

2016

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

Utah Supreme Court

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IN THE
SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE DISCIPLINE OF:
ABRAHAM C. BATES #12440,
Appellee.

BRIEF OF APPELLEE

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Todd M. Shaughnessy, District Court No. 120905676

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FILED
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Jurisdictional Statement

This court has jurisdiction pursuant to section 78A-3-102(3)(c) of the Utah Code and article VII, section 4 of the Utah Constitution.

Introduction

In its complaint, the Utah State Bar Office of Professional Conduct (OPC) alleged that Abraham Bates violated seven different rules of professional conduct. During a hearing in the trial court, the OPC realized that it would not prevail on two alleged violations and abandoned them. The trial court found violations of only three rules, a ruling that the OPC does not challenge on appeal.

Even though the number of alleged violations diminished significantly, the punishment sought by the OPC did not. From the outset, the OPC sought disbarment. The trial court, faced with four fewer alleged violations and no complaining client, imposed a five-month suspension instead of disbarment.

The OPC insists that Mr. Bates should be disbarred. The OPC asserts that Mr. Bates knowingly transferred client funds out of his firm's accounts, leaving temporary deficits. But the OPC ignores the evidence that Mr. Bates did not realize he was transferring client funds. The OPC instead conflates the fact that Mr. Bates knowingly *transferred* the funds with the issue of whether Mr. Bates knowingly *misappropriated* them. Under Utah law, misappropriation requires that a lawyer transfer client funds with the "conscious objective" to "benefit himself or another." That did not happen here, just as the trial court found.

Statement of the Issue

Issue: Whether the trial court clearly erred when it found that, because Mr. Bates did not know he had transferred funds belonging to a client, he did not knowingly misuse the funds with the intent to benefit himself.

Standard of Review: This court reviews an order of attorney discipline under the clearly erroneous standard, but “reserve[s] the right to draw different inferences from the facts than those drawn by the trial court.” *In re Discipline of Ince*, 957 P.2d 1233, 1236 (Utah 1998). Although this court will “ordinarily presume” that the trial court’s findings are correct, the court “may set those findings aside if they are not supported by the evidence.” *Utah State Bar v. Jardine*, 2012 UT 67, ¶ 26, 289 P.3d 516.

Preservation: This issue is preserved. (R.1141-43.)

Determinative Provisions

The following provisions and cases are set forth at Addendum C:

Utah Rules of Professional Conduct:

Rule 1.15. Safekeeping Property

Utah Rules Governing the Utah State Bar:

Rule 14-601. Definitions

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

Rule 14-605. Imposition of Sanctions

Rule 14-607. Aggravation and mitigation

Statement of the Case

1. Nature of the Case and Course of Proceedings

This case began with a bar complaint submitted against Mr. Bates by John Liti, a former client of Mr. Bates' law firm at the time. (R.1662,1456.) But Mr. Liti's complaint is not at issue in this appeal because any violation does not support disbarment. In fact, no client complaints are at issue in this appeal.

Mr. Liti asserted that Mr. Bates' former firm, Wasatch Advocates, had not returned the remainder of Mr. Liti's tax return that the firm had been holding during the pendency of Mr. Liti's bankruptcy litigation. (R.853,1663-68.) As soon as Mr. Bates learned the exact amount to which Mr. Liti claimed he was entitled — \$1,391.61 — Mr. Bates returned the funds. (R.853-54.) But in the meantime, the OPC launched an investigation into Wasatch Advocates, and the investigation did not end when the case concerning Mr. Liti ended. (R.2621.)

The OPC ultimately sought Mr. Bates' disbarment, alleging seven violations of the Utah Rules of Professional Conduct based upon five different client matters. (R.70-105.) The case proceeded in two phases in the trial court.

In the first phase, the court determined whether Mr. Bates violated any rules. (R.830,1138.) The court heard evidence for four days. (R.830.) The evidence at trial showed that Mr. Bates failed to ensure that client funds were consistently deposited into the firm's trust account, rather than the operating account. (R.1711,1714,1735-36,1743-44.) Because of this error, the balance of the trust account was at times less than the amount of client funds that the firm should

have been holding in trust. (R.845-51.) The evidence also showed that the firm's operating account was depleted for a few days before being restored by a line of credit, even though the firm should have been holding a \$16,000 retainer that had been mistakenly deposited into the operating account instead of the trust account. (R.849-50.) The OPC alleged that, based upon this evidence, Mr. Bates intentionally misappropriated client funds. (R.695-98,1500.)

The trial court disagreed with the OPC. The court found that Mr. Bates did not intentionally misappropriate client funds in any of the matters, and in fact, that none of his misconduct was intentional. (R.840,855,1140,1142.) The court also found that Mr. Bates violated only three rules: 1.4(a) (communication), 1.5(a) (safekeeping property), and 1.15(d) (safekeeping property) (R.840,855.) The most severe presumptive sanction for these violations is suspension. (R.1143.)

In the second phase, the trial court determined the appropriate sanction. Despite having lost or abandoned most of its alleged violations and despite the presumptive sanction's being a suspension, the OPC still sought disbarment. (R.856,1329.) After hearing evidence on the applicable aggravating and mitigating factors — and finding seven mitigating factors but only one aggravating factor — the trial court imposed a five-month suspension. (R.1143-45.) The OPC appealed.

2. Statement of Facts

When Mr. Bates graduated from law school in 2009, the economy was in a recession. (R.2283.) Mr. Bates believed the recession was in large part due to a mortgage foreclosure crisis, and he saw an opportunity to develop a practice serving clients in homeowner defense, bankruptcy, and criminal defense matters. (R.2283, 2285-86.) He started Wasatch Advocates in 2010, the year after he graduated. (R.1675.) The firm started small with only six employees. (R.1675.)

Mr. Bates' goal was to make his services affordable to an under-served population who could not have otherwise afforded a lawyer. (R.2285,1436.) To achieve that goal, he provided his clients the option of paying a fixed flat fee. (R.2285.) Nearly all of his clients chose a flat fee arrangement, and most of them paid less than \$2,500. (R.2330-31.) Unfortunately for Mr. Bates, he initially underestimated the work involved and undercharged most of his flat fee clients. (R.2290-93,2333.) Because of this, for most of his cases, he earned much less than the hourly rate he had assumed he would earn. (R.1434-35.)

2.1 Mr. Bates' Accounting Practices

Mr. Bates' accounting practices for Wasatch Advocates are at the center of this case. He had both a trust account and an operating account and understood that client funds and unearned fees should be deposited into the trust account. (R.1676,1679-80,1690,1743-44.) But he also understood that some fees were earned upon receipt and therefore could be deposited into the operating account. As a general rule, he believed smaller fixed flat fees could be considered earned upon

receipt.¹ (R.1679,1689.) He permitted many of his clients to pay their flat fees in monthly installments of \$1,000. (R.1777.) Regardless of the fee arrangement, Mr. Bates kept detailed records of the work he performed for each client. (R.2259-60.) With these records, Mr. Bates was able to calculate how much of the flat fee to return when a client decided to end the representation. (R.6784-85.)

In general, Mr. Bates transferred funds from the trust account into the operating account as he earned them. (R.1741.) To determine the amount he had earned, he reviewed several accounting documents. (R.2259-61.) But when he transferred the funds, he typically transferred less than the full amount that he believed he had earned. (R.1741.) In other words, when he made each transfer, he believed that he had earned "at least" the amount of the transfer. (R.1741.)

Mr. Bates reviewed his balances online six to ten times per month. (R.1677-78.) He routinely reviewed his bank records to determine whether funds had been deposited into the correct account. (R.1731,1733-34.) He also usually reconciled his accounts twice per month. (R.1807.) His receptionist made the firm's deposits, and Mr. Bates instructed her about which funds should be deposited into the trust account. (R.1734,1777-78,2232-33.)

But Wasatch Advocates grew quickly. Within a year, the firm had thirty-seven employees. (R.1695.) And as the firm grew, the accounting became more complicated. (R.1692.) Initially, Mr. Bates retained a certified public accountant to

¹ The OPC does not dispute which fees were earned upon receipt. (R.2386.)

perform monthly reconciliations, auditing, and tax work. (R.1687.) But even with the accountant, Mr. Bates soon realized that he did not have the experience, skill, or time to manage the firm's finances. (R.1692.) He hired an accounting firm, Plum Accounting, to do more frequent reconciliations and to educate Mr. Bates and his staff about accounting procedures. (R.1687-88,1692.)

Over time, Mr. Bates noticed accounting irregularities and realized that his receptionist sometimes incorrectly deposited client funds into the operating account instead of the trust account. (R.1711,1714,1735-36,1743-44.) When he noticed problems, he spoke with his receptionist to try to correct the issue. (R.1734.) But despite his increasing efforts over time, Mr. Bates continued to notice accounting problems. (R.1714.) As a result, and at Plum Accounting's suggestion, Mr. Bates hired a chief operating officer, Blynn Simmons, to help with the firm's accounting practices. (R.1714,1721-22.)

In January 2011, Mr. Bates created a business plan that projected the firm's future growth, needs, and profits. (R.2304-07,1345.) The plan included data about what—and when—clients were likely to pay their legal fees. (R.1345-46.) The plan predicted that the firm's operating account would be overdrawn temporarily in February and March of 2011. (R.2306.) In an effort to avoid the problem, Mr. Bates made a personal loan to the firm, and he also obtained a business loan secured by his home. (R.2306-07.) In fact, when necessary, both Mr. Bates and his wife loaned money to the firm from their retirement and

savings accounts—more than \$400,000 over the life of the firm. (R.2342-43,2350-51,1363.) It was Mr. Bates’ practice to ensure that, at all times, he had access to sufficient funds to satisfy all of his obligations. (R.2548.)

Despite such difficulties Mr. Bates successfully balanced the firm’s accounts. Indeed, when he wound up the firm in January of 2012, “the books balanced perfectly” — only \$16.82 remained unaccounted for. (R.831,2352,1432.)

2.2 The Bar Complaint

In March 2012, after dissolution of the firm, Mr. Bates received a bar complaint on behalf of a former Wasatch Advocates client, Jonathan Liti. (R.1662,1456.) Mr. Liti had hired Jennifer Smock, a former Wasatch Advocates attorney, to represent him in a bankruptcy proceeding. (R.1663.) Mr. Liti’s complaint indicated that Wasatch Advocates owed him money, but the amount he claimed in his complaint was incorrect. (R.853, Def. Ex. 52.) At the informal hearing, Mr. Bates learned the correct amount that Wasatch Advocates owed to Mr. Liti, \$1,391.61, and Mr. Bates promptly paid him. (R. 852-54,1459.)

2.3 The OPC’s Additional Allegations

After receiving Mr. Liti’s complaint, the OPC launched an investigation into Wasatch Advocates’ accounting practices. (R.2621.) In response to the OPC’s requests, Mr. Bates produced thousands of pages of documents, including client files, QuickBooks records, and business and personal bank statements. (R.1460.)

The OPC decided that Mr. Bates had violated seven rules in his representation of five clients and sought disbarment. (R.70-105.)

The matter proceeded before the trial court in two phases. (R.2635-36.) In the first phase, the trial court determined whether Mr. Bates violated the Utah Rules of Professional Conduct. (R.2635.) In the second phase, the trial court determined the appropriate sanction. (R.856.)

2.4 The Trial

The first phase of trial lasted four days. (R.1620,1914,2225,2462.) Because most of the OPC's allegations concerned Mr. Bates' accounting practices, Mr. Bates hired a forensic accountant, Dirk Rasmussen, to present expert testimony about Wasatch Advocates' accounts. (R.2319-20,2327-28.) After the first three days of trial, and after Mr. Rasmussen completed his testimony, the OPC withdrew two of its alleged rule violations. (R.841,2276.)

Ultimately, the OPC asked the trial court to disbar Mr. Bates based upon his conduct in only one of the matters, the F.A. Apartments matter. (R.1504-05.) The OPC argued that the other violations were "aggravating factors."² (R.2467.)

The court found that Mr. Bates violated three rules, but importantly, the court found that he did *not* misappropriate client funds in any matter.

(R.840,855,1140,1142.) The trial court declined to disbar Mr. Bates and instead

² It is unclear why the OPC discusses the other "aggravating" matters in its brief. There is not a sanction more severe than disbarment, the sanction the OPC seeks here based upon *only* the F.A. Apartments matter.

decided to impose a five-month suspension. (R.1145.) The only issue on appeal is whether that sanction was appropriate. (Op. Br. at 33-34.)

Below, Mr. Bates explains the evidence presented concerning the F.A. Apartments matter and each of the “aggravating circumstances” matters. To be clear, Mr. Bates’ conduct in the F.A. Apartments matter is the only conduct relevant to the question on appeal—i.e., whether he intentionally misappropriated client funds. Mr. Bates provides explanations of the other matters only to clear up any confusion that may arise from the OPC’s inclusion of them in its opening brief. (Op. Br. at 3-8, 12-15.)

2.4.1 The Trust Account Matters

With respect to the F.A. Apartments matter and the other so-called “trust account matters,” the OPC’s allegations were based upon funds that were improperly in Wasatch Advocates’ operating account instead of its trust account, and also upon temporary deficits in the trust account balance. The trust account matters are discussed below. The OPC claimed that, in connection with these clients, Mr. Bates violated rule 1.15(a) (safekeeping property) and 1.15(d) (safekeeping property). (R.90,96.)

2.4.1.1 The Liti Matter

At trial, the evidence showed that the firm’s failure to refund Mr. Liti’s money timely was the result of an accounting error combined with attorney turn-over. Mr. Liti had hired Jennifer Smock, an attorney at Wasatch Advocates, to

represent him in a bankruptcy matter. (R.1663-64.) As part of his bankruptcy, he was required to send his tax refund to the bankruptcy trustee. (R.1664,1666.) In March of 2011, Mr. Liti gave to Wasatch Advocates a check in the amount of \$2,980.80. (R.851-52,1666.) Mr. Bates' staff deposited the check into Wasatch Advocates' trust account, but incorrectly described the transaction on the accounting documents — there was no check number, the payee was blank, and the description was "undeposited funds." (R.852,1759,1766.) Mr. Bates was not involved in the Liti matter. (R.1759,2413.)

In July of 2011, Ms. Smock left the firm but continued to represent Mr. Liti and took his client file with her. (R.852.) In her resignation email, she notified Wasatch Advocates that client funds were being held in the trust account for a particular client, but she did not mention Mr. Liti's funds. (R.852.) Indeed, because of the accounting error, Mr. Bates did not know that any funds were being held in trust for Mr. Liti. (R.1759,1763.)

In December of 2011, the bankruptcy trustee sought funds from Mr. Liti's tax refund. (R.852.) Ms. Smock sent a letter to Ms. Simmons at Wasatch Advocates, directing Wasatch Advocates to pay \$1,589.19 to the trustee. (R.852; Def. Ex. 48.) Ms. Simmons promptly sent the check. (R.852; Def. Ex. 48.)

In October, the bankruptcy trustee sent a letter to Mr. Liti informing him that he was entitled to recover from Wasatch Advocates the remainder of his tax refund. (R.1666-67.) Mr. Liti then called and visited Wasatch Advocates several

times in an effort to collect his money, but Wasatch Advocates did not return his calls. (R.1667-68.)

Then, in a letter dated December 27, 2011, Ms. Smock directed Ms. Simmons to return to Mr. Liti the “remaining funds” of his tax refund. (Def. Ex. 50.) Ms. Smock stated, however, that she did not know the amount to which Mr. Liti was entitled. (Def. Ex. 50.)

Mr. Bates was out of town during these exchanges but returned in early January 2012 to begin the process of winding down the firm. (R.853.) On January 11, Mr. Liti filed his bar complaint. (Def. Ex. 52.) In his complaint, Mr. Liti mistakenly claimed that his tax refund was \$3,234.80, and he mistakenly claimed that Wasatch Advocates had failed to send to the trustee the amount requested in Ms. Smock’s letter. (R.853, Def. Ex. 52.)

The matter was set for a screening hearing, and at the hearing Mr. Bates learned the amount owed to Mr. Liti—\$1,391.61. (R.853,1457.) Mr. Bates paid Mr. Liti within a day of learning the amount. (R.1459.) He had not reached out to Mr. Liti before the hearing because he believed that doing so would be improper in light of the pending complaint. (R.1458-59.)

Although Mr. Bates paid to Mr. Liti the money owed, that amount was not in Wasatch Advocates’ trust account when Mr. Bates closed the firm’s accounts. (R.853.) The fact that the firm’s accounts balanced to within \$17, however, shows

that Wasatch Advocates had not spent Mr. Liti's funds but instead held them — erroneously — in the operating account. (R.1432,2352.)

The trial court found that Mr. Bates violated rule 1.15(a) “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.” (R.855.) The court found that Mr. Bates also violated rule 1.15(d) “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.” (R.855.)

But crucially for purposes of this appeal, the court found that Mr. Bates' mental state in the Liti matter was negligence, for which the presumptive discipline is public reprimand. (R.1141.) Mr. Bates did not misappropriate Mr. Liti's money. (R.1140.) On that point, the court found that the “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. . . . 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.” (R.1140-41.)

2.4.1.2 The F.A. Apartments Matter

Like the Liti matter, the problem in the F.A. Apartments matter was, in part, that Wasatch Advocates' trust account dipped below the amount Wasatch Advocates was holding in trust for F.A. Apartments. F.A. Apartments hired

Mr. Bates to defend against a foreclosure. (R.1783.) F.A. Apartments gave Wasatch Advocates \$28,000 to hold in trust and authorized Mr. Bates to use the funds only for particular costs for the apartments including utility bills and property management expenses. (R.1784-85.) Wasatch Advocates deposited the \$28,000 into its trust account. (R.1785.)

Mr. Bates made authorized expenditures out of the \$28,000, and kept detailed records about the remaining balance. (R.1789,1950-51.) At the end of the representation, F.A. Apartments received all the money it was due. (R.851,1139.) F.A. Apartments was satisfied with Mr. Bates' representation and expressed no concerns with Mr. Bates' accounting practices. (R.851.)

But the OPC's investigation revealed that F.A. Apartments' money had not always been held in the trust account. Indeed, the trust account balance was at times less than the amount Wasatch Advocates was holding for F.A. Apartments. (R.847-49.) The evidence showed that on three particular days in early 2011 — January 3, March 17, and June 30 — the balance of Mr. Bates' trust account was approximately \$2,000 less than the amount he should have been holding for F.A. Apartments. (R.847-48.) During those months, the average daily balance of the trust account covered a broad range — up to \$45,074 in January; \$45,652 in March; and \$34,039 in June. (R.848-49.) And on each of the three days that the trust account was deficient, there were sufficient funds in the operating account to

cover the approximately \$2,000 deficiency. (Ex.133 (operating account balance was \$25,926 on January 3, \$36,626 on March 17, and \$47,431 on June 30).)

The problem was complicated by the fact that, in August of 2011, a \$16,000 retainer from F.A. Apartments had been mistakenly deposited into the operating account rather than the trust account.³ (R.849.) Mr. Bates later learned about the mistake but did not transfer the unearned portion into the trust account until the following month. (R.1142,1838-39.)

In the meantime, on September 16—before he transferred F.A. Apartments' \$16,000 retainer out of operating and into trust—Mr. Bates made a transfer of \$20,000 out of the operating account for payroll. (R.850.) This transfer left the operating account with a negative balance, which Mr. Bates corrected three days later with the line of credit he had secured when he anticipated cash flow problems. (R.850.) After he drew on the line of credit, the balance of the operating account was more than \$76,000. (R.850.) Mr. Bates testified—and the court accepted as true—that “he did not wire the \$20,000 knowing that any portion thereof represented client funds held in trust.” (R.851.) Indeed, Mr. Bates testified that he had “no knowledge of any check or dollar of FA Apartments' funds,” either from the original \$28,000 or the \$16,000 retainer, “being used for any other purpose than on behalf of FA Apartments, and it was certainly not [his] intent to do so.” (R.2559.)

³ The full amount of the retainer was \$16,500. (R.849.) All but \$500 of it was mistakenly deposited into the operating account. (R.849.)

The trial court found that Mr. Bates violated rule 1.15(a) “by failing to hold funds belonging to FA Apartments in an account separate from his own account; failing to adequately safeguard FA Apartments’ funds; and failing to keep earned fees separate from unearned fees.” (R.855.)

With respect to the three shortfalls in the trust account, the court found that Mr. Bates’ conduct was negligent. (R.1141-42.) The court found that “the OPC failed to meet its burden of showing Bates knowingly or intentionally caused the apparent shortfalls in the approximate amount of \$2,000.” (R.1141.)

With respect to the payroll transfer from the operating account, the court found that Mr. Bates’ conduct was “knowing but unintentional misconduct that caused potential harm.” (R.1143.) The court noted that “[t]he undisputed evidence at trial showed that Bates expressly instructed his staff to deposit the funds into the trust account,” and that the OPC “failed to carry its burden of proving that Bates was aware of the incorrect deposit” until months later. (R.849,1141-42.) The court also found that Mr. Bates “had lines of credit available which significantly exceeded the amount of the transfer,” and that he “had drawn on these credit lines on multiple prior occasions—including four times in September both preceding and following the [transfer to payroll]—to fund Wasatch Advocates’ operating expenses, including payroll.” (R.1142.)

Like the Liti matter, the court found that Mr. Bates did not misappropriate F.A. Apartments’ money. (R.1141-42.) The court found that “[t]he OPC has not

met is 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." (R.1142.) The court correctly determined that the presumptive sanction was suspension. (R.1143.)

2.4.1.3 The Silver Stream & Pennington Matters

The Silver Stream and Pennington matters arose out of the same accounting practices. In both matters, the clients received all the money they were owed, but their checks were mistakenly issued from Wasatch Advocates' trust account instead of its operating account. (R.1771,1775.)

The mistake concerning Silver Stream was simple. Silver Stream Enterprises performed loan modification services for Wasatch Advocates on behalf of ten of Wasatch Advocates' home loan modification clients. (R.844,1775.) Wasatch Advocates sent a check for \$3,000 to Silver Stream for its work. (R.1775.) The check was written from Wasatch Advocates' trust account. (R.1775.)

Mr. Bates believed that the clients had money in the trust account because he believed that his staff had followed his instructions and deposited the clients' fixed payments into trust, in accordance with Utah law governing foreclosure cases. (R.1776-77.) Mr. Bates later learned that his staff had not followed his instructions and that the clients' money was not in the trust account. (R.1775-77.)

The problem in the Pennington matter was the same. Mr. and Mrs. Pennington hired Wasatch Advocates to handle some litigation concerning their home mortgage. (R.1769.) They selected a fixed flat fee payment plan, and they made small incremental payments that Wasatch Advocates deposited into its operating account. (R.1769-70.) The Penningtons later terminated the representation and asked for a refund of any unearned fees. (R.1771-72.) Ms. Simmons, the chief operating officer, determined the appropriate amount and sent a check to the Penningtons. (R.1771-72.) Ms. Simmons mistakenly sent the check from the trust account instead of the operating account. (R.1771.) Thus, the money sent to the Penningtons belonged to other clients. (R.1774-75.)

For these two matters, the trial court found that Mr. Bates violated rule 1.15(a) because he failed to maintain adequate records. (R.855.) Specifically, the court ruled that “[i]t does not appear to the court that Mr. Bates had any way of readily determining exactly how much was being held in his trust account for any given client.” (R.854-55.)

The court found that Mr. Bates’ mental state was negligence and that a private admonition was the appropriate presumptive sanction. (R.1140.) The court ruled that “[t]here was no misappropriation of funds in connection with these matters, although accounting mistakes were involved.” (R.1140.)

2.4.2 The Bangerter Matter

The Bangerter matter was more complicated. The OPC claimed that, in connection with the Bangerter matter, Mr. Bates violated six different rules—rule 1.2(a) (scope of representation and allocation of authority between client and lawyer), rule 5.1(a) (responsibilities of partners, managers, and supervisory lawyers), rule 1.16(d) (declining or terminating representation), rule 5.3(b) (responsibilities regarding nonlawyer assistants), rule 1.4(a) (communication), and rule 1.15(a) (safekeeping property). (R.82,85,90,99,102,104.)

Mr. Bangerter hired an attorney at Wasatch Advocates to represent him in a lawsuit against a lender. (R.832,2006.) Mr. Bangerter's goal was to forestall the lender's foreclosure, and Wasatch Advocates succeeded in getting a temporary restraining order forestalling the foreclosure. (R.832,833.) The lender then filed a motion to dismiss Mr. Bangerter's case. (R.834.) The lender argued that Mr. Bangerter's claims were judicially estopped because he had failed to schedule them in his Chapter 7 bankruptcy case. (R.834.) Mr. Bangerter had not disclosed the bankruptcy to Wasatch Advocates. (R.835,2024-25.)

In the meantime, as the case proceeded, Mr. Bangerter repeatedly failed to respond to Wasatch Advocates' calls, emails, and written letters. (R.833,834,2025-26.) He also failed to make his required installment payments to Wasatch Advocates. (R.834,2030-31.) Wasatch Advocates sent Mr. Bangerter a letter advising him that the firm would terminate the representation if Mr. Bangerter did not pay his legal fees. (R.834,2030-31.)

Despite Mr. Bangerter's failure to pay, Wasatch Advocates filed an opposition to the motion to dismiss. (R.835,2031-32.) But a week before the hearing on the motion, the Wasatch Advocates attorney who had been handling the case left the firm. (R.835.)

When Mr. Bates reviewed the file, he discovered that Mr. Bangerter's claims were indeed meritless. (R.2024-25.) His claims were based upon a contract that, because of the bankruptcy discharge, no longer existed. (R.2025,2037,2395.) Mr. Bates believed he could not oppose the lender's motion to dismiss without violating rule 11 of the Utah Rules of Civil Procedure. (R.2025,2269.)

Mr. Bates asked his secretary to contact opposing counsel and see if they would stipulate to dismiss the case without prejudice. (R.835,2026.) He did not first consult with Mr. Bangerter because, based on Mr. Bangerter's repeated refusal to communicate with Wasatch Advocates, Mr. Bates believed further efforts would be futile. (R.836,2025-26,2034.)

Mr. Bates' secretary sent opposing counsel a proposed stipulated motion. (R.836,2038.) Opposing counsel revised the motion to dismiss the claims *with* prejudice and returned it along with a proposed order. (R.836,2039.) Mr. Bates' secretary filed the motion with his electronic signature. (R.836-37.)

After the court entered the dismissal, Mr. Bangerter hired a different attorney to file a motion under rule 60(b) to set aside the judgment. (R.836,838,2044.) The motion alleged that Mr. Bates committed a fraud upon the

court. (R.838.) The lender opposed the motion and in support, Mr. Bates supplied an affidavit denying the fraud allegation. (R.839.)

The court agreed that “Mr. Bangerter’s prior bankruptcy filing was fatal to his assertion of the claims in that case.” (R.837.) The court ruled that “Mr. Bangerter was not harmed or prejudiced in any way by the dismissal of his case because the claims asserted therein were meritless.” (R.837.) Of all of the OPC’s allegations, the trial court found that Mr. Bates violated only rule 1.4(a) “by not obtaining Mr. Bangerter’s informed consent prior to dismissing his case.” (R.840.)

The court found that Mr. Bates’ mental state in the Bangerter matter was negligence and that the appropriate sanction was a private admonition.⁴ (R.1139-40.) The court noted that Mr. Bangerter “suffered no harm.” (R.1139.)

2.4.3 The Aggravating and Mitigating Factors

After determining that suspension was the most severe presumptive sanction applicable to Mr. Bates’ conduct, the court heard evidence about the applicable aggravating and mitigating factors listed in rule 14-607. (R.1143.)

The court found that only one aggravating factor applied – a pattern of misconduct. (R.1143) Mr. Bates agreed that his rule violations constituted a pattern. (R.1144.) But the court noted that the conduct occurred during the last six months of Wasatch Advocates’ existence, a period over which the firm

⁴ The court ruled that Mr. Bates’ conduct in the Bangerter matter was consistent with other conduct, occurring during the same timeframe, for which he received five private admonitions. (R.1139-40.)

“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.” (R.1143-44.)

In contrast, the court found that seven mitigating factors applied:

Absence of a prior record of discipline – The court found that Mr. Bates had no record of prior discipline and that “[a]ll of the conduct at issue in this case occurred during the same timeframe.” (R.1143.) The OPC does not challenge this finding. (Op. Br. at 28-33.)

Absence of a dishonest or selfish motive – The court found that Mr. Bates did not have a dishonest or selfish motive for his misconduct. (R.1144.) The court found that Mr. Bates “paid himself a modest salary” and “ended up losing a substantial amount of money as a result of the operation and winding down of Wasatch Advocates.” (R.1144.) As for the F.A. Apartments matter, Mr. Bates testified that he did not intentionally use F.A. Apartments’ funds. (R.1455.) And because F.A. Apartments was struggling to pay its fees, he (i) reduced his hourly rate from \$250 to \$150, (ii) deferred billing, and (iii) decided not to collect the 10% contingent fee to which he was entitled “because [he] knew they didn’t have it.” (R.1455-56.) The OPC does not challenge this finding. (Op. Br. at 28-33.)

Timely good faith effort to make restitution – The court found that Mr. Bates “made a good faith effort to rectify the consequences of his conduct by making restitution to Liti.” (R.1144.) Although the court concluded that Mr. Bates

“probably could have and probably should have refunded the money more promptly than he did,” the court found that the delay was not “meaningful to the question presented.” (R.1141.) The evidence showed that after receiving the bar complaint, Mr. Bates delayed only because he did not know the correct amount Mr. Liti was owed, and he did not think he should contact Mr. Liti while the complaint was pending. (R.1459.) Indeed, Mr. Bates returned Mr. Liti’s money within a day of learning, at the hearing, the correct amount. (R.1458-59.)

Full and free disclosure to the disciplinary authority – The court “f[ound], and the OPC does not dispute, that Bates made full disclosure and was cooperative at all times during these disciplinary proceedings.” (R.1144.) Mr. Bates produced everything the OPC requested – “every bank statement, thousands of pages of documents, [his] personal statements, the firm’s bank statements, the Quick Books records, the client files, everything.” (R.1460.) He also identified all witnesses with relevant knowledge. (R.1460.)

Inexperience in the practice of law – The court found that Mr. Bates’ inexperience in the practice of law was the “most significant[]” mitigating factor. (R.1144.) Specifically, it found that Mr. 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.)

Good character or reputation – The court found that Mr. Bates possessed a good reputation and character. (R.1145.) The court considered this factor to be less significant than the others, however, because Mr. Bates had been practicing for only two years. (R.1145.) Despite his short time practicing law, Mr. Bates had handled important cases, taught CLE seminars on laws related to foreclosures, served on a CLE panel about the mortgage crisis, had been interviewed for a news article concerning mortgage issues, and had worked with nonprofits and the State to try to change the foreclosure laws to help homeowners. (R.1465-67.) In addition, two senior members of the bar who had mentored Mr. Bates testified that he was a person of good character. (R.1145,1385,1410.)

Remorse – The court found that Mr. Bates “expressed remorse for his actions.” (R.1144.) Indeed, Mr. Bates testified that he “made a number of mistakes and had too much confidence in [his] own abilities and [had] been humbled through this process” that led him to these proceedings. (R.1473.)

The court weighed the aggravating factor and the mitigating factors against the presumptive sanction of suspension. (R.1145.) The court “conclude[d] that the balancing test tips in Bates’ favor warranting a slight downward departure from the six-month suspension ‘generally’ imposed under Rule 14-525.” (R.1145.) After weighing the evidence and factors, the court found that a five-month suspension was the most appropriate sanction. (R.1145.)

Summary of the Argument

The OPC asserts that Mr. Bates “knowingly transferred client funds out of his trust account and used those funds for his firm’s payroll.” (OPC Br. at 16.) As support for this assertion, the OPC points to evidence that Mr. Bates knowingly transferred funds, not that he knowingly transferred *client* funds. And the funds used for payroll came from the operating account, not the trust account. While the operating account mistakenly had some client funds in it, that only supports the trial court’s finding that Mr. Bates did not knowingly transfer *client* funds, but instead knowingly transferred funds that happened to be client funds.

The difference is important, and dispositive. Under the operative rules, the failure to keep client funds separate warrants only a suspension. Standards for Imposing Lawyer Sanctions (SILS) R. 14-605(b). Disbarment is not appropriate for a lawyer’s negligent failure to keep client funds separate. The plain language of the relevant rules makes this clear.

Disbarment is appropriate under rule 14-605 only when the lawyer knowingly engages in misconduct under rule 8.4(a), with the “intent to benefit the lawyer,” and causes “potentially serious injury” to a party. SILS R. 14-605(a)(1). A lawyer engages in misconduct under rule 8.4(a) when the lawyer violates one of the other rules of professional conduct. Mr. Bates violated rule 8.4(a), but the OPC failed to prove either that Mr. Bates intended to benefit himself or that his actions caused a potentially serious injury.

The rules define the term “intent” as “the conscious objective or purpose to accomplish a particular result.” SILS R. 14-601(f). The trial court found that, when Mr. Bates transferred \$20,000 for payroll, he failed to keep client funds in a trust account in violation of rule 1.15 of the Utah Rules of Professional Conduct, but Mr. Bates did not “know[] that any portion thereof represented client funds held in trust.” (R.851.) For that reason, the trial court found that Mr. Bates did not act with the conscious objective or purpose to benefit himself because any mishandling of client funds was the result of negligence. The OPC’s repeated assertion that Mr. Bates intended to transfer funds is beside the point, as the OPC’s interpretation blurs the line between merely failing to keep client funds separate and the type of misappropriation that warrants disbarment.

The rules define the phrase “potential injury” as the “harm to a client . . . 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.” SILS R. 14-601(h). Because no client was injured, the OPC had to prove a foreseeable potential *serious* injury that warrants disbarment. But the harm here was not reasonably foreseeable to Mr. Bates because his finances were such that there was never any risk that a client would not be repaid, let alone that it was probable that a client would not be repaid. And if there had been such a risk, the injury would not be “serious” under any plausible definition of that term. This court should affirm.

Argument

The evidence supports the trial court's finding that Mr. Bates' misuse of F.A. Apartments' funds was "knowing but unintentional." (R.1142-43.) Under the applicable rules, the presumptive sanction for knowing but unintentional misconduct is suspension—not disbarment—even when the misconduct at issue is misappropriation.

The OPC believes that because Mr. Bates knowingly made transfers out of his accounts, he necessarily understood that he was using client funds and should therefore be disbarred. That argument is neither supported by the record nor justified by the rules. It confuses negligence with intentional conduct.

To warrant disbarment, a lawyer must commit misconduct with the "conscious objective" to benefit himself. His conduct must cause "serious injury or potentially serious injury" to the client. Mr. Bates had no such intent and his conduct caused no such injury. In addition, substantial mitigating circumstances apply. Suspension is the appropriate sanction. This court should affirm.

1. Suspension Is the Appropriate Sanction

The evidence supports the trial court's finding that Mr. Bates misused F.A. Apartments' funds unintentionally, and that suspension is the appropriate presumptive sanction. But even if this court disagrees, suspension would still be the appropriate presumptive sanction because F.A. Apartments suffered no actual or potential harm. This court can affirm on either ground.

1.1 Disbarment Is Appropriate Only When the Lawyer Knowingly Misuses Client Funds with the Conscious Objective to Benefit Himself

Under the Standards for Imposing Lawyer Sanctions (SILS), disbarment is appropriate only in the most serious cases where the lawyer's misconduct was intentional. The standards are set forth in rules 14-601 through 14-607 of the Rules Governing the State Bar. The rules provide that the appropriate sanction depends upon "the duty violated," "the lawyer's mental state," "the potential or actual injury caused by the lawyer's misconduct," and "the existence of aggravating or mitigating factors." SILS R. 14-604.

The presumptive sanctions for misconduct are listed in rule 14-605, and they range from disbarment to admonition. The rule provides that the presumptive sanctions are "generally appropriate" if there are no aggravating or mitigating circumstances. SILS R. 14-605. Some aggravating and mitigating factors are listed in rule 14-607. In short, after a finding of lawyer misconduct, a trier of fact will typically (i) consider the factors and determine the presumptive sanction, and then (ii) weigh the aggravating and mitigating circumstances to determine whether to apply a greater or lesser sanction. *In re Discipline of Crawley*, 2007 UT 44, ¶ 20, 164 P.3d 1232.

The OPC's argument in this appeal concerns rule 14-605(a), which provides the circumstances under which disbarment is the presumptive sanction.

Under the rule, disbarment is appropriate only where the lawyer's misconduct was intentional. SILS R. 14-605(a). In relevant part,⁵ the rule provides as follows:

(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

SILS R. 14-605(a) (emphasis added). The rules define "intent" as "the conscious objective or purpose to accomplish a particular result." SILS R. 14-601(e). Thus, a lawyer's misappropriation of client funds warrants disbarment when the lawyer knowingly misuses client funds with the conscious objective to benefit himself or another. SILS R. 14-601(e), 14-605(a)(1).

This court has recognized that disbarment is "the harshest sanction available in the realm of attorney misconduct—the proverbial professional death-sentence." *In re Discipline of Lundgren*, 2015 UT 58, ¶ 11, 355 P.3d 984 (internal quotation marks omitted). And this court has recognized how the intent element supports the observation that "intentional misappropriation of client

⁵ The OPC concedes that rule 14-605(a)(2), which applies when the misconduct involves "serious criminal conduct," does not apply here. (Op. Br. at 25.) As explained more fully in part 1.4.1 below, the remaining subsection, (a)(3), does not apply here because it applies only to professional misconduct "other" than the misconduct referenced in (a)(1). SILS R. 14-605(a)(3). Because Mr. Bates violated rule 8.4(a) of the Utah Rules of Professional Conduct, his misconduct is governed by subsection (a)(1) of rule 14-605 and subsection (a)(3) does not apply.

funds is one of, if not the most severe kind of misconduct in the legal profession.” *Id.* The severity of the sanction matches the severity of the misconduct.

As this court put it, the sanction for intentional misappropriation is severe because “the corrosive effect of such acts tends to undermine the foundations of the profession and the public confidence that is essential to the functioning of our legal system.” *In re Discipline of Babilis*, 951 P.2d 207, 217 (Utah 1997). This explains why disbarment is reserved for cases of *intentional* misconduct—not for cases of knowing or negligent misconduct. SILS R. 14-605.

Consistent with the rules, this court has consistently imposed disbarment in cases where the lawyer made a conscious decision to use client funds for the lawyer’s personal benefit. For example, in *In re Discipline of Corey*, the lawyer deliberately used \$50,000 of his client’s settlement funds to cover his firm’s operational expenses for four months. 2012 UT 21, ¶¶ 1, 7, 274 P.3d 972. He tried several unsuccessful plans to hide his misappropriation from his client, and failed to repay the funds when the client demanded the balance. *Id.* ¶ 1. The client eventually sued the lawyer to recover her funds. *Id.* ¶ 7.

The OPC initiated a disciplinary action against the lawyer after the client’s lawsuit was resolved. *Id.* ¶ 8. At trial, the lawyer argued that his conduct was unintentional “because there was no proof as to how exactly he used the money.” *Id.* ¶ 27. This court rejected his argument, holding that “such proof is

unnecessary. 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 that money in a manner chosen by him and not the client." *Id.* Importantly, the lawyer "d[id] not assert that he misdeposited [the client's] funds or that he unwittingly drew against" his operating account. *Id.* ¶ 25. This court concluded that disbarment was appropriate because the lawyer "knew that every time he drew a check against that account balance, he was using his client's funds to cover firm expenses." *Id.* ¶¶ 25, 28.

Similarly, in *In re Discipline of Babilis*, the lawyer took more than \$78,000 from the clients' estate without authorization—he wrote checks for his own benefit, converted savings bonds to his own use, took unauthorized money from the sale of real estate, and overbilled several clients. 951 P.2d 207, 209-10 (Utah 1997). The clients eventually obtained new counsel and settled their claim against the lawyer but recovered only \$30,000. *Id.* at 210. This court found that the record was "replete with examples of deceit, dishonesty, and misrepresentation, all motivated by [the lawyer's] desire to enrich himself." *Id.* at 216. Disbarment was therefore the appropriate sanction. *Id.*

In *In re Discipline of Lundgren*, the lawyer held \$2,500 of settlement funds for the client in order to pay her outstanding medical bills. 2015 UT 58, ¶ 2. Instead of paying the bills, the lawyer took the client's money for his personal

use. *Id.* ¶ 5. Six months later, the client requested an accounting. *Id.* ¶ 3. When the lawyer did not respond, the client filed a bar complaint. *Id.* ¶ 4. At trial, the lawyer admitted that, for years, he had taken client funds from the trust account to cover business and personal expenses. *Id.* ¶ 5. This court agreed that disbarment was the appropriate sanction. *Id.* ¶ 25.

In *In re Discipline of Grimes*, the lawyer left his firm, taking a client and the client's remaining retainer—a little more than \$7,000—with him. 2012 UT 87, ¶ 3, 297 P.3d 564. The lawyer deposited the retainer into his personal account and spent it for his personal use. *Id.* ¶ 7. The next year, he stopped communicating with the client and refused to return the unused portion of the retainer. *Id.* ¶ 4. Again, this court held that disbarment was appropriate. *Id.* ¶ 41.

And in *In re Discipline of Johnson*, the lawyer held nearly \$29,000 of settlement funds in trust for the client while, for more than a year, the client disputed the lawyer's authority to have settled the case. 2001 UT 110, ¶ 2, 48 P.3d 881. Eventually, two years after the lawyer received the funds, the client demanded payment. *Id.* The lawyer refused to return the funds and the client filed a bar complaint. *Id.* At trial, the lawyer argued that the client was not entitled to the funds because the client had insisted that, because the lawyer did not have authority to settle the case, the lawyer could "do as [he] wish[ed]" with the funds. *Id.* ¶¶ 2, 11. The lawyer admitted that he used the client's money for

personal or business purposes. *Id.* This court agreed with the trial court that disbarment was appropriate. *Id.* ¶ 14.

These are the types of cases in which disbarment is appropriate.

1.2 Suspension Is Appropriate When the Lawyer Unintentionally Misuses Client Funds

The rules provide a less harsh sanction when the lawyer's conduct was *not* intentional. When the lawyer acted knowingly but unintentionally, suspension is instead appropriate:

(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.

SILS R. 14-605(b). The rules define "knowledge" as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." SILS R. 14-601(f). "Thus, the difference between the sanctions of disbarment and suspension . . . lies in the attorney's motive and in the relative severity of the conduct." *Babilis*, 951 P.2d at 216. In short, "[w]hen a lawyer knowingly engages in professional misconduct

without the intent to benefit himself or another . . . the presumptive sanction is merely suspension.” *Corey*, 2012 UT 21, ¶ 22 (emphasis added).

It makes sense that suspension, rather than disbarment, is appropriate in cases involving *unintentional* misconduct. Unintentional conduct does not “undermine the foundations of the profession and the public confidence” in the same way. *Babilis*, 951 P.2d at 217. Unintentional conduct does not warrant “the proverbial professional death-sentence.” *Lundgren*, 2015 UT 58, ¶ 11 (internal quotation marks omitted).

But though less harsh than disbarment, suspension remains a severe sanction. As this court has recognized, “[a]s a practical matter, even a short suspension from the practice is sufficient in most cases to destroy an attorney’s practice” and can therefore be “tantamount to disbarment.” *In re Complaint Against Smith*, 872 P.2d 447, 450 (Utah 1994) (internal quotation marks omitted).

Consistent with the rules in Utah, opinions from other jurisdictions recognize that disbarment is not warranted when an attorney misappropriates funds unintentionally or inadvertently. *E.g.*, *In re Anderson*, 778 A.2d 330 (D.C. 2001); *Florida Bar v. Mason*, 826 So. 2d 985 (Fla. 2002) (per curiam); *Attorney Grievance Comm’n of Maryland v. Cafferty*, 831 A.2d 1042, 1057 (Md. 2003); *In re Librizzi*, 569 A.2d 257 (N.J. 1990) (per curiam). The “caselaw distinguishes between the intentional misappropriation of client funds and the

misappropriation of client funds resulting from negligent or otherwise unintentional behavior.” *Cafferty*, 831 A.2d at 1057.

In cases where the attorney misappropriated client funds “without the clear intent to defraud his clients,” suspension is the appropriate sanction. *Id.* In many of these cases, temporary deficits in the lawyer’s trust account were revealed by a random audit, not a client complaint.

For example, in a case from New Jersey, the lawyer unintentionally spent client funds after a he wrote a check from his trust account before ensuring that the client’s check – which was intended to cover the amount – cleared. *In re Moras*, 619 A.2d 1007, 1008-09 (N.J. 1993). The client needed a trust account check to set aside a judgment of foreclosure on her property, so the client gave the lawyer two checks totaling \$17,900, and asked the lawyer to write a check from the trust account for that amount. *Id.* at 1008. But the client had insufficient funds to cover her checks. *Id.* The lawyer’s check cleared, however, and because the client’s funds were not in the trust account as intended, the lawyer’s check necessarily “invad[ed]” the funds of other clients. *Id.* at 1009.

The problem was revealed in an audit by the Office of Attorney Ethics the following year. *Id.* at 1008. By then, the client had paid all but \$2,500 of the money the lawyer owed, and the lawyer had paid the difference out of his own funds to make up for the shortage. *Id.* at 1009. The Supreme Court of New Jersey held that the lawyer acted recklessly, but that the record did not demonstrate

that he knew that the client's check was not good. *Id.* at 1010. Thus, the lawyer's conduct "did not constitute knowing misappropriation of clients' funds." *Id.* The court therefore imposed a sanction of suspension, not disbarment. *Id.* at 1011.

Opinions from other jurisdictions also recognize that a lawyer has not intentionally misappropriated client funds merely because the balance of his bank accounts has dipped below the amount he should be holding in trust for his clients. For example, in a case from Florida, an audit revealed that on at least three dates, the lawyer's trust account balance was lower than the amount she should have been holding for a client. *Mason*, 826 So. 2d at 986. The court held that the case was "clearly distinguishable from the egregious misappropriation cases" because the lawyer's "errors here were due to mistakes in accounting practices. She was not attempting to intentionally steal from her clients, and there is no evidence that clients ultimately sustained any loss." *Id.* at 988.

The court also noted that, although the lawyer "made very serious mistakes due to her inexperience in managing trust accounts, she did everything within her control" — including hiring a CPA to audit accounts and give advice — "to immediately address the problems once she was aware of them." *Id.* The court held that suspension was the appropriate sanction instead of disbarment because she "did not intentionally misappropriate client funds." *Id.* at 988, 990.

The District of Columbia Court of Appeals reached a similar conclusion in *In re Anderson*. 778 A.2d 330, 342 (D.C. 2001). In *Anderson*, the lawyer held client

funds in trust to pay the client's medical bill. *Id.* at 333. The lawyer ultimately paid the medical bill – albeit late – but in the meantime, the balance of his trust account dipped “repeatedly” below the amount he should have been holding. *Id.* at 333, 334. The lawyer testified that he had “simply forgotten” to pay the bill and that, because of his unsophisticated accounting practices, he did not realize his mistake. *Id.* at 333. The court held that his conduct was negligent – not intentional – and therefore imposed a sanction of suspension rather than disbarment. *Id.* at 337, 338 & n.4, 342.

And in *Librizzi*, a random compliance audit revealed a \$25,000 shortfall in the trust account. 569 A.2d at 258. Upon learning of the shortfall, he immediately borrowed money to replenish the funds. *Id.* The shortfalls occurred because the lawyer had misdeposited funds into his operating account, then issued checks from the trust account, causing overdrafts. *Id.* at 259-60.

The Office of Attorney Ethics argued that the lawyer had “systematically misappropriated funds” and that disbarment was appropriate, but the Supreme Court of New Jersey disagreed. *Id.* at 258, 260-61, 263. The court held that suspension was instead appropriate. *Id.* at 263. Central to the court's decision was the fact that the lawyer had three lines of credit available to him and that he had obtained “continuous loans and renewals.” *Id.* at 260. The court found that the short window between the overdraft and the lawyer's replenishing the funds with credit – only eleven days – “weigh[ed] in [the lawyer's] favor.” *Id.*

1.3 Mr. Bates Did Not Knowingly Misappropriate F.A. Apartments' Funds with the Conscious Objective to Benefit Himself

The OPC asserts that “[i]t 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.” (Op. Br. at 16 (emphasis added).) But the trial court’s finding did not rest merely upon the lack of harm to any client. Instead, the court’s determination that Mr. Bates did not misappropriate funds rests, correctly, upon its factual finding regarding *Mr. Bates’* knowledge—and lack thereof—just as the rules require. Because Mr. Bates did not misuse client funds with the “conscious objective” to benefit himself, disbarment is not appropriate.

Shortfalls - With respect to the three instances upon which there were shortfalls in the trust account, the court correctly found that Mr. Bates’ conduct was negligent. (R.1141-42.) The court ruled that “the OPC failed to meet its burden of showing Bates knowingly or intentionally caused the apparent shortfalls in the approximate amount of \$2,000.”⁶ (R.1141-42.)

⁶ The OPC claims that the trial court found that Mr. Bates acted unintentionally because the court mistakenly attributed facts relevant to the payroll transfer with facts relevant to the shortfalls. (Op. Br. at 17.) Indeed, in its discussion of the shortfalls, the court mentioned that Mr. Bates did not initially know that the \$16,000 retainer had been mistakenly deposited into the operating account. (R.1142.)

This mistake is understandable given the way the OPC consistently conflated the two issues throughout the proceedings in its amended complaint, its brief on sanctions, its questioning of Mr. Bates at trial, and its opening brief to this court. (R.86-90,693-98,1783-1871; Op. Br. at 8-12.) Regardless, the mistake is irrelevant because, as discussed above, ample evidence supports the court’s findings about Mr. Bates’ mental state.

The evidence supports the trial court's finding. Indeed, the evidence shows that Mr. Bates intended to *safeguard*—*not* to misappropriate—F.A. Apartments' funds. He made authorized expenditures out of the \$28,000 and kept detailed records about the remaining balance. (R.1950-51,1789.) At the end of the representation, he returned to F.A. Apartments all the money it was due. (R.851,1139.) And Mr. Bates testified that he had "no knowledge of any check or a dollar of FA Apartments' funds . . . being used for any other purpose than on behalf of FA Apartments, and it was certainly not [his] intent to do so." (R.2559.)

The OPC argues that Mr. Bates' conduct was intentional because Mr. Bates "knowingly made large transfers out of the trust account" even though he "frequently monitored his bank accounts and had numerous ways of tracking funds." (Op. Br. at 18.) Similarly, the OPC highlights Mr. Bates' affirmative answers to questions about whether he "could" have looked at records that would have revealed the shortfalls. (Op. Br. at 18-19.) But this evidence shows that Mr. Bates had the *opportunity* to know that his transfers would cause a shortfall, not that he actually knew they would. In effect, the OPC argues that the rules require the disbarment of any lawyer whose trust account balance dips—even momentarily—below the amount of client funds she is holding in trust.

But the rules do not impose strict liability as the OPC asserts. Instead, to warrant disbarment, Mr. Bates would have had to make the transfers with "the

conscious objective or purpose” to misuse F.A. Apartments’ funds. SILS R. 14-601, -605(a)(1). No evidence supports that assertion.

Instead, the evidence shows that although Mr. Bates knowingly transferred funds, he did not understand that he was transferring funds belonging to F.A. Apartments. He therefore acted with “knowledge” as the rules define that word: “the conscious awareness of the nature or attendant circumstances of the conduct *but without the conscious objective or purpose to accomplish a particular result.*” SILS R. 14-601(f) (emphasis added).

Suspension was therefore the appropriate sanction. SILS R. 14-605(b). Indeed, “[w]hen a lawyer knowingly engages in professional misconduct *without* the intent to benefit himself or another . . . the presumptive sanction is merely suspension.” *Corey*, 2012 UT 21, ¶ 22.

Payroll transfer – The court also made findings about the transfer Mr. Bates made out of the operating account into payroll, thereby temporarily depleting the \$16,000 retainer Mr. Bates should have been holding for F.A. Apartments. The court correctly found that Mr. Bates’ conduct was “knowing but unintentional misconduct that caused potential harm.” (R.1143.)

The evidence supports the trial court’s finding. Indeed, the evidence shows that Mr. Bates knew he was transferring the funds, but *not* that he did so “with the intent to benefit [himself] or another,” or that he did so with the intent to

commit misconduct. SILS R. 14-605(a)(1), (3). In fact, the evidence shows that Mr. Bates was working to *avoid* committing misconduct.

The evidence shows that Mr. Bates sought to maintain accurate accounting records and ensure that checks were deposited into the correct accounts. He routinely reviewed bank records and reconciled his accounts. (R.1677-78,1807.) When the firm's accounting outgrew his accounting skills, he hired a certified public accountant, and then an accounting firm, to do more frequent reconciliations and to educate him and his staff about accounting procedures. (R.1687-88,1692.) Despite these efforts, Mr. Bates continued to notice accounting irregularities, and that checks were sometimes deposited into the wrong account. (R.1711,1714,1735-36,1743-44.) He worked with his staff to try to correct the problem. (R.1714,1721-22,1734.) And when that failed, he hired a chief operating officer to help with the firm's accounting. (R.1714,1721-22.)

The \$16,000 retainer was one of the checks that was mistakenly deposited into the wrong account—operating rather than trust. (R.849.) Mr. Bates was not initially aware of the mistake. (R.1142.) Indeed, the court noted that “[t]he undisputed evidence at trial showed that Bates expressly instructed his staff to deposit the funds into the trust account,” and that the OPC “failed to carry its burden of proving that Bates was aware of the incorrect deposit” until months later. (R.849,1141-42.)

Eventually, Mr. Bates became aware of the mistake. (R.1141.) Weeks later, he transferred \$20,000 out of operating and into payroll, leaving the operating account with a negative balance. (R.1141-42.) But when he made the transfer, he did not know he had depleted F.A. Apartments' funds — again, he testified that he had “no knowledge of any check or dollar of FA Apartments' funds . . . being used for any other purpose than on behalf of FA Apartments, and it was certainly not [his] intent to do so.” (R.2559.)

Evidence about the line of credit Mr. Bates secured also supports the trial court's conclusion that Mr. Bates did not transfer the funds with the intent to benefit himself. Mr. Bates corrected the deficit in the operating account three days later with the line of credit he had secured when he had anticipated cash flow problems months earlier. (R.850.) By the end of the month, the balance of his operating account was more than \$76,000.

The court found this evidence to be dispositive. (R.1142.) In concluding that Mr. Bates' conduct was “knowing but unintentional,” the court found that Mr. Bates “had lines of credit available which significantly exceeded the amount of the transfer,” and that he “had drawn on these credit lines on multiple prior occasions — including four times in September both preceding and following the [transfer to payroll] — to fund Wasatch Advocates' operating expenses, including payroll. (R.1142.) The court then found that “[t]he 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." (R.1142-43); *Librizzi*, 569 A.2d at 260 (holding that lawyer who unintentionally misappropriated client funds while he had access to and regularly used lines of credit, and replenished the funds eleven days after using them, was entitled to suspension rather than disbarment).

The OPC asserts that Mr. Bates' conduct was intentional because he "knowingly transferred \$20,000," overdrawing the operating account, even though he knew he was holding F.A. Apartments' retainer in that account. (Op. Br. at 23.) The OPC then concludes that "F.A. Apartment funds were now in the payroll account where they were subsequently spent. That is intentional misappropriation." (Op. Br. at 23.)

But again, and unlike this court's decisions discussing intentional misappropriation, there is no evidence that Mr. Bates acted with a "conscious objective" to misuse F.A. Apartments' funds. Instead, just like with the shortfalls, Mr. Bates' conduct demonstrates "knowledge" — "the conscious awareness of the nature or attendant circumstances of the conduct *but without the conscious objective or purpose to accomplish a particular result.*" SILS R. 14-601(f) (emphasis added). Indeed, in *Corey*, this court seems to have anticipated a situation exactly like this when it noted that the lawyer "d[id] not assert that he misdeposited [the client's] funds or that he unwittingly drew against his newly inflated operational

account.” 2012 UT 21, ¶ 25. But here, that is exactly what Mr. Bates did.

Suspension is the appropriate sanction. SILS R. 14-605(b)(1).

Opinions involving unintentional misappropriation from other jurisdictions support this conclusion. Like those cases, Mr. Bates knowingly transferred funds without realizing that he was using client funds. *E.g., Anderson*, 778 A.2d at 333, 334; *Mason*, 826 So. 2d at 986, 988; *Librizzi*, 569 A.2d at 258-60; *Moras*, 619 A.2d at 1008-09. Like those cases, Mr. Bates quickly remedied the deficit. *E.g., Mason*, 826 So. 2d at 988; *Librizzi*, 569 A.2d at 258. Like those cases, Mr. Bates’ misconduct was revealed during an investigation initiated by the OPC, *not* the client whose funds were affected. *E.g., Moras*, 619 A.2d at 1008; *Librizzi*, 569 A.2d at 258. And like those cases, F.A. Apartments suffered no harm. *E.g., Anderson*, 778 A.2d at 333, 334; *Librizzi*, 569 A.2d at 258. Indeed, F.A. Apartments was satisfied with Mr. Bates’ representation and expressed no concerns with his accounting practices. (R.851.)

Like the lawyer in *Mason*, Mr. Bates’ errors “were due to mistakes in accounting practices. [He] was not attempting to intentionally steal from [his] clients, and there is no evidence that clients ultimately sustained any loss.” 826 So. 2d. at 988. And although he “made very serious mistakes due to [his] inexperience in managing trust accounts, [he] did everything within [his] control” — including hiring a CPA to audit her accounts and give him bookkeeping advice — “to immediately address the problems once [he] was

aware of them.” *Id.* Like the lawyers in *Mason* and the other unintentional misappropriation cases, a suspension was appropriate for Mr. Bates, not disbarment.

1.4 Mr. Bates’ Conduct Also Did Not Cause Serious or Potentially Serious Injury

Disbarment is the presumptive sanction in misappropriation cases only if the lawyer’s misconduct was intentional *and* caused “serious or potentially serious injury” to the client. SILS R. 14-605(a)(1). Because Mr. Bates had access to funds sufficient to cover the amounts he held for F.A. Apartments, his conduct never posed a risk of potentially serious injury. But because the trial court found that Mr. Bates’ misconduct was unintentional, it did not also consider whether F.A. Apartments suffered potentially serious injury. The lack of potentially serious injury therefore serves as an alternative basis for this court to affirm the trial court’s decision. Before demonstrating why this is the case, however, Mr. Bates explains why subsection (a)(1) is the only relevant subsection of the rule.

1.4.1 Only Subsection (a)(1) of Rule 14-605 Governs Misappropriation Cases Where There Has Not Been a Criminal Conviction

As a preliminary matter, it is important to understand that, although rule 14-605 lists three circumstances under which disbarment is the presumptive sanction, *only* the circumstances in subsection (1) apply to misappropriation

cases like this one where there is no criminal conviction. Rule 14-605 provides as follows:

(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.

SILS R. 14-605 (emphasis added).

Without citation, the OPC claims that “[e]ven without a criminal conviction for misappropriation under paragraph (a)(2), taking client funds will still warrant disbarment under paragraphs (a)(1) or (a)(3).” (Op. Br. at 25.) But subsection (2) applies to “serious criminal conduct,” and subsection (3) applies to intentional misconduct “other” than the misconduct listed in subsections (1) or

(2). SILS R. 14-605. Thus, conduct that is covered by subsection (1) cannot also be covered by subsection (3).

Here, Mr. Bates' conduct is covered by subsection (1). Subsection (1) applies when the lawyer has engaged in particular misconduct: "professional misconduct as defined in Rule 8.4(a), (d), (e), or (f)." *Id.* Rule 14-605(a)(1). Those subsections of rule 8.4 provide as follows:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . .

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Utah R. Prof'l Conduct 8.4(a), (d)-(f).

Here, Mr. Bates violated rule 8.4(a) because he "violate[d] the Rules of Professional Conduct." His conduct is therefore covered by subsection (1) and not by subsection (3).

1.4.2 Because Mr. Bates Had Available Lines of Credit, His Conduct Did Not Cause Serious or Potentially Serious Injury to F.A. Apartments

The trial court found that Mr. Bates lacked the requisite intent to warrant disbarment under rule 14-605(a)(1). But there is an additional reason that disbarment is not appropriate under the rule: Mr. Bates did not “cause[] serious or potentially serious injury” to F.A. Apartments. Because the trial court did not base its decision upon this ground, it serves as an alternative ground for affirmance. *Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158 (appellate court may affirm on “any legal ground or theory apparent on the record”).

To warrant the presumptive sanction of disbarment, the lawyer’s conduct must both be intentional and cause “*serious injury or potentially serious injury*.” SILS R. 14-605(a)(1) (emphasis added). In contrast, suspension is the appropriate sanction where the lawyer’s conduct “causes injury or potential injury” that is *not* serious. SILS R. 14-605(b)(1). “Injury” includes “any level of injury” — or potential injury — “greater than ‘little or no’ injury.” SILS R. 14-601(d).

Under the rules, injury is defined as “harm,” and “potential injury” is defined as harm “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.” SILS R. 14-601(d), (h) (emphasis added). This court has held that a lawyer causes “serious injury” to a client when he intentionally misappropriates the client’s funds and deprives the client the use of her funds. *Corey*, 2012 UT 21, ¶¶ 7, 28. And this court has

suggested that a client may suffer a “potentially serious injury” when a lawyer steals a client’s funds, even if the client never finds out that the funds are gone. *Lundgren*, 2015 UT 58, ¶ 23.

Here, it is undisputed that F.A. Apartments did not suffer an injury, let alone a serious injury. (R.1142.) And there is no evidence of a potential for serious injury.

Payroll transfer – On the day Mr. Bates made the payroll transfer that depleted the \$16,000 he was holding in the operating account for F.A. Apartments, he had “lines of credit available which significantly exceeded the amount of the transfer.” (R.1142.) He had “drawn on these credit lines on multiple prior occasions—including four times” that month, “both preceding and following the [transfer to payroll]—to fund Wasatch Advocates’ operating expenses, including payroll.” (R.1142.) And after he drew on the line of credit, the balance of the operating account was more than \$76,000. (R.850.)

Indeed, Mr. Bates had predicted months earlier that the shortfalls would occur. (R.2306.) Historically, he and his wife made personal loans to the firm, and he also obtained a business loan secured by their home. (R.2306-07.) He had made it his practice to ensure that, at all times, he had access to sufficient funds to satisfy all of his financial obligations. (R.2548.)

Thus, on the day Mr. Bates made the payroll transfer, it was not “reasonably foreseeable” that F.A. Apartments could be harmed. SILS R.

14-601(h). Instead, it was nearly impossible that F.A. Apartments could be harmed — Mr. Bates knew that if he depleted the funds in the operating account, he would be able to replenish the funds from a line of credit. The payroll transfer did not cause a potentially serious injury to F.A. Apartments.

Shortfalls – The lines of credit available to Mr. Bates likewise prevented the shortfalls from posing a potentially serious injury to F.A. Apartments. But there is an additional reason that the shortfalls did not pose a potentially serious injury. On the three days upon which there were shortfalls of approximately \$2,000 in the trust account, the balance of the operating account was more than sufficient to cover the deficiency. (Ex.133 (operating account balance was \$25,927 on January 3, \$36,626 on March 17, and \$47,431 on June 30).) Because Wasatch Advocates always had sufficient funds to cover what it was holding for F.A. Apartments — albeit in the incorrect bank account — the shortfalls never put F.A. Apartments at risk of suffering injury or serious injury. Put differently, serious injury was never “reasonably foreseeable.” SILS R. 14-601(h).

To be clear, Mr. Bates’ conduct constitutes a violation of rule 1.15 of the Utah Rules of Professional Conduct. He violated his duty to safeguard F.A. Apartments’ funds. Utah R. Prof’l Conduct 1.15. But his failure to do so, while a rule violation, did not cause a “serious or potentially serious injury” to F.A. Apartments. As the trial court recognized, disbarment is not the presumptive sanction for his misconduct.

1.5 The Aggravating and Mitigating Circumstances Weigh in Favor of Suspension

Even if disbarment were the appropriate presumptive sanction, the mitigating circumstances would warrant a decrease to the lesser sanction of suspension. “After misconduct has been established, aggravating and mitigating circumstances may be considered and weighed in deciding what sanction to impose.” SILS R. 14-607. In cases where a lawyer has intentionally misappropriated client funds, the presumptive sanction of disbarment will not be disturbed “unless the lawyer can demonstrate truly compelling mitigating circumstances.” *Babilis*, 951 P.2d at 217 (internal quotation marks omitted).

Here, suspension was the presumptive sanction because, as the trial court found, Mr. Bates had not intentionally misappropriated funds. (R.1142-43,1145.) Then, in considering the aggravating and mitigating factors listed in rule 14-607, the trial court found that seven mitigating factors applied but that only one aggravating factor applied. (R.1143-45.) After weighing the factors, the court concluded that “the balancing test tips in Bates’ favor warranting a slight downward departure from the six-month suspension ‘generally’ imposed under Rule 14-525,” and the court decided to instead impose a five-month suspension. (R.1145.)

The OPC assumes that Mr. Bates intentionally misappropriated F.A. Apartments’ funds – which he did not – and that disbarment is therefore the presumptive sanction. The OPC then argues that the mitigating factors are not

“truly compelling” and do not warrant a departure from the presumptive sanction of disbarment. (Op. Br. at 28.)

As discussed above, because Mr. Bates’ misconduct was *unintentional*, suspension is the presumptive sanction. SILS R. 14-605(b)(1). And the single aggravating factor – the “pattern of misconduct” revealed by the OPC’s investigation in this case – is insufficient to increase that presumptive sanction to disbarment. (R.1143.)

But even if the OPC were correct that disbarment is the presumptive sanction, the wealth of mitigating factors in this case is “truly mitigating” and would warrant a decrease in the degree of discipline. All but one of the desirable mitigating factors apply to Mr. Bates. Rule 14-607 lists fourteen mitigating circumstances. Only eight of them are desirable circumstances – the remaining six are mitigating but a lawyer could not be faulted for their absence.⁷ The trial court found that seven of the eight desirable mitigating factors apply: absence of a prior record of discipline, absence of a dishonest or selfish motive, timely good faith effort to make restitution, full and free disclosure to the disciplinary authority, inexperience in the practice of law, good character and reputation, and remorse. (R.1143-45.) The only mitigating factor that the court found inapplicable to Mr. Bates is “interim reform.” (R.1145.)

⁷ The six undesirable mitigating circumstances are personal or emotional problems, physical disability, mental disability or impairment, unreasonable delay in disciplinary proceedings, imposition of other penalties or sanctions, and remoteness of prior offenses. SILS R. 14-607(b)(3), (8), (9), (10), (12), (14).

The OPC attempts to attack some of these findings with unsupported – and incorrect – conclusions. As for the remorse and full disclosure factors, the OPC claims that Mr. Bates “refus[ed] to even acknowledge that it was wrong for him to use his clients’ funds without their authorization,” and “maintained that he did nothing wrong in using them.” (Op. Br. at 30, 32.) The OPC provides no citation for either claim, which is unsurprising as neither claim is supported by the record. (*Id.*) Instead, as the OPC concedes, Mr. Bates testified that he “made a number of mistakes” and “had too much confidence in [his] own abilities,” and that he had “been humbled” through the disciplinary process. (R.1473.)

Similarly, as for the inexperience factor, the OPC claims that Mr. Bates used client funds “because he needed them and the alternative was to incur more debt.” (Op. Br. at 31.) Again, the OPC provides no citation, and its claim is unsupported by the record. Instead, the opposite is true: Mr. Bates frequently incurred and repaid debt to manage the firm’s cash flow problems. Indeed, when Mr. Bates predicted cash flow problems, he secured a business loan with his home, repeatedly loaned money to the firm, arranged for lines of credit, and repeatedly drew on those lines to ensure he always had access to sufficient funds to satisfy all of the firm’s financial obligations. (R.1142,1363,2306-07,2342-43,2350-51,2548.)

The OPC also challenges the trial court’s finding that Mr. Bates “paid himself a modest salary” and “ended up losing a substantial amount of money as

a result of the operation and winding down of Wasatch Advocates,” and that he therefore did not have a “dishonest or selfish motive” for his misconduct. (Op. Br. at 32 (quoting R.1144).) The OPC asserts without explanation that Mr. Bates’ personal financial sacrifices are “irrelevant” and “not a mitigating factor.” (Op. Br. at 32.) But the absence of a selfish motive is relevant, not only because it is expressly listed as a mitigating circumstance, but also because it is central to the question of whether Mr. Bates misused client funds with the “conscious objective” to benefit himself. SILS R. 14-601(e), -605(a)(1), -607(b)(2).

The lines of credit Mr. Bates established also “weigh[] in [his] favor” as a mitigating circumstance. *Librizzi*, 569 A.2d at 260. Indeed, the list of mitigating circumstances provided in rule 14-607 is not exhaustive. The rule provides that “[m]itigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed” and that “[m]itigating circumstances *may include*” those listed in the rule. SILS R. 14-607(b) (emphasis added). Mr. Bates’ proactive efforts to ensure he had access to sufficient funds at all times was designed to eliminate the risk that he may have insufficient funds to cover his financial obligations. It is therefore a mitigating circumstance that would justify a downward degree of discipline.

Although none of these circumstances may alone warrant a decrease in the presumptive sanction, together they are “truly compelling.” The fact that seven out of the eight desirable mitigating circumstances apply here — plus the

additional mitigating circumstance of Mr. Bates' securing lines of credit— make the mitigating circumstances in this case more substantial than those in any this court has yet considered. *See, e.g., Corey*, 2012 UT 21, ¶ 31 (evidence that a cyst in the lawyer's brain could have impaired his judgment was not “truly compelling” mitigating evidence that would rebut the presumption of disbarment); *Grimes*, 2012 UT 87, ¶¶ 25-34 (concluding that five desirable mitigating factors along with personal financial problems and mental health problems were not “truly compelling”); *Johnson*, 2001 UT 110, ¶ 10 (“Although a good reputation and community service are commendable, they do not constitute ‘truly compelling mitigating circumstances’ when there has been a misappropriation of client’s funds.”).


For the presumption sanction of disbarment to function as a presumption and not an automatic sanction, it must be possible that an attorney can show “truly compelling mitigating circumstances” even though he has misappropriated client funds. *Lundgren*, 2015 UT 58, ¶¶ 14-15 (upholding the “truly compelling mitigating circumstances” standard even though “no attorney in Utah to date” has been able to make the requisite showing). It cannot be, as the OPC seems to suggest, that the misappropriation renders all the mitigating circumstances irrelevant. Thus, even if the presumptive sanction were disbarment— which it is not— the mitigating circumstances would warrant a downward departure. Suspension would still be the appropriate sanction.

Conclusion

For the reasons above, this court should affirm the trial court's decision to impose a five-month suspension for Mr. Bates' misconduct.

DATED this 29th day of March, 2016.

ZIMMERMAN JONES BOOHER



Troy L. Booher
Beth E. Kennedy
Attorneys for Appellee

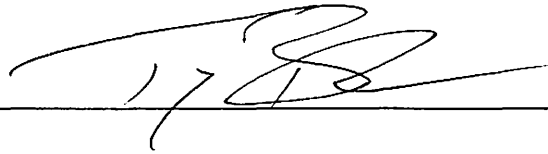
Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 13,317 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Book Antiqua.

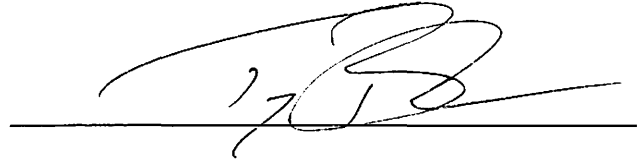
DATED this 29th day of March, 2016.


A handwritten signature in black ink, consisting of stylized, overlapping loops and strokes, is written above a solid horizontal line.

Certificate of Service

This is to certify that on the 29th day of March, 2016, I caused two true and correct copies of the Brief of Appellee to be served on the following via first-class mail, postage prepaid:

Todd Wahlquist, Deputy Senior Counsel
Office of Professional Conduct
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "TW", is written over a horizontal line.

Tab A

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FILED DISTRICT COURT
Third Judicial District

2015 - 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 complaint, 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.

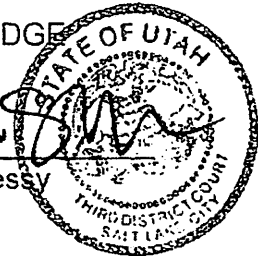
This matter be set pursuant to Rule 14-511(f) of the Rules of Lawyer Discipline and Disability for a sanctions hearing. At the sanctions hearing, as appropriate, the court will consider relevant evidence of aggravation and mitigation of Mr. Bates' misconduct. The court will then impose the appropriate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

Tab B

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 \$16,000 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.

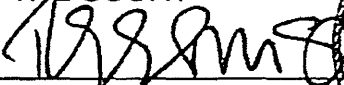
The court has weighed the aggravating and mitigating factors in connection with the misconduct-giving rise to a suspension as the presumptive level of discipline. The court concludes that the balancing test tips in Bates' favor warranting a slight downward departure from the six-month suspension "generally" 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

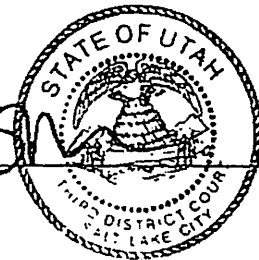
Based on the foregoing Findings of Fact, Bates shall be suspended from the practice of law for a period of five (5) months. The suspension shall commence on July 1, 2015. During the period of suspension, Mr. Bates is enjoined and prohibited from practicing law in the State of Utah, holding himself out 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 tboohere@zjbappeals.com

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MANUAL EMAIL: TODD WAHLQUIST opcfileing@utahbar.org

06/01/2015

/s/ MANDY ACEVEDO

Date: _____

Deputy Court Clerk

Tab C

Utah Rules of Professional Conduct

West's Utah Code Annotated

State Court Rules

Utah Code of Judicial Administration

Part II. Supreme Court Rules of Professional Practice

Chapter 13. Rules of Professional Conduct (Refs & Annos)

Maintaining the Integrity of the Profession

Rules of Prof.Conduct, Rule 8.4

RULE 8.4. MISCONDUCT

Currentness

It is professional misconduct for a lawyer to:

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

Credits

[Amended effective April 1, 1997; November 1, 2005. Comment amended effective July 16, 2013. Comment amended effective November 1, 2015.]

West's Utah Code Annotated

State Court Rules

Utah Code of Judicial Administration

Part II. Supreme Court Rules of Professional Practice

Chapter 13. Rules of Professional Conduct (Refs & Annos)

Client-Lawyer Relationship

Rules of Prof. Conduct, Rule 1.15

RULE 1.15. SAFEKEEPING PROPERTY

Currentness

(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.

Credits

[Former Rule 1.13 renumbered as Rule 1.15, effective September 1, 1995; Rule 1.15 amended effective April 30, 1997; November 1, 2005.]

Utah Standards for Imposing Lawyer Sanctions

West's Utah Code Annotated
State Court Rules
Utah Code of Judicial Administration
Part II. Supreme Court Rules of Professional Practice
Chapter 14. Rules Governing the Utah State Bar
Article 6. Standards for Imposing Lawyer Sanctions

UT Lawyer Sanctions Standards Rule 14-601

RULE 14-601. DEFINITIONS

Currentness

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.

Credits

[Amended effective November 1, 2006.]

Lawyer Sanctions Standards Rule 14-601, UT R BAR LWYR SANCTIONS STDS Rule 14-601
current with amendments received through February 1, 2016.

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West's Utah Code Annotated
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Article 6. Standards for Imposing Lawyer Sanctions

UT Lawyer Sanctions Standards Rule 14-604

RULE 14-604. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS

Currentness

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.

Credits

[Amended effective November 1, 2006.]

Notes of Decisions (2)

Lawyer Sanctions Standards Rule 14-604, UT R BAR LWYR SANCTIONS STDS Rule 14-604
current with amendments received through February 1, 2016.

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UT Lawyer Sanctions Standards Rule 14-605

RULE 14-605. IMPOSITION OF SANCTIONS

Currentness

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.

Credits

[Amended effective November 1, 2006.]

Notes of Decisions (62)

Lawyer Sanctions Standards Rule 14-605, UT R BAR LWYR SANCTIONS STDS Rule 14-605
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UT Lawyer Sanctions Standards Rule 14-607

RULE 14-607. AGGRAVATION AND MITIGATION

Currentness

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.

Credits

[Amended effective November 1, 2006.]

Notes of Decisions (11)

Lawyer Sanctions Standards Rule 14-607, UT R BAR LWYR SANCTIONS STDS Rule 14-607
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