

2015

Abraham C. Bates v. District Court : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

In the Matter of the Discipline of:

Abraham C. Bates #12440

Respondent/Appellee

Supreme Court No. 20150483-SC

District Court No. 120905676

BRIEF OF THE APPELLANT

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JURISDICTIONAL STATEMENT

The Utah State Bar's Office of Professional Conduct ("OPC") appeals from a final judgment of the Third District Court suspending Abraham Bates 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 finding that Mr. Bates did not engage in intentional misappropriation when he used client funds for his firm's payroll, and therefore, err in imposing a suspension rather than disbarment?

This issue was preserved through closing argument and through the Sanctions Hearing Brief submitted to the District Court. [R. 689]

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 14-604	Factors to be Considered in Imposing Lawyer Sanctions
Rule 14-605	Imposition of Sanctions
Rule 14-607	Aggravation and Mitigation
Rule 1.15	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. Bates for a period of five months for violating rules 1.4(a), 1.15(a), and 1.15(d) of the Rules of Professional Conduct. 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. Bates pursuant to a directive of a screening panel of the Utah Supreme Court's Ethics

and Discipline Committee. [R. 1] On May 6, 7 & 8, 2014, the district court presided over an adjudication trial to determine whether Mr. Bates violated the Rules of Professional Conduct ("Rules"). [R. 830] On March 2, 2015, the court issues its Second Amended Findings of Fact and Conclusions of Law, finding that Mr. Bates violated rules 1.4(a), 1.15(a) and 1.15(d) of the Rules. (R. 830) Accordingly, a sanctions hearing was held on April 15, 2015. [R. 1138] On June 1, 2015, the court entered its order suspending Mr. Bates for five months. [R. 1138] The OPC filed its Notice of Appeal on June 8, 2015. [R. 1150] .

STATEMENT OF RELEVANT FACTS

Mr. Bates was admitted to practice law in Utah on October 20, 2009 and started a private practice around December 1, 2009. [R. 831] On July 1, 2010, Mr. Bates formed Wasatch Advocates, a firm which he solely owned and operated at all times relevant to the Amended Complaint and until the firm's dissolution on January 31, 2012. (R. 831)

Bangerter Matter

Grant Bangerter first retained Wasatch Advocates to represent Rimroc Properties and Development, LLC ("Rimroc"), a real estate investment company of which he was a member. (R. 832) Wasatch Advocates' engagement was to attempt to set aside a default judgment taken against certain members of Rimroc in a case pending in federal court (the "Rimroc Case"). (R. 832)

In the same timeframe, Mr. Bangerter separately retained Wasatch Advocates to represent him in lawsuit against a lender, ING, related to real property he owned. (R. 833) Mr. Bangerter hired Wasatch Advocates to forestall ING's foreclosure sale, scheduled for March 17, 2011. (R. 833) An initial complaint and motion for TRO were drafted and filed in Fourth District Court by Wasatch Advocates. The Complaint in the Fourth District Case bears Mr. Bates' name on the caption and attached his digital signature. (R. 833) The court granted Mr. Bangerter's motion for TRO, thereby forestalling the foreclosure sale. (R. 833) However, because Mr. Bangerter failed to post the required bond, the preliminary injunction did not issue, leaving ING free to foreclose on the property. (R. 834) ING subsequently filed a motion to dismiss the case with prejudice. (R. 834)

On or about May 23, 2011, Wasatch Advocates attempted to contact Mr. Bangerter by email regarding his failure to make required payments to the firm. (R. 834) In a letter dated May 25, 2011 Wasatch Advocates attempted to communicate with Mr. Bangerter regarding the status of the case and his failure to make required payments to the firm. (R. 834) Mr. Bangerter did not respond to the May 25 letter. (R. 834) On or about June 3, 2011, Wasatch Advocates filed a memorandum in opposition to the motion to dismiss. (R. 835) On or about June 10, 2011, Wasatch Advocates filed a motion to withdraw from the case, but

ING objected to the withdrawal. On July 11, 2011, the court denied Wasatch Advocates' motion to withdraw based on the lack of any substantive basis and potential prejudice to judicial process and ING. (R. 835) Oral argument on the motion to dismiss was scheduled for July 29, 2011.

On July 21, 2011, Mr. Bates' paralegal sent him an email informing him that the court had denied the motion to withdraw and that oral argument was scheduled for July 29, 2011 on the motion to dismiss. (R. 835) On July 21, 2011, Mr. Bates attempted to get a former associate from his firm to handle the hearing, but the former associate was unwilling or unable to assist. (R. 835) On July 28, 2011, the day before the hearing, Mr. Bates instructed his paralegal to contact opposing counsel and make arrangements to dismiss Mr. Bangerter's case. The timing and circumstances suggest that Mr. Bates did so because he was either unable or unwilling to attend the hearing on July 29, 2011. (R. 835)

Mr. Bates' paralegal prepared an email to opposing counsel and appended a stipulation and order for dismissal of the case without prejudice. Opposing counsel made clear ING would not agree to a dismissal without prejudice and revised the stipulation and order to reflect a dismissal with prejudice and returned it to Mr. Bates' paralegal. (R. 836) Mr. Bates' paralegal filed with the court the stipulation and proposed form of order dismissing the case with prejudice. Mr. Bates electronically signed the stipulation. (R. 836) The July 29, 2011, hearing

did not go forward and, on August 15, 2011, the court entered the stipulated order dismissing with prejudice Mr. Bangerter's claims. (R. 836)

Mr. Bates did not communicate with Mr. Bangerter prior to stipulating to a dismissal of his case. Mr. Bates acknowledges that the case should not have been voluntarily dismissed with prejudice, absent advance consultation with Mr. Bangerter. (R. 836)

Trust Account Matters

Between approximately July 2010, and February 2012, Mr. Bates maintained a firm operating account and a separate client trust account at Zions Bank. (R. 842) All checks written from the client trust account bear the signature of Mr. Bates. (R. 842) Mr. Bates was the only person authorized to withdraw money from the client trust account. No one other than Mr. Bates made online transfers into or out of the client trust account. (R. 842)

The majority of legal fees paid to Wasatch Advocates between July 2010, and February 2012, were fixed/flat fees that Mr. Bates deemed to be earned upon receipt. The majority of those fees were deposited directly into Mr. Bates' operating account, rather than the client trust account. (R. 842) At times, whether by mistake or in accordance with an evolving policy on where fixed/flat fees should be deposited, some earned fixed/flat fees were deposited into the trust account. Mr. Bates was aware that, at times, fixed/flat fee payments that he

deemed to be earned upon receipt had been deposited into his trust account. (R. 842)

Mr. Bates periodically would transfer funds from his trust account to his operating account based on his estimation of work that had been performed. The transfers made from the trust account to the operating account were typically not associated with a specific client. In determining how much to transfer, Mr. Bates would consult (a) QuickBooks "Payments Received" reports for the time period in question, (b) QuickBooks "Deposit Detail" reports, which included reports by clients, (c) weekly practice management spreadsheets, and (d) bank account records for his operating account and trust account. (R. 842)

Silver Stream Enterprises' Transaction

Wasatch Advocates employed the services of a third party vendor called Silver Stream Enterprises ("Silver Stream") to perform loan modification services on behalf of some of its foreclosure defense clients. (R. 844) On June 28, 2011, Wasatch Advocates issued a check from the trust account in the amount of \$3,000 payable to Silver Stream for loan modification services rendered on behalf of ten separate Wasatch Advocates' clients. (R. 844) At the time the check was written, none of the ten clients on whose behalf the check was written had money that was being held in the trust account. Each of the ten clients had made small payments in the previous thirty days ranging between \$250-\$500

under fixed/flat fee agreements providing for loan modification services. The fees were deposited into Wasatch Advocates' operating account instead of the trust account. (R. 844) Mr. Bates admits that this check should not have been written from the trust account and claims this was a mistake. (R. 844)

Pennington Transaction

On October 10, 2011, Wasatch Advocates issued a check in the amount of \$2,325.90 from the trust account to "Client Pennington" for "refunded legal fees" as indicated by the memo line on the check. (R. 845) None of the legal fees paid to Wasatch Advocates by "Client Pennington" had been deposited into the trust account. Therefore "Client Pennington" had no funds in the trust account at the time the check was written. (R. 845) Mr. Bates does not dispute OPC's claim that the Penningtons did not have any fees in the trust account on October 10, 2011, and that the refund check was mistakenly issued from the trust account rather than the operating account. (R. 846)

F.A. Apartments Transaction

On December 10, 2010 Wasatch Advocates received a \$28,000 check from client F.A. Apartments. The \$28,000 was deposited into the client trust account. (R. 847) The F.A. Apartment funds were to be held in trust and only used for certain expenses authorized by F.A. Apartments. No portion of the \$28,000 held in trust was intended to be used for Mr. Bates' legal fees. (R. 847)

Between December 10, 2010, and September 25, 2011, F.A. Apartments authorized various expenditures from the \$28,000 in the trust account. It is undisputed that F.A. Apartments only authorized these funds to be used for designated purposes. (R. 847) The authorized expenditures are detailed on Defendant's Trial Ex. 82, BATES 1401. (Included in Addendum) (R. 847)

On January 3, 2011, Mr. Bates transferred \$15,000 from the client trust account to his operating account. (Trial Ex. 130 BATES 0485) As a result, on January 3, 2011, the balance in Mr. Bates' trust account was \$22,792.36 (R. 848) (Def. Trial Ex. #130, BATES 0485) As of that date, F.A. Apartments had authorized the firm to pay \$3,206.38 in F.A. Apartment expenses.¹ (R. 848) Deducting these expenses from the original \$28,000 means there should have been \$24,793.62 in trust for F.A. Apartments. So on January 3, 2011, Mr. Bates was out of trust with F.A. Apartments in the amount of \$2,001.26. (R. 848).

On March 15, 2011, Mr. Bates transferred \$10,000 from his client trust account to his operating account. (Trial Ex. 130 BATES 0493) On March 17, 2011, the balance in Mr. Bates' trust account was \$8,926.83. (R. 848) As of that

¹ Although F.A. Apartments had authorized certain expenses totaling \$3,206.38 between December 10, 2010 and January 3, 2011, Mr. Bates did not actually write a check from the trust account on behalf of F.A. Apartments until January 31, 2015.

date, F.A. Apartments had authorized the firm to pay \$16,729.19 in F.A. Apartment expenses. (R. 848) Deducting these expenses from the original \$28,000 means there should have been \$11,270.81 in trust for F.A. Apartments. (R. 848) Mr. Bates was therefore out of trust with F.A. Apartments on March 17, 2011, in the amount of \$2,343.98. (R. 848)

On June 28, 2011, Mr. Bates transferred \$18,000 from his client trust account to his operating account. (Trial Ex. 130 BATES 0507) On June 30, 2011, the balance in Mr. Bates' trust account was \$5,351.10. (R. 848) As of that date, F.A. Apartments had authorized the firm to pay \$18,427.10 in F.A. Apartment expenses. (R. 848) Deducting these expenses from the original \$28,000 means there should have been \$9,572.90 in trust for F.A. Apartments. (R. 848) Mr. Bates was therefore out of trust with F.A. Apartments on June 30, 2011, in the amount of \$4,221.80. (R. 848).

Between July 29, 2011, and August 2, 2011, the principals of F.A. Apartments paid Mr. Bates a \$16,500 retainer that was to be used for his work on the matter. (R. 849) \$16,000 of \$16,500 was mistakenly deposited into the operating account rather than the trust account. The \$16,000 represented unearned fees at the time it was deposited into the operating account. (R. 849) On or about August 23, 2011, Mr. Bates learned the \$16,000 had been mistakenly deposited in the operating account rather than the trust account. (R.

849) On or about August 24, 2011, Mr. Bates and F.A. Apartments agreed that instead of using the \$16,000 retainer for Mr. Bates' legal fees, that amount would be applied toward certain expenses that had originally been debited against the \$28,000 in trust. However, the \$16,000 was not transferred to the trust account at that time and remained in the operating account. (R. 849) After this agreement was made, Mr. Bates understood that the \$16,000 being held in his operating account was client property and not firm property. (R. 1454) On September 16, 2011, Mr. Bates transferred \$20,000 from his operating account to his payroll account, leaving the operating account with a negative balance of \$454.94. (R. 850) At the time of the September 16 transfer, F.A. Apartments had \$16,000 in Mr. Bates operating account. (R. 850) As a result of the September 16 transfer, all of F.A. Apartment's funds were transferred to Mr. Bates' payroll account and appear to have been used for the firm's payroll. (R. 850)

As of September 16, 2011, Mr. Bates should have been holding in the trust account at least \$20,000 belonging to F.A. Apartments, from the residue of the \$28,000 originally placed in the trust account in combination with the \$16,000 retainer that was mistakenly deposited into the operating account. (R. 850) However, on September 16, 2011, Mr. Bates' operating account balance was in the negative and his total trust account balance was \$3,335.73. (R. 850)

A settlement of the F.A. Apartments matter was reached, which required, among other things, payment of \$20,000 to F.A. Apartments' creditor. (R. 849) On September 26, 2011, a series of deposits were made into Mr. Bates' trust account representing payments from various clients. (R. 850) Also on September 26, 2011, Mr. Bates transferred \$10,000, which he had drawn from a line of credit, from the operating account to the trust account. (R. 850) On September 27, 2011, Mr. Bates wired \$20,000 from the trust account for the F.A. Apartments' settlement. (R. 850)

John Liti Transaction

In October 2010, John Liti hired Wasatch Advocates to represent him in a bankruptcy matter. (R. 851) As part of the bankruptcy, Mr. Liti was required to turn over at least a portion of his 2010 tax refund to the bankruptcy trustee. (R. 851) On March 12, 2011 Mr. Liti delivered to Wasatch Advocates a \$2,980.80 check representing his tax refund. On March 23, 2011, the check was deposited into Wasatch Advocates' trust account. (R. 852) On July 31, 2011, Jennifer Smock, the attorney handling Mr. Liti's bankruptcy, left the firm (R. 851) but did not advise Wasatch Advocates of the funds being held in trust for Mr. Liti. (R. 852) Ms. Smock took with her Mr. Liti's file and continued to represent him. (R. 852)

On September 27, 2011, Mr. Bates wired \$20,000 from the client trust account on behalf F.A. Apartments. (R. 852) After the wire transfer, the balance in Mr. Bates' client trust account was \$497.73. (R. 852) As of that date, Mr. Bates should have been holding in the trust account the \$2,980.80 deposited by Mr. Liti. (R. 852)

On December 2, 2011, Ms. Smock wrote a letter to Wasatch Advocates advising that the bankruptcy trustee in Mr. Liti's case sought the 2010 tax refund, and directing that \$1,589.19 be paid to the trustee. (R. 852) On December 9, 2011, Wasatch Advocates COO Blynn Simmons delivered to the trustee a check drawn on the trust account in the requested amount of \$1,589.19. (R. 852) In a letter dated December 23, 2011, to Ms. Smock, Ms. Simmons offered to refund the balance of Mr. Liti's tax refund and requested that Ms. Smock respond with a written acknowledgement authorizing the firm to release the funds to Mr. Liti. (R. 852) Ms. Smock responded by letter dated December 27, 2011, advising Wasatch Advocates to return to Mr. Liti the balance of his tax refund. (R. 853) Mr. Liti's funds were not returned at that time. (R. 853) Mr. Bates was out of town on vacation during the time these exchanges were taking place. When Mr. Bates returned in early January 2012, Ms. Simmons had quit Wasatch Advocates. (R. 853) Mr. Bates claims he was unaware of the communications

between Ms. Smock and Ms. Simmons regarding Mr. Liti's funds that were still in the firm's possession. (R. 853)

After he returned in early January 2012, Mr. Bates began the process of winding down Wasatch Advocates. This wind down included closing his operating and trust accounts. Mr. Bates dissolved the firm effective January 31, 2012. (R. 853) At the time he dissolved the firm, Mr. Bates was holding funds in trust for a few clients. Prior to transferring funds from his Wasatch Advocates accounts to his new accounts, Mr. Bates attempted to identify all of the funds he was holding in trust and to whom those funds belonged. Mr. Bates did not identify any funds being held in trust as belonging to Mr. Liti. (R. 853) As of the time Mr. Bates transferred the funds he was holding in trust from his old accounts to his new accounts, the \$1,391.61 belonging to Mr. Liti was gone. (R. 853) Mr. Bates acknowledges that the \$1,391.61 should have been in Wasatch Advocates' trust account when the trust account was closed, but it was not. (R. 853)

Mr. Bates first became aware that Mr. Liti was claiming he was owed money from Wasatch Advocates' trust account in approximately March 2012 when the OPC served Mr. Bates with a copy of Mr. Liti's January 11, 2012 Bar complaint, and OPC's request for information relating thereto. (R. 853) The amount claimed in Mr. Liti's Bar complaint differs from the amount actually

deposited in the trust account. (R. 853) Mr. Bates testified that it was not until Ms. Smock and Mr. Liti testified at the screening panel hearing that he understood the particulars of the amounts owing to Mr. Liti. Mr. Bates paid the amounts owed to Mr. Liti after the screening panel hearing. (R. 854)

Based on the above facts found by the trial court, the court concluded that Mr. Bates violated rule 1.4 in the Bangerter matter for failing to communicate with his client prior to dismissing the case; rule 1.15(a) in the Silver Stream and Pennington matters for failing to maintain adequate records; rule 1.15(a) in the F.A. Apartments matter for failing to hold client funds separate from his own, failing to adequately safeguard client funds, and failing to keep earned fees separate from unearned fees; and rules 1.15(a) and 1.15(d) in the Liti matter for failing to safeguard client property, failing to hold the funds in the trust account, using client funds for some other purpose, and failing to promptly refund the client's money. (R. 854)

ADDENDUM

The following documents are attached as Addenda to this Brief:

- Second Amended Findings of Fact and Conclusions of Law (Adjudication Trial)
- Findings of Fact and Conclusions of Law Pertaining to Sanctions Phase.
- Trial Exhibit Defense #82

SUMMARY OF THE ARGUMENT

The facts establish that Mr. Bates knowingly transferred client funds out of his trust account and used those funds for his firm's payroll. It was error for the trial court to conclude Mr. Bates' did not intentionally misappropriate client funds simply because the client was unaware, and therefore, not harmed by the misuse of the funds.

Because the trial court erred in not finding that Mr. Bates misappropriated client funds, it incorrectly imposed a five-month suspension, where disbarment is the presumptive sanction for intentional misappropriation.

This Court should exercise its own independent judgment, find that Mr. Bates engaged in intentional misappropriation, and disbar him from the practice of law.

ARGUMENT

i. Mr. Bates Intentionally Misappropriated Client Funds.

Misappropriation is "any unauthorized use of client funds entrusted to him [the attorney], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he [the attorney] derives any personal gain or benefit therefrom." In re Nicholas Addams, 579 A.2d 190, 195 (D.C. App. 1990); quoting from In re Harrison, 461 A.2d 1034, 1036 (D.C. 1983).

This Court has stated that:

A lawyer's use of client funds is intentional whether the money is spent on a new Harley, food for orphans, or the quills and ink for his firm. In any case, the effect is the same – counsel has knowingly stolen his client's funds with the intent to spend the money in a manner chosen by him and not the client.

In the Matter of the Discipline of Corey, 2012 UT 21 ¶ 27.

When an attorney withdraws funds from his trust account, knowing those funds belong to a client, and knowing he is not using the funds on behalf of the client, he is engaging in misappropriation. That is what Mr. Bates did with F.A. Apartment's money.

A. The January, March and June F.A. Apartment Shortfalls.

Although the trial court found that Mr. Bates was out of trust with regard to F.A. Apartment funds in January, March and June, 2011, the court concluded this was not intentional misappropriation because Mr. Bates did not "knowingly or intentionally" cause the shortfalls. The trial court reached its conclusion that Mr. Bates was negligent because it erroneously connected the missing trust funds to Mr. Bates' lack of knowledge regarding the location of the clients' \$16,000 retainer payment. The trial court concluded:

It is undisputed that the amount of \$16,000 was mistakenly deposited into Wasatch Advocates' operating account, and should have been deposited into Wasatch Advocates' trust account on behalf of F.A.....The OPC has failed to carry its burden of proving that Bates was aware of the incorrect deposit prior to August 23, 2011. The undisputed evidence at trial showed that Bates expressly instructed his staff to deposit the

funds into the trust account. Additionally, the OPC failed to meets [sic] its burden of showing Bates knowingly or intentionally caused the apparent shortfalls in the approximate amount of \$2,000 in March or June of 2011 and therefore this conduct also does not constitute intentional misappropriation. The shortfalls in the trust account were based on Bates' negligent mental state. It was not until August 23, 2011, when Bates informed F.A. he was about to bill his time for the previous six weeks against the \$16,000 deposit that Bates learned F.A. funds were not in trust.

(R. 1142 Findings of Fact and Conclusions of Law Pertaining to Sanctions Phase, ¶ 4(d))

Mr. Bates caused the shortfalls in the F.A. Apartment trust funds in January, March and June of 2011 when he knowingly made large transfers out of the trust account to meet payroll. These transfers occurred months before the F.A. clients ever paid the \$16,000 retainer that was mistakenly placed in the operating account. These transactions are not related in any way. The fact that he was unaware the retainer was deposited into his operating account in August of 2011, has nothing to do with Mr. Bates' use of F.A. Apartment trust funds in January, March and June.

Further evidence that would support a finding that Mr. Bates knowingly transferred F.A. Apartment funds out of his trust account without the clients' authorization in January, March and June is Mr. Bates' own testimony at trial that he frequently monitored his bank accounts and had numerous ways of tracking funds associated with clients:

Q. So you could go into Quick Books and look at all the transactions, payment or bills associated with a particular client, correct?

A. Correct, and let me just make sure I'm clear here. I believe we've talked about this with F.A. Apartments, but you certainly should have been able to go in, and this would be a complete and accurate representation, you know, as of the day that it's printed; and certainly if it's printed later in time like this one, it should be complete and accurate.

(R.1355 line 13-21)

Q. So anytime you could go into Quick Books and look, see what payments you received from clients during a particular period of time. In this case, October 29 through November 12?

A. Correct, and this was one of the documents that I previously testified that I would rely upon in making either transcripts [sic] from trust or payroll transfers, payment received and then deposit detail, so I knew whether it was trust or operating.

(R. 1356 line 22 – 1357 line 5)

Q. Where again you could go in and look for a particular time period what payments - - where they were deposited, exactly which account, which clients they were associated with?

A. With the exception of where you see clearing. Sometimes it's clear.

(R. 1357 line 11-15)

Q. So you could log on and see all the transfers associated with the various accounts at Zion's Bank, correct?

A. Correct.

(R. 1358 line 12-14)

Q. So you could look up all the transactions associated with - - that had been recorded in Quick Books for a particular account?

A. Uh-huh.

(R. 1360 line 4-7)

When asked about going online to see transactions associated with a particular bank account, Mr. Bates testified that, "I acknowledge I did so frequently, more frequently than, for example, receiving a monthly bank statement in the mail or through email." (R. 1356 line 15-17)

With regard to the large transfers from the trust account, three of which resulted in the January, March and June use of F.A. Apartment funds, the evidence led the trial court to find that:

Mr. Bates periodically would transfer funds from his trust account to his operating account based on his estimation of work that had been performed. The transfers made from the trust account to the operating account were typically not associated with a specific client. In determining how much to transfer, Mr. Bates would consult (a) Quickbooks "Payments Received" reports for the time period in question, (b) Quickbooks "Deposit Detail" reports, which included reports by client, (c) weekly practice management spreadsheets, and (d) bank account records for his operating account and trust account.

(R. 843, Second Amended Findings of Fact and Conclusions of Law ¶ 77)

Given the amount of information reviewed by Mr. Bates prior to each transfer, and the court's specific finding that he would consult bank records for both

his operating and trust accounts before making any transfers, it was error for the trial court to conclude that Mr. Bates did not knowingly cause the short falls in the trust account when he transferred money out. If the purpose of reviewing the information was to determine how much money to transfer, as claimed by Mr. Bates, and if the information revealed how much money had been deposited or withdrawn in each account and which transactions were associated with which clients, as claimed by Mr. Bates, then how could he not know he was using F.A. Apartment funds when he made the large transfers that left a deficit in the client's funds? In short, if Mr. Bates actually reviewed all the documents he said he reviewed then he knew he was dipping into F.A. Apartment funds with the January, March and June transfers.

B. The September 16, 2011 Transfer to Payroll.

The \$28,000 deposited into Mr. Bates' client trust account in December 2010, represented rents collected by his client, F.A. Apartments. The funds were to be held in trust until a dispute with F.A. Apartments and a creditor were resolved. Although the client authorized Mr. Bates to make certain payments out of the account to keep the apartments functioning, (i.e. utility bills), it was understood that none of those funds were to be used for Mr. Bates' attorneys fees or anything not authorized by the client. On or around August 1, 2011, the principles of F.A. Apartments gave a \$16,500 retainer to Mr. Bates to be used for his legal fees.

\$16,000 of that amount was mistakenly placed in Mr. Bates' operating account, rather than his client trust account. It was not until approximately August 23, 2011, that Mr. Bates learned the unearned funds were in his operating account rather than his trust account. However, the funds remained in the operating account and were not transferred to the trust account.

As discussed above, and as shown on Trial Ex. #82, between December 10, 2010, and August 23, 2011, the amount that was to be held in trust had been reduced from \$28,000 to \$7,321.41 for expenses authorized by F.A. Apartments. In September 2011, F.A. Apartments reached a settlement with its creditor in which it agreed, in part, to pay \$20,000 from the funds being held in trust. However, because of the expenses that had been taken out of the account, there was far less than the necessary \$20,000 in the account. At that point, on or about August 24, 2011, Mr. Bates and his clients reached an agreement whereby the \$16,000 retainer would be used to off-set the shortfall in the trust account, thereby allowing F.A. Apartments to settle its case. Mr. Bates acknowledges the funds then changed from being an unearned retainer to the property of F.A. Apartments.

A. ...I acknowledged that when I made that offer to them to defer billing against it and they accepted, that that was not firm property, and it was client [sic]."

Q. You weren't just assuming it was your money at that point?

A. That's right.

(R. 1454, line 6-11)

Despite his recognition the funds belonged to his clients, Mr. Bates left the \$16,000 in his operating account. Then, on September 16, 2011, when it was time for his semi-monthly payroll, Mr. Bates knowingly transferred \$20,000 from his operating account to his payroll account. That reduced the balance in Mr. Bates' operating account to negative \$454.94. The \$16,000 belonging to F.A. Apartments was gone; it was used to pay Mr. Bates' employees. On that date, the date the trial court found he was supposed to be holding \$20,000 in trust for F.A. Apartments (R. 850), Mr. Bates' trust account balance was only \$3,335.73 and his operating account was in the negative. F.A. Apartment funds were now in the payroll account, where they were subsequently spent. That is intentional misappropriation.

Notwithstanding its finding that Mr. Bates' conduct with regard to F.A. Apartment funds was, "done knowingly" after August 23, 2011, the trial court concluded this conduct did not amount to misappropriation because:

The OPC has not met its burden of showing that Bates made the transfer to payroll with the specific intent to use F.A. Funds to benefit himself, another, or to harm F.A.. Moreover, F.A. was not actually harmed in any way and shortly after the transfer to payroll all of F.A.'s funds were properly accounted for.

(R. 1142)

It was error for the trial court to conclude Mr. Bates did not use F.A. Apartment funds to benefit himself where he used the funds to pay his employees. But for his clients' funds, Mr. Bates would have been unable to satisfy his payroll obligations from the money in his accounts. The fact that Mr. Bates borrowed money from his lines of credit a few days later to re-inflate the balance of his operating account does not mean Mr. Bates did not benefit from his misuse of his clients' money.

Furthermore, it was error for the trial court to rely on a lack of harm to the client as justification for not finding misappropriation. This Court has made it clear that, with regard to intentional misappropriation:

A lawyer's lack of motive to injure his client is irrelevant to the intent inquiry.

...the intent inquiry focuses not on whether the attorney intended to injure his client through his misconduct, but rather whether he intended to benefit himself or another through it.

In re Corey, 2012 UT 21 ¶26, note 16.

The facts support a finding that Mr. Bates intended to benefit himself by using his clients' funds for payroll. If he didn't use F.A. Apartment funds, he would have had to borrow the money because he did not have sufficient funds in any of his accounts to meet his obligations. The fact that he did not intend to injure his clients by using their money is irrelevant.

II. Disbarment Is The Appropriate Sanction For Mr. Bates' Misconduct.

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), taking client 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).

In the present case, however, relying on its incorrect view of intent, the trial court erroneously concluded, "the presumptive sanction for [Mr. Bates'] conduct is suspension under 14-605(b)(1), which involves knowing but unintentional misconduct that caused potential harm." (R. 1143, Findings of Fact and Conclusions of Law Pertaining to Sanctions Phase, ¶ 4)

It appears the trial court gave more weight to the clients' understanding of what occurred than it did to Mr. Bates' actual conduct:

The court understands that imposition of a sanction, including disbarment, does not necessarily turn on a client's satisfaction or whether or not the client filed a bar complaint. Nevertheless, the fact that the client testified it was completely satisfied with the representation, that it found no reason to file a complaint with the Bar, and that after all of the events came to light it still maintains that the lawyer provided the services in the manner requested, without any harm to the client, seriously undermines the OPC's contention that a sanction amounting to professional death penalty is warranted.²

² The disciplinary case against Mr. Bates was initiated based on the complaint filed by Mr. Liti. During the course of its investigation into Mr. Bates' conduct as it related to the funds being held in trust for Mr. Liti, the OPC discovered the misuse of F.A. Apartment's trust funds.

(R. 1139, Findings of Fact and Conclusions of Law Pertaining to Sanctions Phase, ¶ 3)

However, the fact that a client is satisfied with the representation and unaware of the attorney's misdeeds is not a defense to misappropriation. This Court addressed the issue of a client's knowledge while upholding the sanction of disbarment in In the Matter of the Discipline of Lundgren, 2015 UT 58 ¶ 23:

And Mr. Lundgren misses the ethical point entirely when he attempts to minimize his misappropriation by asserting that it is "philosophically debatable if the client does not know of the removal of funds over which the client does not have control, whether there is actual injury." It is not philosophically debatable whether stealing money is okay so long as the victim never finds out.

In Lundgren the attorney settled a worker's compensation case and retained \$2,500 of the client's share in order to pay her outstanding medical bills. Rather than use the money to pay the medical bills, the attorney took the money from the trust account for his personal and business use. The client was unaware her funds were being misused for several months and the attorney eventually accounted for the funds by paying the medical bills. Nonetheless, this Court found his conduct amounted to intentional misappropriation:

Mr. Lundgren,...knowingly took funds that were not only unearned, but would never be earned, and were in fact earmarked for another purpose, namely, to pay [his client's] medical bills.

Id. at ¶ 21.

Like the attorney in Lundgren, Mr. Bates knowingly took funds that would never be earned, and were in fact earmarked to pay his clients' creditors, and used them for his own purpose. The clients' lack of knowledge is not a factor in making a determination as to misappropriation. To hold otherwise would simply reward attorneys who are more stealthy than others in their misuse of client property.

It was error for the trial court to conclude Mr. Bates did not engage in intentional misappropriation and that disbarment was not the appropriate sanction based on the clients' lack of knowledge that the funds had been taken; and based on the clients' unwillingness to complain against the attorney.

iii. There Are No Mitigating Factors That Justify A Departure From The Presumptive Discipline.

In cases of intentional misappropriation, departure from the presumptive sanction of disbarment, "is only appropriate in cases presenting truly compelling mitigating circumstances." In the Matter of Grimes, 212 UT 87 ¶ 21.

In the present case, Mr. Bates failed to establish that the mitigating circumstances were "truly compelling." In fact, some of the factors found by the

trial court are not mitigating at all.

A. Good Faith Effort to Rectify Consequences.

The trial court concluded that, “Bates made a good faith effort to rectify the consequences of his conduct by making restitution to Liti.” (R. 1144, Findings of Fact and Conclusions of Law Pertaining to Sanctions Phase, ¶ 7)

A conclusion that the restitution was made in “good faith” seems inconsistent with the trial court’s finding that, “Mr. Bates probably could have, and probably should have, refunded the money more promptly than he did...” Id. at ¶ 4(c)) Although he claims to have been unclear about the exact amount owed to his client, Mr. Bates made no effort to ascertain the correct amount and did not refund Mr. Liti’s money until the day of the Screening Panel hearing. As stated by this Court, “the repaying of [the client’s] money, though the right thing to do, was not accomplished in a way that mitigates the misappropriation.” In the Matter of Ennegna, 2001 UT 111 ¶ 13.

Even if an attorney repays money that was stolen, as was the case with F.A. Apartment funds, it would seem a rare circumstance that restitution would be a “truly compelling” mitigating factor sufficient to justify a departure from disbarment.

B. Remorse.

The trial court found, “that Bates has expressed remorse for his actions.”

(R. 1144, Findings of Fact and Conclusions of Law Pertaining to Sanctions Phase, ¶ 7) However, the basis for this finding is unclear. Mr. Bates' testimony at trial came nowhere near to expressing remorse for his misuse of F.A. Apartment funds:

Q. All right, I want to finish up in mitigating factors with remorse, No. 13. First of all, I think you've acknowledged but I want to make clear on the record, you acknowledge you've made mistakes, professional mistakes when you were at Wasatch Advocates?

A. Yes, I've made a number of mistakes and had too much confidence in my own abilities and have been humbled through this process that leads me here today.

(R. 1473, line 11-18)

Although Mr. Bates' testimony went on to describe how difficult it was to manage his growing law firm, he at no time expressed remorse for using F.A. Apartment funds to pay his employees. In fact, Mr. Bates' refusal to even acknowledge that it was wrong for him to use his clients' funds without their authorization would seem to preclude a finding that remorse is a truly compelling mitigating factor in this case.

C. Inexperience in the Practice of Law.

With regard to this factor, the trial court stated:

Third, and most significantly, the court finds that the mitigating factor which carries predominant weight is Bates' inexperience in the practice of law. Bates bit off far more than he was able

to chew in building such a large law firm less than two years out of law school. The rule violations that occurred in the latter half of 2011 occurred because Bates was in way over his head in his efforts to expand his firm so quickly and on a scale which a more experienced lawyer would have avoided.

(R. 1144, Findings of Fact and Conclusions of Law Pertaining to Sanctions Phase, ¶ 7) Mr. Bates' inexperience may mitigate his failure to communicate in the Bangerter matter, or explain his negligence in the Liti matter, but this Court has made it clear that, "it does not take substantial experience in the practice of law to know that misappropriation is improper," because, "...the prohibition on misappropriation of client funds is fundamental to the practice of law." In the Matter of Grimes, 2012 UT 87¶ 26. In short, Mr. Bates did not use F.A. Apartment funds for his payroll because he was inexperienced in the practice of law. He used them because he needed them and the alternative was to incur more debt.

D. Full Disclosure and Cooperative Attitude.

On this issue, the trial court stated, "the court finds, and the OPC does not dispute, that Bates made full disclosure and was cooperative at all times during these disciplinary proceedings." (R. 1144, Findings of Fact and Conclusions of Law Pertaining to Sanctions Phase, ¶ 7)

While the OPC agreed that Mr. Bates was cooperative during the disciplinary proceedings, there is no evidence, and the OPC never conceded,

that he made full disclosure of his misconduct. Not only did he fail to self-report his use of client funds, Mr. Bates has maintained that he did nothing wrong in using them. The basis for this statement by the trial court is unclear. Mr. Bates did not disclose his misappropriation of client funds.

E. Modest Salary

The trial court stated, "Mr. Bates paid himself a modest salary and at the end of the day ended up losing a substantial amount of money as a result of the operation and winding down of Wasatch Advocates." (R. 1144, Findings of Fact and Conclusions of Law Pertaining to Sanctions Phase, ¶ 7)

Whether Mr. Bates in fact only paid himself a modest salary during the period of time he operated his firm is irrelevant to the issue of misappropriation. The reasoning of the trial court seems to be that Mr. Bates' decision to not take a lot of money out of the firm to pay himself somehow mitigates his decision to use client funds for payroll because it is evidence that Mr. Bates lacked a dishonest or selfish motive. This is not a mitigating factor.

F. Good Reputation.

Although the trial court found that Mr. Bates had a good reputation, the court did not view this as a significant mitigating factor, given that Mr. Bates had only been practicing for two years.

Aggravating Factors

As an aggravating factor, the trial court only found multiple offenses.

In sum, the mitigating circumstances found by the trial court are not "truly compelling" as required to justify a departure from the presumptive sanction of disbarment for misappropriation.

CONCLUSION

Mr. Bates knew he deposited \$28,000 into his client trust account. Mr. Bates knew the money belonged to F.A. Apartments. Mr. Bates knew he took money out of the trust account in January, March and June for payroll. If Mr. Bates reviewed the documents he claims to have reviewed prior to the January, March and June transfers, then he knew he did not have sufficient funds in the trust account to cover the transfers without using funds belonging to F.A. Apartments. Mr. Bates knew he received a \$16,000 retainer from the F.A. Apartments principles. Mr. Bates knew he was holding the \$16,000 in his operating account. Mr. Bates knew the \$16,000 was client property. Mr. Bates knew he transferred the \$16,000 to his payroll account. Mr. Bates knew he paid his employees from the payroll account.

A consideration of everything Mr. Bates knew supports the conclusion that he knowingly used F.A. Apartments funds to benefit himself and engaged in intentional misappropriation.

The trial court erred in finding that Mr. Bates did not engage in intentional misappropriation and erred in imposing a five month suspension rather than disbarment as a sanction for Mr. Bates' misconduct. This Court should reverse the trial court and disbar Mr. Bates from the practice of law.

Dated: December 17, 2015.

OFFICE OF PROFESSIONAL CONDUCT



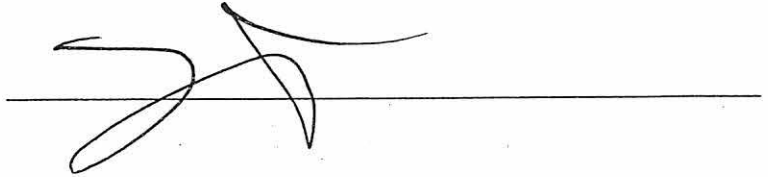
Todd Wahlquist
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CERTIFICATE OF MAILING

I hereby certify that on this 17th day of December, 2015, I caused to be mailed via U.S. first-class mail, postage pre-paid, two true and correct copies of the foregoing Appellee's Supplemental Brief to:

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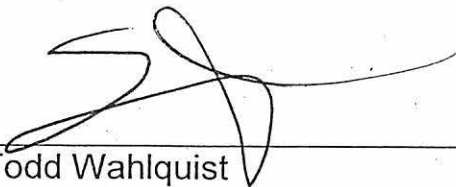
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24(f)(1)(C) because:

- o This brief contains 7,817 words and 751 lines of text, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).



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Dated: December 17, 2015

ADDENDUM

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Rule 14-601	Definitions; Standards for Imposing Lawyer Sanctions
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Rule 1.15	Rules of Professional Conduct (with comments)
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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.

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.

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.

Rule 14-604. Factors to be considered in imposing sanctions.

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

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

Rule 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.

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.

Rule 1.15. Safekeeping Property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. The account may only be maintained in a financial institution that agrees to report to the Office of Professional Conduct in the event any instrument in properly payable form is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. In addition to normal monthly maintenance fees on each account, the lawyers can anticipate that financial institutions may charge additional fees for reporting overdrafts in accordance with this Rule. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

[6a] This Rule is identical to ABA Model Rule 1.15 except it incorporates two sentences that were added to the prior version of this Rule in 1997. These two sentences are the third sentence of paragraph (a) of the Rule and the corresponding fifth sentence of Comment [1].

ADDENDUM EXHIBIT 1

FILED DISTRICT COURT
Third Judicial District

DEC - 2 2015

By MP SALT LAKE COUNTY
Deputy Clerk

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

IN THE MATTER OF THE DISCIPLINE
OF ABRAHAM C. BATES.

SECOND AMENDED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Case No. 120905676

Judge Todd Shaughnessy

This matter came before the court for a bench trial pursuant to Rule 14-511(e) of the Rules of Lawyer Discipline and Disability ("RLDD") on May 6 through 8, 2014. The Utah State Bar's Office of Professional Conduct was represented by Todd Wahlquist. Respondent Abraham Bates was represented by Michael Skolnick and Kirk Gibbs. The court issued its Findings of Fact and Conclusions of Law on July 16, 2014. Thereafter, both parties filed motions to amend the findings, which were fully briefed and heard by the court on December 11, 2014, and a subsequent hearing was held on February 13, 2015, at which additional evidence was taken. All amendments to the court's original, July 16, 2014, findings are indicated below by strikethrough and bold.

Having heard the evidence and arguments of counsel, the court hereby makes these findings of fact and conclusions of law.

1. The complaint in this case 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 Informal Complaints submitted against Mr. Bates by John Liti and the OPC.

2. On June 7, 2012, a Screening Panel of the Ethics and Discipline Committee of the Utah Supreme Court ("the Screening Panel") heard the Liti matter.

3. At the conclusion of the hearing on June 7, 2012, the Screening Panel directed the OPC to file a formal complaint against Mr. Bates.

4. On January 10, 2013, the Screening Panel heard the OPC matter.

5. At the conclusion of the hearing on January 10, 2013, the Screening Panel directed the OPC to file a formal complaint against Mr. Bates.

6. Jurisdiction is proper in this Court pursuant to Rule 14-511(a), Rules of Lawyer Discipline and Disability.

7. Venue is proper in this Court pursuant to Rule 14-511(b) of the RLDD, in that, at all relevant times, Respondent practiced law in Salt Lake County.

GENERAL BACKGROUND

8. Mr. Bates is an attorney in the State of Utah and a member of the Utah State Bar. He was admitted to the Bar on October 20, 2009.

9. Mr. Bates started a private practice around December 1, 2009, focused primarily on misdemeanor criminal defense matters using a fixed/flat fee model commonly employed in that practice area.

10. Mr. Bates' practice expanded rapidly and within six months he had hired three associate contract attorneys, a paralegal and a law clerk to assist him with a steadily growing volume of clients. Mr. Bates also expanded his practice area to include consumer law issues, including bankruptcy and mortgage foreclosure defense. Approximately six months into practice, on July 1, 2010, Mr. Bates formed Wasatch Advocates, a firm which he solely owned and operated at all times relevant to the Amended Complaint and until the firm's dissolution on January 31, 2012.

11. Wasatch Advocates had three primary practice areas: criminal defense, consumer/individual bankruptcies, and mortgage foreclosure defense. Mr. Bates formed Wasatch Advocates to provide representation for lower- and middle-income individuals faced with mortgage foreclosure and who otherwise could not afford the services of private

counsel. Wasatch Advocates' standard fee agreement provided prospective clients with a fixed/flat fee option in addition to a traditional retainer/hourly billing option. The overwhelming majority of Wasatch Advocates clients elected the fixed/flat fee option and made initial down payments, and subsequent monthly payment plan payments in amounts that rarely exceeded \$2,500.00.

BANGERTER MATTER

FINDINGS OF FACT

12. Grant Bangerter first retained Wasatch Advocates to represent Rimroc Properties and Development, LLC ("Rimroc"), a real estate investment company of which he was a member.

13. Wasatch Advocates' engagement was to attempt to set aside a default judgment taken against certain members of Rimroc in a case pending in federal court (the "Rimroc Case").

14. In the Rimroc Case, Mr. Bangerter and two other members of Rimroc failed to disclose their bankruptcy filings.

15. When Wasatch Advocates learned of the bankruptcies from the FDIC's opposition to the Rule 60(b) motion filed on Rimroc's behalf, Wasatch Advocates advised Mr. Bangerter of the inherent conflict of interest which existed between bankrupt and non-bankrupt members.

16. After the conflict was disclosed, Mr. Bangerter and other Rimroc members failed to respond to Wasatch Advocates' further communications and requests to discuss the conflict and possible resolution.

17. Wasatch Advocates moved to withdraw from the Rimroc Case. The court granted Wasatch Advocates' motion and Wasatch Advocates disengaged from representation.

18. In the same timeframe, Mr. Bangerter separately retained Wasatch Advocates to represent him in lawsuit against a lender ING.

19. ING held a secured interest in real property located in Cedar Hills, Utah which was owned by Mr. Bangerter ("Cedar Hills Property").

20. The Cedar Hills Property was also subject to a secured claim arising from Rimroc-related loans.

21. Mr. Bangerter had last made payment on the Cedar Hills Property in February 2010.

22. Mr. Bangerter hired Wasatch Advocates to forestall ING's foreclosure sale, scheduled for March 17, 2011.

23. An initial complaint and motion for TRO were drafted and filed in Fourth District Court by Wasatch Advocates. The Complaint in the Fourth District Case bears Mr. Bates' name on the caption and attached his digital signature. Mr. Bates claims this was done without his knowledge or approval; whether that is true or not is irrelevant since Mr. Bates is responsible for all pleadings and papers filed with the court on his behalf, as explained in more detail below.

24. Attorneys at Wasatch Advocates other than Mr. Bates had primary responsibility for the representation of Mr. Bangerter.

25. Mr. Edwards and Ms. Jones of Wasatch Advocates appeared at the TRO hearing on behalf of Mr. Bangerter. The court granted Mr. Bangerter's motion for TRO, thereby forestalling the foreclosure sale and accomplishing the primary purpose for which Mr. Bangerter retained Wasatch Advocates.

26. A subsequent preliminary injunction order was conditioned on payment of a \$26,000 bond. Mr. Bangerter was advised of the requirement that he post this bond as a condition of the issue of a preliminary injunction. Mr. Bangerter failed to respond to attempts by Wasatch Advocates to communicate with him by written letters, emails and by telephone.

27. Mr. Bangerter testified the bond was only \$9,000 and that he paid that amount. That testimony is not credible. There is no evidence in the Fourth District Court's

docket suggesting that the bond was only \$9,000, nor any evidence that Mr. Bangerter posted that amount or any other amount.

28. Because Mr. Bangerter failed to post the required bond, the preliminary injunction did not issue, leaving ING free to foreclose on the Cedar Hills Property. Neither Mr. Bates nor any other Wasatch Advocates' attorney is responsible for Mr. Bangerter's failure to post the required bond.

29. ING subsequently filed a motion to dismiss the case with prejudice.

30. ING's motion to dismiss with prejudice argued, inter alia, that Mr. Bangerter's claims were judicially estopped based upon his failure to schedule them in his Chapter 7 bankruptcy case.

31. Mr. Bangerter did not schedule claims related to the Cedar Hills property in his Chapter 7 bankruptcy. He received a discharge in February 2011 and his bankruptcy case was closed.

32. On or about May 23, 2011, Wasatch Advocates attempted to contact Mr. Bangerter by email regarding his failure to make required payments to the firm. Mr. Bangerter claims he did not receive this email. That testimony is not credible.

33. In a letter dated May 25, 2011 Wasatch Advocates attempted to communicate with Mr. Bangerter regarding the status of the case and his failure to pay remaining fee obligations owed under Wasatch Advocates' fee agreement.

34. Wasatch Advocates' May 25 letter notified Mr. Bangerter Wasatch Advocates would take whatever further action necessary to terminate his legal representation if he did not pay fees to which he had agreed.

35. Mr. Bangerter received the May 25 letter, despite having testified before the screening panel that he did not. Mr. Bangerter's credibility is undermined by his conflicting testimony.

36. Mr. Bangerter did not respond to the May 25 letter. He not make any additional payment to the firm after receipt of the May 25 letter, despite being in arrears under his fee agreement.

37. On or about June 3, 2011, Wasatch Advocates filed a memorandum in opposition to the motion to dismiss.

38. On or about June 10, 2011, Wasatch Advocates filed a motion to withdraw. ING objected to the withdrawal. On July 11, 2011, the court denied Wasatch Advocates' motion to withdraw, based on the lack of any substantive basis and potential prejudice to judicial process and ING.

39. Oral argument on the motion was scheduled for July 29, 2011.

40. In mid-July, about a week before the scheduled hearing, the Wasatch Advocates attorney who had been handling Mr. Bangerter's matter abruptly left the firm.

41. When Mr. Bangerter's case was filed in March 2011, Mr. Bangerter provided Wasatch Advocates with a loan history ending in October 2010. The loan history he provided stated he filed a bankruptcy petition in October 2010 for the purpose of forestalling a scheduled trustee's sale on the property. Mr. Bangerter admitted he did not inform anyone at Wasatch Advocates that he had further pursued his bankruptcy petition. He did not think he needed to discuss that with Wasatch Advocates.

42. On July 21, 2011, Mr. Bates' paralegal sent him an email informing him that the court had denied the motion to withdraw in Mr. Bangerter's case and that oral argument on the pending motion to dismiss was scheduled for July 29, 2011.

43. On July 21, 2011, Mr. Bates attempted to get a former associate from his firm to handle the hearing on the motion to dismiss. The former associate was unwilling or unable to cover the hearing.

44. On July 28, 2011, the day before the hearing, Mr. Bates instructed his paralegal to contact opposing counsel and make arrangements to dismiss Mr. Bangerter's case. The timing and circumstances suggest that Mr. Bates did so because he was either unable or unwilling to attend the hearing on July 29, 2011.

45. Mr. Bates' paralegal, on his behalf, proposed that the case be dismissed without prejudice. ING's counsel understandably refused to agree to a dismissal without

prejudice, because doing so would mean Mr. Bangerter could simply re-file the case and start over again. ING's counsel appropriately insisted upon a dismissal with prejudice.

46. Mr. Bates' paralegal prepared an email to opposing counsel and appended a stipulation and order for dismissal of the case without prejudice. Opposing counsel made clear ING would not agree to a dismissal without prejudice and revised the stipulation and order to reflect a dismissal with prejudice and returned it to Mr. Bates' paralegal.

47. Mr. Bates' paralegal filed with the court the stipulation and proposed form of order dismissing the case with prejudice. Mr. Bates electronically signed the stipulation.

48. The July 29, 2011, hearing did not go forward and, on August 15, 2011, the court entered the stipulated order dismissing with prejudice Mr. Bangerter's claims.

49. Mr. Bates did not communicate with Mr. Bangerter prior to stipulating to a dismissal of his case. Mr. Bates acknowledged that the case should not have been voluntarily dismissed with prejudice, absent advance consultation with Mr. Bangerter.

50. Mr. Bates' primary defense to this alleged rule violation is his claim that he was unaware of the change that had been made to the stipulation whereby the case was dismissed with prejudice as opposed to without prejudice. Mr. Bates testified to this effect at trial. Mr. Bates' paralegal could not recall discussing this change with Mr. Bates. Thus, there is credible evidence that Mr. Bates did not know of the content of the stipulation. However, even if Mr. Bates was entirely unaware of the content of the stipulation, that fact is irrelevant.

51. Mr. Bates' argument implicitly suggests that there is a difference between an electronic signature that is appended to a document upon filing it with the court and a manual or wet signature appended by the attorney prior to filing. Mr. Bates seems to suggest that because opposing counsel revised his paralegal's stipulation, and his paralegal then appended his electronic signature to the document without consulting him, he is somehow absolved of the consequences of having signed the document. But an electronic signature is for all intents and for all purposes the exact same as a wet signature

and an electronic signature carries with it all of the same legal consequences of a manual signature.

52. In other words, if Mr. Bates had asked his paralegal to prepare a stipulation for dismissal without prejudice and she instead prepared a stipulation for dismissal with prejudice (or if Mr. Bates thought opposing counsel had prepared a stipulation and order for dismissal without prejudice but instead prepared documents dismissing the case with prejudice), and Mr. Bates manually signed those documents without reading them, he would nevertheless be fully responsible for the content of those documents and could not properly blame his paralegal (or opposing counsel). This is exactly what occurred. Mr. Bates "signed" the documents when they were electronically filed using his efilg account and there is no evidence that Mr. Bates ever read them prior to doing so. And whether or not Mr. Bates had an office policy requiring that nothing be filed without him first reviewing it is likewise irrelevant – an attorney is responsible for the content of court-filed documents on which the attorney's signature appears, whether that signature is wet or electronic.¹

53. Mr. Bates does not claim that his efilg account was hacked nor does he claim that his paralegal forged his signature or otherwise acted without any authority from him. Mr. Bates authorized the filing of the documents, and appending his electronic signature to them. He just failed to read them before doing so.

54. Mr. Bangerter was not harmed or prejudiced in any way by the dismissal of his case because the claims asserted therein were meritless. Mr. Bangerter's prior bankruptcy filing was fatal to his assertion of the claims in that case. *Cf. Bishop v. Inwest Title Services, Inc.*, 2014 UT App 134, ¶ 7 (in an effort to avoid bankruptcy bar, borrower unsuccessfully argued the claim did not accrue until after bankruptcy filing and therefore

¹ The court understands that lawyers can and frequently do rely on non-lawyer assistants to handle the mechanics of electronic filing, and nothing herein is intended to suggest that doing so is in any way improper. However, lawyers can and must ensure that their electronic signature is not used without their authority and must understand that they are responsible for the content of everything filed with the court that bears their signature, be it electronic or wet. Indeed, the court's electronic filing system depends on an electronic and wet signatures being treated exactly the same. Considerable mischief would be created if lawyers – or declarants, who can append electronic signatures to declarations made under penalty of perjury – could avoid responsibility for the content of electronically-filed documents bearing their signature.

was not required to be scheduled; borrower did not even attempt to argue bankruptcy bar did not apply). Additionally, the primary purpose of his hiring of Wasatch Advocates had been accomplished earlier, when he was granted a TRO that resulted in the cancellation of the trustee's sale. Mr. Bangerter's unwillingness or inability to post the required bond was the reason a preliminary injunction was not entered.

55. After learning that his case had been dismissed, Mr. Bangerter retained Tara Jones to represent him in the matter. Ms. Jones filed a motion, on behalf of Mr. Bangerter, based on Rule 60(b) of the Utah Rules of Civil Procedure in which she argued, among other things, that Mr. Bates had filed a dismissal with prejudice based upon a "fraud upon the court." The motion alternatively argued that equity required the Court to set aside the dismissal. The motion did not argue mistake or inadvertence.

56. Ms. Jones did not consult with Mr. Bates prior to filing her Rule 60(b) motion to gain an understanding of the events leading up to the dismissal of Mr. Bangerter's case.

57. In a declaration filed by Mr. Bangerter in connection with the Rule 60(b) motion he stated: "Wasatch Advocates sent me one letter, but to my recollection there were no further phone calls or emails. The letter, to my understanding, asked me if I wanted to pay more money to continue with the case. However, I did not understand specifically what Wasatch Advocates was asking to continue with on the case and therefore, I did not do anything further with the letter."

58. The net effect of Mr. Bangerter's motion was charging Mr. Bates with having committed a fraud upon the court.

59. The May 25 letter states, in part, "if the fees of \$1,000 a month are not brought current within ten days (2 payments have been missed and you presently owe \$2,000, with another month soon to be due) we will take that to mean you have no interest in going forward and we will take withdraw [sic] and take whatever further action necessary to terminate your legal representation. Opposing Counsel filed a motion to dismiss with a response due by May 31, 2011 so please govern yourself accordingly." Mr. Bangerter's statement in his declaration that he did not know "what Wasatch Advocates was asking" is

not accurate; Mr. Bangerter knew or should have known what Wasatch Advocates was requesting – that he bring his account current. He likewise knew, or should have known, that his case would potentially be dismissed if he did not at least contact Wasatch Advocates to discuss it.

60. Mr. Bangerter testified that at this point, he had paid Wasatch Advocates \$1,600 for a loan audit, a set of TRO/preliminary papers, a complaint, and at least one court appearance to obtain injunctive relief. Evidence in Wasatch Advocates' file suggested Mr. Bangerter may have paid Wasatch Advocates \$5,000 for representation in his individual matter. In either event, he had not paid the amount agreed upon in the fee agreement.

61. Mr. Bangerter testified he did nothing to respond to the May 25 letter, but rather chose to ignore it because he felt he should not have to pay Wasatch Advocates anything further.

62. ING opposed Mr. Bangerter's Rule 60(b) motion and Mr. Bates supplied an affidavit whereby he denied Mr. Bangerter's fraud allegation. The affidavit directly addressed the fraud allegation, based on research Mr. Bates performed after learning he was accused of fraud on the court.

63. The Fourth District Court ultimately denied Mr. Bangerter's Rule 60(b) motion on both fraud and equity bases, finding "Plaintiff's allegations are more appropriate [sic] litigated in a malpractice action, rather than this case against Defendants ING Bank and James Woodall."

64. Had the 60(b) motion been granted, the causes of action alleged by Bangerter would have belonged not to Mr. Bangerter, but to his chapter 7 trustee.

65. Even if ING's motion to dismiss with prejudice based on judicial estoppel was denied, and the Fourth District Case continued, the claims alleged would not have belonged to Mr. Bangerter.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the court makes the following conclusions

of law:

66. Mr. Bates violated Rule 1.4(a) of the Utah Rules of Professional Conduct by not obtaining Mr. Bangerter's informed consent prior to dismissing his case. Mr. Bates may have been justified in withdrawing from the case due to non-payment of fees, and Mr. Bates may have been hampered in his ability to represent Mr. Bangerter given that Mr. Bangerter did not respond to the May 25 letter or make any effort to communicate with the firm regarding the case. Moreover, had Mr. Bates appeared at the July 29 hearing, Rule 11 likely would have limited his ability to advance some or all of the arguments against dismissal of the case. However, Mr. Bates did not promptly inform Mr. Bangerter that he was agreeing to the dismissal of the case. Moreover, Mr. Bates was fully responsible for the content of documents filed with the court that bore his electronic signature. To the extent he was unaware of the dismissal with prejudice, it was because he did not read the documents before they were filed. Mr. Bangerter suffered no harm or prejudice as a result of this violation, but harm to the client is not required to establish a violation of Rule 1.4(a).

67. OPC argues that Mr. Bates violated Rule 5.3(b) of the Utah Rules of Professional Conduct by failing to adequately supervise his paralegal. Rule 5.3(c) states: a "lawyer shall be responsible for conduct of [a non-lawyer assistant] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: ... the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action." The court does not find a violation of Rule 5.3(b) for the following reasons:

a) First, as noted above, Mr. Bates is fully responsible for the content of documents filed with the court under his signature, and therefore is fully responsible for the dismissal with prejudice of Mr. Bangerter's case. In other words, what OPC refers to as the "predicate offense" was committed not by Mr. Bates's paralegal but by Mr. Bates himself. Resort to the fall back position of failing to adequately supervise his paralegal is therefore unnecessary.

b) Second, in light of this, finding a violation of 5.3(b) would amount to punishing Mr. Bates under two different rules for the exact same conduct – filing papers with the court that dismissed a client's case with prejudice without consulting with the client.

c) Third, while Mr. Bates had direct supervisory authority over his paralegal and was a partner in the firm, OPC has not proven that Mr. Bates was aware of the conduct of his paralegal “at a time when its consequences [could] be avoided or mitigated but fail[ed] to take remedial action.” Mr. Bates did not become aware of the filing until after Mr. Bangerter had hired new counsel and a Rule 60(b) motion had already been filed. More important, it is not clear that any remedial action could have been taken, in light of the lack of merit of Mr. Bangerter's claims and his inability to personally pursue them.

68. Mr. Bates did not violate Rule 1.16(d), as claimed by OPC. Mr. Bates' representation of Mr. Bangerter was terminated either by the dismissal of Mr. Bangerter's case, or his retention of another attorney to represent him and file on his behalf a motion in which he accused Mr. Bates of having committed a fraud on the court. Upon being accused by his client of fraud, Mr. Bates was entitled (perhaps obligated) to respond. In particular, Mr. Bates was entitled to inform the court that Mr. Bangerter was advised in writing what was required of him to continue forward with the case, and that Mr. Bangerter did not respond. Additionally, given that Mr. Bangerter did not own the claims he was seeking to have reinstated with his Rule 60(b) motion, Mr. Bates had no obligation to assist him in that effort.

69. The OPC expressly abandoned its claim that Mr. Bates violated Rule 5.1(a) in connection with his representation of Mr. Bangerter. The OPC appears to have abandoned its claim that Mr. Bates violated Rules 1.2(a) of the Utah Rules of Professional Conduct in connection with his representation of Mr. Bangerter, including by virtue of the fact that OPC did not prepare findings or conclusions regarding any purported violation of this rule. To the extent OPC is claiming violations of this rule, the court finds those

allegations to be unsupported, including for the reasons set forth in Mr. Bates' proposed findings and conclusions.

TRUST ACCOUNT MATTER

FINDINGS OF FACT

70. Between approximately July 2010, and February 2012, Mr. Bates maintained a firm operating account at Zions Bank.

71. Between approximately July 2010, and February 2012, Mr. Bates maintained a separate client trust account at Zions Bank.

72. All checks written from the client trust account bear the signature of Mr. Bates.

73. Mr. Bates was the only person authorized to withdraw money from the client trust account. No one other than Mr. Bates made online transfers into or out of the client trust account.

74. The majority of legal fees paid to Wasatch Advocates between July 2010, and February 2012, were fixed/flat fees that Mr. Bates deemed to be earned upon receipt. Mr. Bates offered the testimony of an expert, Derk Rasmussen, a certified forensic accountant, who opined that there was satisfactory documentation to show that the fixed/flat fees paid to Wasatch Advocates were earned upon receipt. Mr. Rasmussen testified that based on his review, very few Wasatch Advocates' clients elected the traditional hourly fee option that Wasatch Advocates offered in its fee agreement.

75. The majority of those fees were deposited directly into Mr. Bates' operating account, rather than the client trust account.

76. At times, whether by mistake or in accordance with an evolving policy on where fixed/flat fees should be deposited, some earned fixed/flat fees were deposited into the trust account. Mr. Bates was aware that, at times, fixed/flat fee payments that he deemed to be earned upon receipt had been deposited into his trust account.

77. Mr. Bates periodically would transfer funds from his trust account to his operating account based on his estimation of work that had been performed. The transfers

made from the trust account to the operating account were typically not associated with a specific client. **In determining how much to transfer, Mr. Bates would consult (a) QuickBooks "Payments Received" reports for the time period in question, (b) QuickBooks "Deposit Detail" reports, which included reports by client, (c) weekly practice management spreadsheets, and (d) bank account records for his operating account and trust account.**

78. The transactions into and out of Mr. Bates' trust account are difficult to follow and it appeared to the court that without considerable effort, Mr. Bates would not have had the ability to say, on any given day, how much money was being held in the trust account for a particular client. At the same time, Mr. Bates did not have any experience operating a law firm trust account. He did **maintain a widely-used software accounting program to track all financial activity in the operating account and trust account and to generate accounting reports and ultimately consulted with an accounting firm. He also** employed individuals with accounting backgrounds to try and ensure his trust and operating accounts were properly maintained. Despite these efforts, the operation of Mr. Bates' trust account remained somewhat chaotic.

79. In the amended complaint, OPC outlines conduct by Mr. Bates generally related to depositing legal fees paid by clients to the firm's operating account (presumably instead of the trust account). As the court understands it, OPC was claiming that Mr. Bates had deposited in the firm's operating account unearned client fees that should have been deposited in the trust account. Mr. Bates presented evidence that his "office policy" was to treat any fee payments equal to or less than \$2,500 as earned upon receipt. The OPC does not appear to take issue with Mr. Bates' claim that treating these amounts as earned upon receipt does not amount to a per se violation of Rule 1.15. To the extent OPC is claiming a per se violation of the rule on this basis, the court finds that OPC has not met its burden of proof. Thus, insofar as the trust account matters are concerned, the only items that are the subject of the OPC's claims are: (i) the Silver Stream Enterprises'

transactions, (ii) the Pennington transactions, (iii) the FA Apartments' transactions, and (iv) the John Liti transactions.

Silver Stream Enterprises' Transaction

80. Wasatch Advocates employed the services of a third party vendor called Silver Stream Enterprises ("Silver Stream") to perform loan modification services on behalf of some of its foreclosure defense clients.

81. On June 28, 2011, Wasatch Advocates issued a check from the trust account in the amount of \$3,000 payable to Silver Stream for loan modification services rendered on behalf of ten separate Wasatch Advocates' clients.

82. At the time the check was written, none of the ten clients on whose behalf the check was written had money that was being held in the trust account. Each of the ten clients had made small payments in the previous thirty days ranging between \$250-\$500 under fixed/flat fee agreements providing for loan modification services. The fees were deposited into Wasatch Advocates' operating account instead of the trust account.

83. Mr. Bates testified that he thought at the time the check was issued that the payments totaling \$3,000 made by these clients in June had been deposited by Wasatch Advocates' receptionist into the firm's trust account. Mr. Bates believed this to be the case in part because he had recently trained his staff that any payments made by homeowners for "mortgage relief assistance" must be deposited in the firm's trust account (and not its operating account) in order to comply with recently-enacted ~~statute~~ statutes and federal regulations governing such fee payments.

84. Mr. Bates admits that this check should not have been written from the trust account and claims this was a mistake. It does not appear that Mr. Bates or Wasatch Advocates ever benefitted financially from this transaction, which supports Mr. Bates' contention that this was an accounting mistake.

85. Mr. Bates primary defense to this claim is that as of June 28, 2011, he had deposited **and was holding** in the trust account earned fees **in amounts** well in excess of

the \$3,000 check to Silver Stream. Therefore, while the firm never deposited funds in the trust account on behalf of these clients, the total balance in the trust account exceeded the total amount necessary to cover amounts held in trust for all of Wasatch Advocates' clients. Therefore, according to Mr. Bates, the payment of this check did not cause Wasatch Advocates to draw upon client trust funds being held for another client. OPC ~~does not appear to dispute~~ **disputes this. The** ~~this fact, though given the manner in which the trust account records were maintained it would be difficult to~~ **makes it difficult if not impossible to make this determination. The trust account had a positive balance on June 28, 2011, but of course that does not necessarily mean that there were sufficient funds to cover all trust deposits of all clients as of June 28, 2011. Based on the evidence presented, the court cannot find that the \$3,000 check caused the trust account to go out of balance on or immediately after June 28, 2011, the date of the check; subject, however, to the discussion of the F.A. Apartments transactions, discussed below. With respect to the operating account – the account from which the check should have been written since the client deposits were made into this account – the balance was almost \$40,000 on June 28, 2011, well in excess of what was needed to cover the check had it been written from this account instead of the trust account.**

Pennington Transaction

86. On October 10, 2011, Wasatch Advocates issued a check in the amount of \$2,325.90 from the trust account to "Client Pennington" for "refunded legal fees" as indicated by the memo line on the check.

87. None of the legal fees paid to Wasatch Advocates by "Client Pennington" had been deposited into the trust account. Therefore "Client Pennington" had no funds in the trust account at the time the check was written.

88. Mr. Bates does not dispute OPC's claim that the Penningtons did not have any fees in the trust account on October 10, 2011, and that the refund check was mistakenly issued from the trust account rather than the operating account.

89. As with the Silver Stream transaction, Mr. Bates maintains that, as of October 10, 2011, ~~June 28, 2011~~, he had in the trust account earned fees well in excess of the \$2,300 refund check. So, once again, Mr. Bates maintains that no other client trust funds were used to pay this check. And, once again, ~~OPC does not appear to dispute~~ **disputes this. The fact but it is difficult to verify given the manner in which Wasatch Advocates maintained the account makes it difficult if not impossible to verify.** The trust account had a positive balance on October 10, 2011, but of course that does not necessarily mean that there were sufficient funds to cover all trust deposits of all clients as of October 10, 2011. Based on the evidence presented, the court cannot find that the \$2,300 check caused the trust account to go out of balance on or immediately after October 10, 2011, the date of the check; subject, however, to the discussion of the F.A. Apartments transactions discussed below. As with the Silver Stream transaction, the operating account – the account from which the check should have been written – had a balance of over \$20,000 on October 10, 2011, well in excess of what was needed to cover the check had it been written from this account instead of the trust account.

The net effect of the Silver Stream and Pennington transactions was that \$5,300 was paid out of the trust account for payment to vendors and for a client refund, when those amounts should have been paid out of the operating account. In relation to these transactions, Mr. Bates did not use funds belonging to Silver Stream or Pennington in a manner not authorized by those clients – on the contrary, the Silver Stream clients understood these fees would be used to pay a vendor, and the Pennington funds were refunded to Pennington. Likewise, none of the clients were harmed by these checks having been written out of the trust account rather than the operating account. While the court is unable to conclude that these

transactions caused the trust account balance to fall below the necessary balances on June 28, 2011, and on October 10, 2011, these errors and transactions may have affected the trust account balances related to F.A. Apartments, transactions that spanned this entire time frame.

FA Apartments' Transaction

90. On December 10, 2010 Wasatch Advocates received a \$28,000 check from Wasatch Advocates' client F.A. Apartments. The \$28,000 was deposited into Wasatch Advocates' trust account.

91. The F.A. Apartment funds were to be held in trust and only used for certain expenses authorized by F.A. Apartments. No portion of the \$28,000 held in trust was intended to be used for Mr. Bates' legal fees. According to F.A. Apartment's principal, the \$28,000 was to be used for payment of certain costs, including local counsel fees, utility bills, property management expenses, and Mr. Bates' travel costs.

92. Between December 10, 2010, and September 25, 2011, F.A. Apartments authorized various expenditures from the \$28,000 in the trust account. **It is undisputed that F.A. Apartments did not authorize these funds to be used for purposes not authorized by it.**

93. Those expenditures are detailed on Defendant's Trial Ex. 82, BATES001401. Mark Berrett of F.A. Apartments testified that FA Apartments authorized Wasatch Advocates to make each of these payments, totaling \$20,678.59, which reduced the balance from \$28,000 to \$7,321.41. In addition, at least \$1,206.30 in additional expenses related to the representation of F.A. Apartments was incurred by the firm. ~~to these, two payments totaling \$3,206.30 were made from the operating account (but which should have been drawn on the trust account). So, of the \$28,000, FA Apartments authorized Wasatch Advocates to pay all but \$4,115.11 of that amount.~~

93(a). OPC first focuses on January 3, 2011, correctly pointing out the following: (1) The trust account balance on January 3, 2011, was \$22,792.36 so even

if all of the money in the trust account was for F.A. Apartments, the amount being held was \$5,207.64 less than the original \$28,000. (2) As of that date, F.A. Apartments had authorized the firm to pay \$3,206.38 in F.A. Apartment expenses. (3) So on January 3, 2011, Mr. Bates was out of trust with F.A. Apartments in the amount of \$2,001.26. However, the court notes that the daily balance in the trust account during the month of January 2011 covers a broad range – from a low of \$22,792.36 on January 3 (the date selected by OPC) to a high of \$45,074.36 on January 20.

93(b). OPC next focuses on March 17, 2011, correctly pointing out the following: (1) The trust account balance on March 17, 2011, was \$8,926.83. (2) As of that date, F.A. Apartments had authorized the firm to pay \$16,729.19 in F.A. Apartment expenses. (3) Deducting these expenses from the original \$28,000 means there should have been \$11,270.81 in trust for F.A. Apartments, but the total balance as noted above was \$8,926.83, a difference of \$2,343.98. Mr. Bates was therefore out of trust with F.A. Apartments on March 17, 2011, and the amount by which he was out of trust was \$342.72 more than it was on January 3, 2011. Again, the daily balance in the trust account during the month of March 2011 covers a broad range – from a low of \$8,926.83 on March 17 (the date selected by OPC) to a high of \$45,652.02 ten days earlier on March 7.

93(c). OPC next focuses on June 30, 2011, correctly pointing out the following: (1) The trust account balance on June 30, 2011, was \$5,351.10. (2) As of that date, F.A. Apartments had authorized the firm to pay \$18,427.10 in F.A. Apartment expenses. (3) Deducting these expenses from the original \$28,000 means there should have been \$9,572.90 in trust for F.A. Apartments, but the total balance as noted above was \$5,351.10, a difference of \$4,221.80. Mr. Bates was therefore out of trust with F.A. Apartments on June 30, 2011, and the amount by which he was out of trust was \$1,877.82 more than it was on March 17, 2011. Once again, the daily balance in the trust account during the month of June 2011 covers a broad range –

from a low of \$5,351.10 on June 30 (the date selected by OPC) to a high of \$34,039.10 seven days earlier on June 23.

94. [deleted]

95. F.A. Apartments asked Wasatch Advocates to prepare a reconciliation of the \$28,000 trust deposit to be disclosed to the opposing party as part of settlement negotiations. However, F.A. Apartments requested that certain of the expenses it had authorized to be paid not be included on the reconciliation for reasons not relevant to the present dispute. This reconciliation, showing a balance remaining of \$20,179.65, represents the reconciliation that FA Apartments asked Wasatch Advocates to prepare and is not an accurate or complete reconciliation of all the payments FA Apartments authorized Wasatch Advocates to pay from the \$28,000 trust deposit.

96. A settlement of the F.A. Apartments matter was reached, which required, among other things, payment of \$20,000 based on the reconciliation prepared at F.A. Apartments' direction.

97. Between July 29, 2011, and August 2, 2011, the principals of F.A. Apartments paid to Wasatch Advocates and/or Mr. Bates an additional \$16,500 retainer that was to be used for his work on the matter. This \$16,500 should have been deposited in the trust account. **All but \$500 was mistakenly deposited in the operating account; it was not.** despite Mr. Bates' direction that **these funds** it be deposited in the trust account, **\$16,000 of the \$16,500** it was mistakenly deposited into the operating account. The **\$16,000** \$16,500 represented unearned fees at the time it was deposited into the operating account.

98. **About a month later**, on or about August 23, 2011, Mr. Bates learned the \$16,000 500 had been mistakenly deposited in the operating account rather than the trust account. On or about August 24, 2011, Mr. Bates and F.A. Apartments agreed that instead of using the \$16,000 500 retainer for Mr. Bates' legal fees, that amount would be applied toward certain of the expenses that had originally been debited against the \$28,000 in trust. However, the \$16,000 500 was not transferred to the trust account at that time and remained in the operating account.

99. As of September 16, 2011, Mr. Bates should have been holding in the trust account at least \$20,000 belonging to F.A. Apartments, either from the residue of the \$28,000 originally placed in the trust account or in combination with the \$16,500 retainer, **\$16,000 of which was** mistakenly deposited into the operating account **and which** should have been transferred to the trust account.

100. On September 16, 2011, Mr. Bates' total trust account balance was **\$3,335.73**. **On September 16, 2011, Mr. Bates transferred \$20,000 from his operating account to his payroll account, leaving the operating account with a negative balance of \$454.94. Following the transfer, the payroll account balance was \$27,278.67. At the time of the September 16 transfer, F.A. Apartments had \$16,000 in Mr. Bates operating account (which should have been in his trust account). As a result of the September 16 transfer, all of those funds were transferred to Mr. Bates' payroll account and appear to have been used for the firm's payroll. On September 19 and again on September 21, 2011, Mr. Bates drew on a line of credit and transferred to the operating account \$5,000 and \$7,000. Mr. Bates had previously established a line of credit or revolving loan from his wife or himself and he periodically put money into the operation of the law firm through this loan or line of credit when the cash flow needs of the firm required it. By September 28, 2011, the balance of the operating account had increased to \$76,623.21.**

101. On September 26, 2011, a series of deposits were made into Mr. Bates' trust account representing payments from various clients. According to Mr. Bates, these represented fees that the firm had earned upon receipt (but which nevertheless were deposited in the trust account). Also on September 26, 2011, Mr. Bates transferred \$10,000 from the operating account to the trust account to facilitate a wire transfer on behalf of F.A. Apartments. Prior to this, Mr. Bates had not made any transfers of F.A. Apartments' funds from the operating account to the trust account.

102. On September 27, 2011, Mr. Bates wired \$20,000 from the trust account for the F.A. Apartments' settlement. **At or around this time, it appears Mr. Bates'**

representation of F.A. Apartments concluded. That representation concluded to the satisfaction of all parties. F.A. Apartments did not and has not raised any concerns with Mr. Bates' representation of it. Likewise, F.A. Apartments did not and has not raised any issues with Mr. Bates accounting for the money it paid to him (in trust or otherwise), Mr. Bates' payment of various bills on behalf of F.A. Apartments, or amounts Mr. Bates billed for his services or costs.

103. After the \$20,000 was wired from trust on September 27, 2011, the Wasatch Advocates' trust account balance was approximately \$427.00. Mr. Bates acknowledges that on this date Wasatch Advocates client John Liti's tax return totaling \$2,980.80 should have been in Wasatch Advocates' trust account. Mr. Bates testified that when he wired the \$20,000 he was unaware Mr. Liti's tax return had been deposited in Wasatch Advocates' trust account in March 2011. The court accepts as accurate Mr. Bates testimony that he did not wire the \$20,000 knowing that any portion thereof represented client funds held in trust for the benefit of another client or a third person. Although he may not have intended it, that clearly is what occurred.

104. [deleted; as it pertains to sanctions phase].

105. [deleted; as it pertains to sanctions phase].

John Liti Transaction

106. In or about October 2010, John Liti hired Wasatch Advocates to represent him in a bankruptcy matter. That representation continued until approximately July 31, 2011. From October 2010 until July 31, 2011, the Wasatch Advocates' attorney assigned to Mr. Liti's case was Jennifer Smock. During this time period Mr. Bates never appeared as counsel of record for Mr. Liti, nor was he familiar with Mr. Liti's case.

107. Mr. Liti paid \$1,275 to Wasatch Advocates for legal fees and filing fees associated with his bankruptcy case.

108. As part of the bankruptcy, Mr. Liti was required to turn over at least a portion of his 2010 tax refund to the bankruptcy trustee. On March 12, 2011 Mr. Liti delivered to

Wasatch Advocates a \$2,980.80 check representing his tax refund. On March 23, 2011, the check was deposited into Wasatch Advocates' trust account.

109. No portion of the \$2,980.80 was for legal fees or services owed to Wasatch Advocates.

110. Ms. Smock left Wasatch Advocates effective July 31, 2011. Ms. Smock's resignation email advised Wasatch Advocates of certain funds being held in trust for a debt negotiation client, but did not advise Wasatch Advocates of funds being held in trust for any other client, including Mr. Liti. Ms. Smock took with her Mr. Liti's file and continued to represent him.

111. On September 27, 2011, Mr. Bates wired \$20,000 from the client trust account on behalf FA Apartments. After the wire transfer, the balance in Mr. Bates' client trust account was \$497.73. As of that date, Mr. Bates and Wasatch Advocates should have been holding in the trust account the \$2,980.80 deposited by Mr. Liti.

112. Mr. Bates acknowledges Mr. Liti's tax refund should have been in Wasatch Advocates' trust account on September 27, 2011, after he wired from the trust account \$20,000 on behalf of FA Apartments, but that it was not.

113. On December 2, 2011, Ms. Smock wrote a letter to Wasatch Advocates, c/o Wasatch Advocates COO, Blynn Simmons. Ms. Smock advised Wasatch Advocates that the bankruptcy trustee in Mr. Liti's case had filed a Motion to Turn Over Property, which sought "the 2010 tax refund of your client Mr. Liti." Ms. Smock's letter directed that \$1,589.19 be paid to the trustee.

114. On December 9, 2011, Ms. Simmons delivered to the trustee a check drawn on the trust account in the requested amount of \$1,589.19.

115. In a letter dated December 23, 2011, to Ms. Smock, Mr. Liti's attorney-of-record, Ms. Simmons on behalf of Wasatch Advocates offered to refund the balance of Mr. Liti's tax refund. Ms. Simmons requested that Ms. Smock respond with a written acknowledgement authorizing the firm to release the funds to Mr. Liti.

116. Ms. Smock responded by letter dated December 27, 2011. Ms. Smock advised Ms. Simmons to return to Mr. Liti the balance of his tax refund.

117. Mr. Liti's funds were not returned at that time.

118. Mr. Bates was out of town on vacation during the time these exchanges were taking place. When Mr. Bates returned in early January 2012, Ms. Simmons had quit Wasatch Advocates. Mr. Bates claims he was unaware of the communications between Ms. Smock and Ms. Simmons regarding Mr. Liti's funds that were still in the firm's possession.

119. After he returned in early January 2012, Mr. Bates began the process of winding down Wasatch Advocates. That included closing its operating and trust accounts. Mr. Bates dissolved the firm effective January 31, 2012.

120. At the time he dissolved the firm, Mr. Bates was holding funds in trust for a few clients. Prior to transferring funds from his Wasatch Advocates accounts to his new accounts, Mr. Bates attempted to identify all of the funds he was holding in trust and to whom those funds belonged. Mr. Bates did not identify any funds being held in trust as belonging to Mr. Liti.

121. As of the time Mr. Bates transferred the funds he was holding in trust from his old accounts to his new accounts, the \$1,391.61 belonging to Mr. Liti was gone.

122. Mr. Bates acknowledges that the \$1,391.61 should have been in Wasatch Advocates' trust account when the trust account was closed, but it was not.

123. Mr. Bates testified he first became aware that Mr. Liti was claiming he was owed money from Wasatch Advocates' trust account in approximately March, 2012 when the OPC served Mr. Bates with a copy of Mr. Liti's January 11, 2012 Bar compliant, and OPC's request for information relating thereto.

124. The amount claimed in Mr. Liti's Bar complaint differs from the amount actually deposited in the trust account. Additionally, the ledger entry for Mr. Liti's deposit does not clearly identify what the funds are and what they are for.

125. Mr. Bates testified that it was not until Ms. Smock and Mr. Liti testified at the Screening Panel hearing that he understood the particulars of the amounts owing to Mr. Liti. Mr. Bates paid the amounts owed to Mr. Liti after the Screening Panel hearing.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the court makes the following conclusions of law:

126. With respect to the Silver Stream transaction:

a) To the extent OPC is claiming Mr. Bates misappropriated client funds in violation of Rule 1.15(a) of the Utah Rules of Professional Conduct, OPC has not met its burden of proving the same. **The money these clients paid to Wasatch Advocates was used by the firm exactly as the clients understood it would be used – to pay a vendor for services associated with the legal representation. Mr. Bates was not holding these funds in trust for a client but was paying a vendor for services provided to the client. Paying a vendor is not a misappropriation or misuse of the client's funds. Additionally, OPC has not shown that the issuance of the \$3,000 check on June 28, 2011, by itself, caused Mr. Bates to invade any amounts held in trust for other clients; rather, Mr. Bates appears to have had in the account at the time funds he determined had been earned that were in excess of the \$3,000 check.**²

b) However, under Rule 1.15(a), a lawyer must maintain "[c]omplete records of such account funds..." which the comment explains as follows: "A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order." It does not appear to the court that Mr. Bates had any way of readily determining exactly

² The court does not understand OPC to be claiming a violation of Rule 1.15(b), which prohibits a lawyer from depositing the lawyer's own funds in a client trust account, except as may be necessary to pay bank service charges on the account. The court therefore does not consider this issue.

how much was being held in his trust account for any given client.³ If he had such records, he or his staff would have been able to quickly and easily determine that the Silver Stream clients did not have any funds in the trust account and therefore the check should not have been issued from this account. The court therefore concludes that Mr. Bates failed to maintain adequate records as required by Rule 1.15(a).

127. With respect to the Pennington transaction, the court reaches the same conclusions of law as it did with the Silver Stream transaction, and for the same reasons, as explained above.

128. With respect to the FA Apartments' transaction:

a) Mr. Bates violated Rule 1.15(a) of the Utah Rules of Professional Conduct by failing to hold funds belonging to FA Apartments in an account separate from his own account; failing adequately to safeguard FA Apartments' funds; and failing to keep earned fees separate from unearned fees.

b) [deleted; as it pertains to sanctions phase].

129. With respect to the transactions involving Mr. Liti:

a) Mr. Bates violated Rule 1.15(a) of the Utah Rules of Professional Conduct by failing to safeguard Mr. Liti's property; failing to hold Mr. Liti's funds in his trust account; and using those funds for some other purpose.

b) Mr. Bates violated Rule 1.15(d) of the Utah Rules of Professional Conduct by failing to promptly deliver to Mr. Liti the remaining portion of his tax refund when he learned the money was supposed to be in his account.

Based upon the Court's Findings of Fact and Conclusions of Law of Mr. Bates' misconduct and violations of the Rules of Professional Conduct, IT IS HEREBY ORDERED THAT:


³ Mr. Bates' expert, Mr. Rasmussen, offered the general opinion that he was able to do a forensic accounting of Mr. Bates' accounts and was able to determine, in that setting, where the funds came from, where they were deposited, and how they were used. That appears to be true as far as it goes. However, Mr. Rasmussen did not offer the opinion that he or anyone else would have been able to determine, at any given moment in time, exactly how much of the total funds being held in trust represented funds being held for each individual client.

This matter be set pursuant to Rule 14-511(f) of the Rules of Lawyer Discipline and Disability for a sanctions hearing. At the sanctions hearing, as appropriate, the court will consider relevant evidence of aggravation and mitigation of Mr. Bates' misconduct. The court will then impose the appropriate sanction for Mr. Bates' professional misconduct as governed by the Standards for Imposing Lawyer Sanctions.

The foregoing constitutes the order of the court on the matters presented, and no additional or further order is required to be prepared.

DATED this 2nd day of March, 2014.

DISTRICT COURT JUDGE


Judge Todd Shaughnessy



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 120905676 by the method and on the date specified.

EMAIL: KIRK G GIBBS kggibbs@kipbandchristian.com

EMAIL: MICHAEL F SKOLNICK mfskolnick@kipbandchristian.com

EMAIL: TODD WAHLQUIST opcfileing@utahbar.org

03/02/2015

/s/ MARK PARADISE

Date: _____

Deputy Court Clerk

ADDENDUM EXHIBIT 2

JUN 01 2015

Salt Lake County

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

Deputy Clerk

In the Matter of the Discipline of
Abraham C. Bates #12440,

Respondent.

: FINDINGS OF FACT AND
: CONCLUSIONS OF LAW
: PERTAINING TO SANCTIONS
: PHASE

: Case No.120905676
: Judge Todd M. Shaughnessy

On April 15, 2015 the court conducted a one-day bench trial regarding the sanctions phase of this disciplinary proceeding. The OPC was represented by Todd Wahlquist. Respondent Abraham C. Bates ("Bates") was represented by Michael F. Skolnick and Kirk G. Gibbs. The court previously heard in May 2014 the violations phase of this case and entered its Second Amended Findings of Fact and Conclusions of Law, which are incorporated by reference to the extent necessary. Having received the parties' evidence and having heard argument from counsel, the Court hereby enters the following Findings of Fact and Conclusion of Law Pertaining to Sanctions Phase:

FINDINGS OF FACT

1. The OPC's recommended sanction, disbarment, is not appropriate in this case. Considering all the evidence received by the court, the only matter upon which disbarment could possibly be based is the F.A. Apartments ("FA") matter. Conduct related to the Liti matter does not give rise to disbarment and for the reasons detailed in

this findings and on the record in this matter the OPC's argument that disbarment is necessary based on the FA matter gives this court serious pause.

2. Although not required for disbarment, it is significant that FA suffered no harm, monetary or otherwise. FA made no complaint to the Bar or anyone else regarding any aspect of Bates' representation of FA. Instead, FA principal Mark Berrett, a Certified Professional Accountant by profession, testified he was completely satisfied with Bates' representation of FA and that Bates made continuous efforts to communicate with him regarding the accounting on FA's trust deposit. Mr. Berrett offered no testimony adverse to Bates.

3. The court understands that imposition of a sanction, including disbarment, does not necessarily turn on a client's satisfaction or whether or not the client filed a Bar complaint. Nevertheless, the fact that the client testified it was completely satisfied with the representation, that it found no reason to file a complaint with the Bar, and that after all of the events came to light it still maintains that the lawyer provided the services requested in the manner requested, without any harm to the client, seriously undermines the OPC's contention that a sanction amounting to professional death penalty is warranted.

4. With respect to the specific individual matters before the Court:

(a) Bangerter ("OPC") matter: Bates' conduct was negligent.

Bangerter suffered no harm and the conduct in question is consistent with the

five private admonitions Bates received for conduct that transpired during the same timeframe as the conduct before the Court. In other words, the Bangerter matter involved the same type of circumstances and conduct as those contained in the admonitions submitted to the Court by the OPC. Therefore, standing on its own, the rule violation involved in the Bangerter matter would give rise to the same sanction as was imposed in the other, similar matters – a private admonition.

(b) Silverstream and Pennington matters: There was no misappropriation of funds in connection with these matters, although accounting mistakes were involved. Bates' mental state was negligence in that he ultimately failed to maintain adequate records on these matters despite his efforts to the contrary. Therefore, similar to the Bangerter matter, a private admonition would be the appropriate presumptive sanction in the Silverstream and Pennington matters.

(c) Liti matter: The Court finds that disbarment is not an appropriate presumptive sanction with respect to this matter. OPC failed to meet its burden in support of its claim that Bates knowingly and intentionally took any money from Liti with the intent to benefit himself, another, or with any intention to deprive Liti of his funds. To the extent OPC relies on constructive notice by virtue of Bates controlling the account in question and withdrawing funds from the account, the

court does not see how constructive notice creates the specific intent required to support disbarment. The conduct in question is somewhat similar to cases involving trust account overdrafts, and a bookkeeping mistake should not lead to an attorney's disbarment. Bates' mental state in the Liti matter was negligence. There was some injury in the amount of approximately \$1,500, but Bates did pay restitution in full once the amount owed to Liti was finally determined at the screening panel hearing. Mr. Bates probably could have, and probably should have, refunded the money more promptly than he did, but the court does not find the delay to be ultimately meaningful to the question presented. The presumptive discipline in the Liti matter would be a public reprimand.

(d) FA matter: It is undisputed that the amount of \$16,000.00 was mistakenly deposited in Wasatch Advocates' operating account, and should have been deposited into Wasatch Advocates' trust account on behalf of FA. The main issue in the FA matter relates to Bates' mental state. The OPC has failed to carry its burden of proving that Bates was aware of the incorrect deposit prior to August 23, 2011. The undisputed evidence at trial showed that Bates expressly instructed his staff to deposit the funds into the trust account. Additionally, the OPC failed to meet its burden of showing Bates knowingly or intentionally caused the apparent shortfalls in the approximate amount of \$2,000 in March or June of 2011 and therefore this conduct also does not constitute

intentional misappropriation. The shortfalls in the trust account were based on Bates' negligent mental state. It was not until August 23, 2011, when Bates informed FA he was about to bill his time for the previous six weeks against the \$16,0000 deposit that Bates learned FA funds were not in trust. On the same day, Bates' offered to defer billing against this deposit for the client's benefit so that the funds could be used to fund the settlement in the case. However, based on the agreement and because Bates did not move those funds back into trust as of August 23rd, Bates' conduct from that point forward with respect to the funds was done knowingly. On September 16, 2011 a transfer from Wasatch Advocates' operating account to Wasatch Advocates' payroll account was made. At the same time, Bates had lines of credit available which significantly exceeded the amount of the transfer. Evidence was presented that Bates had drawn on these credit lines on multiple prior occasions – including four times in September both preceding and following the September 16 payroll transfer - to fund Wasatch Advocates' operating expenses, including payroll. The OPC has not met its burden of showing that Bates made the transfer to payroll with the specific intent to use FA funds to benefit himself, another, or to harm FA. Moreover, FA was not actually harmed in any way and shortly after the transfer to payroll all of FA's funds were properly accounted for. And, as Bates had agreed to do for the benefit of FA, he deferred billing against the \$16,000 deposit until November 15,

2011 and the settlement in the case was fully and timely funded with the funds Mr. Bates was holding. Therefore the presumptive sanction for this conduct is suspension under 14-605(b)(1), which involves knowing but unintentional misconduct that caused potential harm.

5. In determining the overall level of discipline the court takes the conduct resulting in the most serious level of discipline, which in this case is suspension, and then performs a balancing test in light of any aggravating and mitigating factors applicable at the time the conduct occurred.

6. The OPC argued the Court should find three aggravating factors applied at the time of Bates' misconduct. With respect to OPC's first claim that Bates has a prior record of discipline, the Court finds there is no prior record of discipline for the reasons argued by Bates. All of the conduct at issue in this case occurred during the same timeframe as the conduct set forth in the five matters submitted to the court by OPC. The rule in question clearly requires a temporal sequence with respect to a prior record of discipline – ie, discipline, awareness of the misconduct and resulting discipline, and then continued misconduct. That does not exist here. With respect to OPC's second alleged aggravating factor, the court does find that multiple offenses occurred involving a pattern of misconduct over the last six months of Wasatch Advocates' existence. During this period, Wasatch Advocates imploded as a result of a significant proportion of Bates' staff abruptly leaving the firm, combined with changing

economic circumstances related to Bates' foreclosure defense practice. Bates did not dispute that the multiple offenses involving a pattern of misconduct applied to his case. As to OPC's third alleged aggravating factor, the court concludes OPC failed to carry its burden in support of its allegations that Bates acted with a dishonest or selfish motive or that Bates failed to express remorse for his misconduct.

7. With respect to mitigating factors, Bates argued the court should consider a total of seven mitigating factors in his favor. First, the court finds that Bates made a good faith effort to rectify the consequences of his conduct by making restitution to Liti. Second, the court also finds that Bates has expressed remorse for his actions. Third, and most significantly, the court finds that the mitigating factor which carries predominant weight is Bates' inexperience in the practice of law. Bates bit off far more than he was able to chew in building such a large law firm less than two years out of law school. The rule violations that occurred in the latter half of 2011 occurred because Bates was in way over his head in his efforts to expand his firm so quickly and on a scale which a more experienced lawyer would have avoided. Fourth, the court finds, and the OPC does not dispute, that Bates made full disclosure and was cooperative at all times during these disciplinary proceedings. Fifth, Mr. Bates paid himself a modest salary and at the end of the day ended up losing a substantial amount of money as a result of the operation and winding down of Wasatch Advocates. The court cannot find that Bates had a dishonest or selfish motive for the misconduct involved in this case.

Sixth, the court finds, and the OPC does not dispute, that Bates had a good reputation considering he was a second year lawyer. However, the court does not consider Bates' reputation two years into practice as a significant mitigating factor, given Bates' limited experience in the practice of law. Similarly, in support of his claim of good character, Bates offered testimony from two senior members of the Bar who mentored him during the time period in question. The OPC did not demonstrate Bates' lack of good character. However, while the court finds that Bates possessed good character, the court declines to assign significant weight to Bates' character as a mitigating factor. Lastly, with respect to interim reform, Bates testified as to the various changes he has made to his trust accounting procedures since the dissolution of Wasatch Advocates three years ago, in addition to other operational changes which have reduced the size and scale of his law practice in the three years after Wasatch Advocates was dissolved. However, the court declines to make a finding with respect to Bates' interim reform based on lack of sufficient evidence.

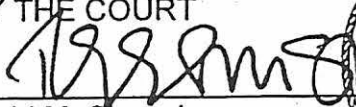
The court has weighed the aggravating and mitigating factors in connection with the misconduct-giving rise to a suspension as the presumptive level of discipline. The court concludes that the balancing test tips in Bates' favor warranting a slight downward departure from the six-month suspension "generally" imposed under Rule 14-525. The court therefore concludes, pursuant to Rules 14-604 and 14-524, that a suspension of five months is appropriate in this case.

CONCLUSIONS OF LAW

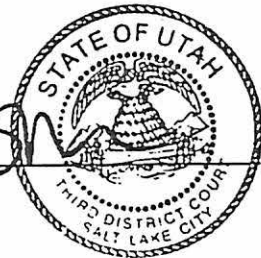
Based on the foregoing Findings of Fact, Bates shall be suspended from the practice of law for a period of five (5) months. The suspension shall commence on July 1, 2015. During the period of suspension, Mr. Bates is enjoined and prohibited from practicing law in the State of Utah, holding himself out as an attorney at law, performing legal services for others, giving legal advice to others, accepting fees for rendering legal services, or appearing as counsel in any proceeding in any Utah court or before any Utah administrative body, or holding himself out to others as "Attorney at Law", "Counselor at Law", "Lawyer", or similar titles.

DATED this 1st day of June, 2015.

BY THE COURT



Todd M. Shaughnessy
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 120905676 by the method and on the date specified.

MANUAL EMAIL: TROY L BOOHER tbooher@zjbappeals.com

MANUAL EMAIL: KIRK G GIBBS kggibbs@kipbandchristian.com

MANUAL EMAIL: ERIN B HULL ehull@zjbappeals.com

MANUAL EMAIL: MICHAEL F SKOLNICK mfskolnick@kipbandchristian.com

MANUAL EMAIL: TODD WAHLQUIST opcfileing@utahbar.org

06/01/2015

/s/ MANDY ACEVEDO

Date: _____

Deputy Court Clerk

ADDENDUM EXHIBIT 3

10:39 AM

08/22/11

Cash Basis

Wasatch Advocates
FA Apartments Trust Account
 All Transactions

Type	Date	Num	Memo	Paid Amount	Balance
4100 - Client Trust					
4130 - Client Trust Funds					
Invoice	12/10/2010	505	Funds placed In Trust	28,000.00	28,000.00
Credit Memo	1/31/2011	543	Mortensen & Raffle Retainer	-1,500.00	26,500.00
Credit Memo	2/2/2011	383	Hutchison & Steffen, LLC Retainer Check	-4,800.37	21,699.63
Credit Memo	2/4/2011	384	Trust Account Check to Temple Ridge Apartments	-550.00	21,149.63
Credit Memo	2/4/2011	385	Cut Trust Check to Temple Ridge to pay NV Power Bill	-245.63	20,904.00
Credit Memo	2/4/2011	550	Retainer to Hutchison & Steffens	-2,000.00	18,904.00
Credit Memo	2/22/2011	552	Trust Check 1010 to RGR-SNA Group #2, llc	-5,000.00	13,904.00
Credit Memo	3/4/2011	598	Phone Bill- CenturyLink- Trust Check 1011	-355.19	13,548.81
Credit Memo	3/7/2011	603	Management Fees to Shirley	-550.00	12,998.81
Credit Memo	3/17/2011	648	NV Energy Bill- Trust Check 1015	-521.62	12,477.19
Credit Memo	6/7/2011	859	Credit Bureau Central- NV Utilities Invoice 020461-04 Paid with Trust Check # 1025	-806.13	11,671.06
Credit Memo	6/7/2011	861	ADT Security Services Inc. Account 187729898 FA Apartments- Paid with Trust Check # 1024	-460.41	11,210.65
Credit Memo	6/7/2011	863	NV Energy for FA Apartments Final Power Bill- 3000215633613624010 Paid with Trust Check #1023	-131.76	11,078.89
Credit Memo	6/7/2011	866	Cox Communications, Inc. FA Apartments Bill- Accl. 0018610046251218 Paid with Trust Check #1022	-102.34	10,976.55
Credit Memo	6/7/2011	867	CenturyLink Bill- FA Apartments Account 309620459 Paid with Trust Check #1021	-197.27	10,779.28
Credit Memo	7/5/2011	915	Trust Check #1029 to Hutchinson & Steffen, LLC Subcontracted Legal Services	-150.12	10,629.16
Credit Memo	8/4/2011	967	Trust- Subcontracted Legal Services Retainer to Reade & Associates- Trust Check #1033	-1,500.00	9,129.16
Credit Memo	8/16/2011	999	Trust Check #1038 to Mortensen & Raffle for Subcontracted Legal Services	-1,807.75	7,321.41
Total 4130 - Client Trust Funds				<u>7,321.41</u>	<u>7,321.41</u>
Total 4100 - Client Trust				<u>7,321.41</u>	<u>7,321.41</u>
TOTAL				<u><u>7,321.41</u></u>	<u><u>7,321.41</u></u>