Rules of Professional Conduct knowingly and intentionally.
3. Mr. Barrett's conduct caused actual injury but the injured party has been made whole.
4. The Court finds the following aggravating circumstances:
  - a. Dishonest or selfish motive;
  - b. Multiple offenses;
  - c. Refusal to acknowledge the wrongful nature of the misconduct.
5. The Court finds the following mitigating circumstances:
  - a. Absence of a prior record;
  - b. Restitution and efforts to rectify the consequences of the misconduct involved;
  - c. Cooperation with the OPC throughout the proceedings;
  - d. A partial understanding of actions he should have taken with his firm to avoid the problems.
6. The Court does not find that client funds were taken and that disbarment is not mandated in this case.

7. Based upon all of the factors above and based upon the Standards for Imposing Lawyer Discipline, the Court finds that a suspension from the practice of law for a period of time is the appropriate sanction for Mr. Barrett's misconduct.

**ORDER**

IT IS THEREFORE ORDERED, that Joseph Barrett shall be suspended from the practice of law for a period of 150 days effective 30 days from the date of this Order.

IT IS FURTHER ORDERED, that Mr. Barrett shall comply with all requirements of Rule 14-526(a) of the Rules of Lawyer Discipline and Disability.

IT IS FURTHER ORDERED, that Mr. Barrett shall pay costs incurred by the OPC in prosecuting this action.

Dated this 3rd day of March, 2015.

BY THE COURT

ROBERT E. ASHBY  
DISTRICT COURT JUDGE





**CERTIFICATE OF SERVICE**

I hereby certify that I mailed/emailed a true and correct copy of the foregoing Order of Suspension, to the following, this 3rd day of March, 2015:

Todd Wahlquist  
Deputy Senior Counsel  
Office of Professional Conduct  
Utah State Bar  
645 South 200 East  
Salt Lake City, Utah 84111  
[opcfilings@utahbar.org](mailto:opcfilings@utahbar.org)

George M. Haley  
J. Andrew Sjoblom  
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[GMHaley@hollandhart.com](mailto:GMHaley@hollandhart.com)  
[JASjoblom@hollandhart.com](mailto:JASjoblom@hollandhart.com)



Addendum Exhibit 3

## **Article 6. Standards for Imposing Lawyer Sanctions**

### **Rule 14-601. Definitions.**

As used in this article:

- (a) "complainant" means the person who files an informal complaint or the OPC when the OPC determines to open an investigation based on information it has received;
- (b) "formal complaint" means a complaint filed in the district court alleging misconduct by a lawyer or seeking the transfer of a lawyer to disability status;
- (c) "informal complaint" means any written, notarized allegation of misconduct by or incapacity of a lawyer;
- (d) "injury" means harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury;
- (e) "intent" means the conscious objective or purpose to accomplish a particular result;
- (f) "knowledge" means the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result;
- (g) "negligence" means the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation;
- (h) "potential injury" means the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct;
- (i) "respondent" means a lawyer subject to the disciplinary jurisdiction of the Supreme Court against whom an informal or formal complaint has been filed; and
- (j) "Rules of Professional Conduct" means the Utah Rules of Professional Conduct (including the accompanying comments) initially adopted by the Supreme Court in 1988, as amended from time to time.

Addendum Exhibit 4

## **Rule 14-602. Purpose and nature of sanctions.**

(a) Summary. This article is based on the Black Letter Rules contained in the Standards for Imposing Lawyer Sanctions prepared by the American Bar Association's Center for Professional Responsibility. They have been substantially revised by the Supreme Court. Notably, ABA Standards 4 through 8 have been reduced into a single Rule 14-605.

(b) Purpose of lawyer discipline proceedings. The purpose of imposing lawyer sanctions is to ensure and maintain the high standard of professional conduct required of those who undertake the discharge of professional responsibilities as lawyers, and to protect the public and the administration of justice from lawyers who have demonstrated by their conduct that they are unable or likely to be unable to discharge properly their professional responsibilities.

(c) Public nature of lawyer discipline proceedings. Ultimate disposition of lawyer discipline shall be public in cases of disbarment, suspension, and reprimand, and nonpublic in cases of admonition.

(d) Purpose of these rules. These rules are designed for use in imposing a sanction or sanctions following a determination that a member of the legal profession has violated a provision of the Rules of Professional Conduct. Descriptions in these rules of substantive disciplinary offenses are not intended to create grounds for determining culpability independent of the Rules of Professional Conduct. The rules constitute a system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. They are designed to promote:

(d)(1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case;

(d)(2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; and

(d)(3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.

Addendum Exhibit 5

### **Rule 14-603. Sanctions.**

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

(b) Disbarment. Disbarment terminates the individual's status as a lawyer. A lawyer who has been disbarred may be readmitted as provided in Rule 14-525.

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

(c)(1) A lawyer who has been suspended for six months or less may be reinstated as set forth in Rule 14-524.

(c)(2) A lawyer who has been suspended for more than six months may be reinstated as set forth in Rule 14-525.

(d) Interim suspension. Interim suspension is the temporary suspension of a lawyer from the practice of law. Interim suspension may be imposed as set forth in Rules 14-518 and 14-519.

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

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

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

(h) Resignation with discipline pending. Resignation with discipline pending is a form of public discipline which allows a respondent to resign from the practice of law while either an informal or formal complaint is pending against the respondent. Resignation with discipline pending may be imposed as set forth in Rule 14-521.

(i) Other sanctions and remedies. Other sanctions and remedies which may be imposed include:

(i)(1) restitution;

(i)(2) assessment of costs;

(i)(3) limitation upon practice;

(i)(4) appointment of a receiver;

(i)(5) a requirement that the lawyer take the Bar Examination or professional responsibility examination; and

(i)(6) a requirement that the lawyer attend continuing education courses.

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



Addendum Exhibit 6

### **Rule 14-605. Imposition of sanctions.**

Absent aggravating or mitigating circumstances, upon application of the factors set out in Rule 14-604, the following sanctions are generally appropriate.

(a) Disbarment. Disbarment is generally appropriate when a lawyer:

(a)(1) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct with the intent to benefit the lawyer or another or to deceive the court, and causes serious or potentially serious injury to a party, the public, or the legal system, or causes serious or potentially serious interference with a legal proceeding; or

(a)(2) engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution, or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(a)(3) engages in any other intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.

(b) Suspension. Suspension is generally appropriate when a lawyer:

(b)(1) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceeding; or

(b)(2) engages in criminal conduct that does not contain the elements listed in Rule 14-605(a)(2) but nevertheless seriously adversely reflects on the lawyer's fitness to practice law.

(c) Reprimand. Reprimand is generally appropriate when a lawyer:

(c)(1) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury to a party, the public, or the legal system, or causes interference with a legal proceeding; or

(c)(2) engages in any other misconduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

(d) Admonition. Admonition is generally appropriate when a lawyer:

(d)(1) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes little or no injury to a party, the public, or the legal system or interference with a legal proceeding, but exposes a party, the public, or the legal system to potential injury or causes potential interference with a legal proceeding; or

(d)(2) engages in any professional misconduct not otherwise identified in this rule that adversely reflects on the lawyer's fitness to practice law.

Addendum Exhibit 7

### **Rule 14-607. Aggravation and mitigation.**

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

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

- (a)(1) prior record of discipline;
- (a)(2) dishonest or selfish motive;
- (a)(3) a pattern of misconduct;
- (a)(4) multiple offenses;
- (a)(5) obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority;
- (a)(6) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (a)(7) refusal to acknowledge the wrongful nature of the misconduct involved, either to the client or to the disciplinary authority;
- (a)(8) vulnerability of victim;
- (a)(9) substantial experience in the practice of law;
- (a)(10) lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved; and
- (a)(11) illegal conduct, including the use of controlled substances.

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

- (b)(1) absence of a prior record of discipline;
- (b)(2) absence of a dishonest or selfish motive;
- (b)(3) personal or emotional problems;
- (b)(4) timely good faith effort to make restitution or to rectify the consequences of the misconduct involved;
- (b)(5) full and free disclosure to the client or the disciplinary authority prior to the discovery of any misconduct or cooperative attitude toward proceedings;
- (b)(6) inexperience in the practice of law;
- (b)(7) good character or reputation;

(b)(8) physical disability;

(b)(9) mental disability or impairment, including substance abuse when:

(b)(9)(A) the respondent is affected by a substance abuse or mental disability; and

(b)(9)(B) the substance abuse or mental disability causally contributed to the misconduct; and

(b)(9)(C) the respondent's recovery from the substance abuse or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(b)(9)(D) the recovery arrested the misconduct and the recurrence of that misconduct is unlikely;

(b)(10) unreasonable delay in disciplinary proceedings, provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated prejudice resulting from the delay;

(b)(11) interim reform in circumstances not involving mental disability or impairment;

(b)(12) imposition of other penalties or sanctions;

(b)(13) remorse; and

(b)(14) remoteness of prior offenses.

(c) Other circumstances. The following circumstances should not be considered as either aggravating or mitigating:

(c)(1) forced or compelled restitution;

(c)(2) withdrawal of complaint against the lawyer;

(c)(3) resignation prior to completion of disciplinary proceedings;

(c)(4) complainant's recommendation as to sanction; and

(c)(5) failure of injured client to complain.

Addendum Exhibit 8

#### **Rule 8.4. Misconduct.**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

#### **Comment**

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct or knowingly assist or induce another to do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[1a] A violation of paragraph (a) based solely on the lawyer's violation of another Rule of Professional Conduct shall not be charged as a separate violation. However, this rule defines professional misconduct as a violation of the Rules of Professional Conduct as the term professional misconduct is used in the Supreme Court Rules of Professional Practice, including the Standards for Imposing Lawyer Sanctions. In this respect, if a lawyer violates any of the Rules of Professional Conduct, the appropriate discipline may be imposed pursuant to Rule 14-605.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates



paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[3a] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.