

1984

## **In Re: James M. Jones : Brief of Respondent Utah State Bar**

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TABLE OF CONTENTS

NATURE OF THE CASE . . . . .		1
DISPOSITION BY THE BOARD OF BAR COMMISSIONERS . . . . .		1
RELIEF SOUGHT ON APPEAL. . . . .		1
STATEMENT OF FACTS . . . . .		2
ARGUMENT . . . . .		4
POINT I.	APPELLANT DID NOT ATTEMPT TO INTRODUCE EVIDENCE BEFORE THE HEARING COMMITTEE PANEL. . . . .	4
POINT II.	APPELLANT'S ARGUMENT THAT THE HEARING COMMITTEE PANEL DENIED HIM THE RIGHT TO INTRODUCE EVIDENCE AT THE HEARING BEFORE THEM IS ERRONEOUS AND NOT BASED ON FACT. . . . .	5
POINT III.	APPELLANT WAS AFFORDED DUE PROCESS OF LAW AT THE HEARING BEFORE THE HEARING COMMITTEE PANEL . . . . .	6
POINT IV.	THE HEARING COMMITTEE PANEL FOUND APPELLANT HAD VIOLATED PROVISIONS OF THE REVISED RULES OF PROFESSIONAL CONDUCT OF THE UTAH STATE BAR . . . .	8
POINT V.	THE RECOMMENDATIONS OF THE BOARD OF BAR COMMISSIONERS ARE REASONABLE, NOT ARBITRARY AND SUPPORTED BY SUBSTANTIAL EVIDENCE . . . . .	9
CONCLUSION . . . . .		10

TABLE OF CASES AND AUTHORITIES

<u>In Re Badger</u> , 27 Utah 2d 174, 493 P.2d 1273 (1972) . . . . .	9
<u>In Re Blackham</u> , 588 P.2d 694 (Utah 1978) . . . . .	9
<u>In Re Bridwell</u> , 25 Utah 2d 1, 474 P.2d 116 (1970) . . . . .	9
<u>In Re Fullmer</u> , 17 Utah 2d 121, 405 P.2d 343 (1965) . . . . .	9
<u>In Re Gudmundson</u> , 556 P.2d 212 (Utah 1976) . . . . .	6,7
<u>In Re Hansen</u> , 584 P.2d 805 (Utah 1978) . . . . .	9
<u>In Re Judd</u> , 629 P.2d 435 (Utah 1981) . . . . .	9
<u>In Re Macfarlane</u> , 10 Utah 2d 217, 350 P.2d 631, (1960) . . . . .	9
Revised Rules of Professional Conduct Of the Utah State Bar . . . . .	8
Rules for Integration and Management of the Utah State Bar . . . . .	4,5,9

## NATURE OF THE CASE

Appellant was charged in a Formal Complaint before the Board of Bar Commissioners of the Utah State Bar with violations of the Revised Rules of Professional Conduct of the Utah State Bar. The complaint was filed as a consequence of Appellant's felony conviction of two counts of theft by deception, by a jury in the Third Judicial District Court, Salt Lake County, Utah.

## DISPOSITION BY BOARD OF BAR COMMISSIONERS

After a Hearing and Trial on January 18, 1984, a majority of the Hearing Committee Panel found Appellant had violated specific provisions of the Revised Rules of Professional Conduct of the Utah State Bar and recommended to the Board of Bar Commissioners that Appellant be disbarred. The Board of Bar Commissioners approved and adopted the Findings of Fact, Conclusions of Law and Recommendation of the majority of the Hearing Committee Panel, made additional Findings and recommended to this court that Appellant be disbarred from the practice of law in the State of Utah.

## RELIEF SOUGHT ON APPEAL

The Recommendations of the Board of Commissioners of the Utah State Bar be affirmed and this Court adopt its recommendation that Appellant be disbarred from the practice of law.

## STATEMENT OF FACTS

Respondent offers its own Statement of Facts herein as that included in Appellant's brief contains assertions which Respondent contends are totally erroneous and unsupported by the record herein.

Mr. James M. Jones was convicted of two counts of theft by deception in the Third Judicial District Court for Salt Lake County, Utah as the result of a jury trial. The judgment and commitment was entered on November 26, 1980. (Tr., Exhibit 2). Appellant's conviction was appealed to the Utah Supreme Court and was affirmed by the Court in its decision filed November 10, 1982. Appellant filed a Motion for Rehearing which was denied on February 4, 1983. Respondent filed a Motion for Disbarment with the Utah Supreme Court. The Motion was denied and the matter remanded to the Utah State Bar by minute entry dated April 18, 1983. The Court's remand to the Bar was for the purpose of the Bar conducting "a rehearing pursuant to Rule 32, Rules for Integration and Management of the Utah State Bar and applicable Rules of Discipline of the Utah State Bar." (Tr. Exhibit 3) (R. 30).

Respondent then filed its complaint and Appellant his answer. The Hearing was held at the Utah State Bar Center on January 18, 1984. Appellant was not present at the Hearing but he was represented by counsel. His presence was not required. (Tr. 2).

Respondent submitted its evidence to the Hearing Committee Panel which evidence included a certified copy of Appellant's judgment of conviction, certified copies of the actions taken by the Supreme Court regarding Appellant's appeal and the remand of the Supreme Court to the Utah State Bar. (Tr., Exhibits 1-4). A majority of the Hearing Committee Panel found that the Appellant had been convicted of a felony. They concluded, as a matter of law, that the certified copy of the conviction was conclusive evidence of the conviction and that Appellant, as a result of the conviction, had violated Rule II, Section 4 and Canon 1, DR 1-102(A)(4) of the Revised Rules of Professional Conduct of the Utah State Bar. (R. 27). A majority of the Hearing Committee Panel recommended that Appellant be disbarred from the practice of law in the State of Utah. (R. 28). Appellant never attempted to offer any evidence including evidence of mitigation to be considered by the Hearing Committee Panel. Appellant, through his attorney, never made a proffer of proof to the Hearing Committee Panel. As previously noted, Appellant was not present at the Hearing (R.2). A dissenting member of the Hearing Committee Panel recommended that a recommendation as to discipline be deferred until a hearing of the facts giving rise to the complaint could be held. (R.25).

The Board of Bar Commissioners of the Utah State Bar reviewed the Findings of Fact, Conclusions of Law and



Recommendations of the Hearing Committee Panel. The Board of Bar Commissioners found that James M. Jones was convicted of two counts of theft by deception, a felony, that the felony conviction was a final judgment of the Supreme Court of the State of Utah, and that at the Hearing of the matter before the Hearing Committee Panel of the Utah State Bar no evidence was offered by the Appellant's attorney, James Dean, to mitigate his record of conviction. (R 33-34). The Board of Bar Commissioners recommendation to the Supreme Court is that Appellant be disbarred pursuant to the recommendations (of the majority decision) of the Hearing Committee Panel and pursuant to Rule 32 of the Rules for Integration and Management of the Utah State Bar. (R 33).

#### ARGUMENT

##### POINT I

Respondent does not disagree with the statements in Appellant's Point I regarding the constitutional authority of the Supreme Court in regulating the practice of law in Utah or regarding the contents of Rule 19 of the Rules of Integration and Management of the Utah State Bar. However, Respondent strenuously objects to Appellant's misstatement of fact that the Hearing Panel which heard this matter pursuant to this court's remand of April 18, 1983 denied Appellant the right to introduce evidence at his disciplinary hearing. Appellant does not cite any record or transcript of the

Hearing before the Hearing Committee Panel which demonstrates that Appellant offered any evidence for admission before the Panel. The transcript of the proceeding is void of this evidence because the Appellant did not move to offer evidence for consideration by the Panel. Appellant was not present at the Hearing. His attorney acknowledged that Appellant was not required to be present at the Hearing and did not object to conducting the Hearing without Appellant (Tr.2). The record is void of any attempt by Appellant's attorney to offer any evidence in mitigation of his record of conviction or for any other purpose to the Hearing Committee Panel. A review of the record shows that the Board of Bar Commissioners made a specific finding that no evidence in mitigation was offered into evidence by Appellant's attorney, James Dean. (R.33). Appellant's argument that the Hearing Committee Panel denied the Appellant the right to introduce evidence at the Hearing is erroneous and not based on fact.

#### POINT II

The Respondent does not contest Appellant's recitation of the contents of Rule 16 of the Rules of Integration and Management of the Utah State Bar. However, Respondent strenuously objects to Appellant's argument that the Hearing Committee Panel denied the Appellant the right to introduce any evidence in his defense. Appellant's entire argument

that he was denied the right to introduce evidence to the Hearing Panel is erroneous and unsupported by the evidence. The record is clear and shows that Appellant never offered or proffered any evidence for the Panel's consideration. The following statement from the Chairman of the Hearing Committee Panel shows that Appellant was not present and his counsel did not require his attendance for presentation of evidence.

"Let the record show then, that the Bar is here present, represented by Mr. Jeffry Paoletti, and that James Murrell Jones is represented by James Dean, who is his counsel of record. Let the record also show that the panel has been consulted with respect to whether the presence of the respondent would be required for this hearing. It is my understanding that neither party intends to call Mr. Jones as a witness, and his presence here has not been required."  
(Tr., p.2)

### POINT III

Appellant was afforded the right to a hearing and the right to present evidence to mitigate the record of his conviction of two counts of theft by deception before the Hearing Committee Panel. Appellant chose not to present any such evidence. Appellant argued legal positions before the Hearing Committee Panel but did not offer evidence for consideration by the Panel. This case is similar to In Re: Gudmundson, 556 P.2d 212 (Utah 1976).

In Gudmundson, the court examined the premise that an attorney charged with unprofessional conduct is entitled to due process of law in a fair and adequate hearing. In that

case, the attorney was absent from the hearing before the Hearing Committee Panel but he was represented by counsel. Further, his counsel agreed to the hearing going forward at that time. In Re: Gudmundson, supra, 213.

Similarly, in the instant case, Appellant was not present, but his attorney agreed that his presence was not necessary. (Tr.2). In In Re: Gudmundson, supra, 213, the

"appellant did not offer any evidence or information which changed the effects of the proof submitted by the complainants and other witnesses. The appellant had a reasonable opportunity to present evidence to refute the allegations contained in the complaints made against him. The Appellant was not prohibited from introducing his evidence either by affidavit or his files to demonstrate the extent of his diligence and work product."

In the instant case, Appellant Jones had the opportunity to present evidence to the Hearing Committee Panel but failed to exercise that opportunity. He was not prohibited from presenting evidence by the Hearing Committee Panel.

In the cited case of In Re: Gudmundson, supra, 213, the court found that "the record is supported by substantial and uncontroverted evidence. The appellant had the opportunity but declined to present positive evidence in rebuttal to that offered the commission". The court went on to affirm the commissioners' recommendation and suspended Mr. Gudmundson from the practice of law.

In the instant case, the record shows that appellant was afforded due process of law in a fair and adequate hearing. Appellant declined to present evidence to rebut or mitigate that offered against him. The recommendation of the Hearing Committee Panel and of the Board of Bar Commissioners is supported by substantial and uncontroverted evidence. Appellant does not contest the conclusiveness of the record of conviction for purposes of this appeal. (See Appellant's brief, p.5). He contends the Hearing Committee Panel decided to limit their Findings of Fact and Conclusions of Law to only the record of conviction and that decision violated his due process rights. Appellant, however, ignores the fact that he did not present any evidence to dispute the record of conviction. As previously stated, appellant's contention that he was denied his due process right is erroneous as no other evidence was presented by the Appellant. He was afforded due process of law at the hearing.

#### POINT IV

The Hearing Committee Panel found that Appellant's conviction of the felony crime, theft by deception, was a violation of Rule II, Section 4 and Canon 1, DR 1-102(A) (4) of the Revised Rules of Professional Conduct of the Utah State Bar. The Panel's recommendation is based on a finding that these provisions of the Revised Rules of Professional

Conduct of the Utah State Bar have been violated and not in the language of Rule 32 of the Rules of Integration and Governance of the Utah State Bar. (Rec. 29).

#### POINT V

In attorney discipline matters, this Court applies the following standard when reviewing Findings and Recommendations of the Board of Bar Commissioners:

"...although it is the prerogative and responsibility of the court to make the ultimate decision in this case, the court will look indulgently upon the Findings and Recommendations of the Board as advisory, and will be inclined to act in accordance therewith and adopt such findings unless it appears the Commission has acted arbitrarily or unreasonably, or unless those findings were not supported by substantial evidence."

In Re: Judd, 629 P.2d 435 (Utah 1981) citing: In Re: Macfarlane, 10 Utah 2d 217, 350 P.2d 631 (1960), In Re: Fuller, 17 Utah 2d 121, 405 P.2d 343 (1965), In Re: Bridwell, 25 Utah 2d 1, 474 P.2d 116 (1970), In Re: Badger, 27 Utah 2d 174, 493 P.2d 1273 (1972), In Re: Hansen, 584 P.2d 805 (Utah 1978), In Re: Blackham, 588 P.2d 694 (Utah 1978).

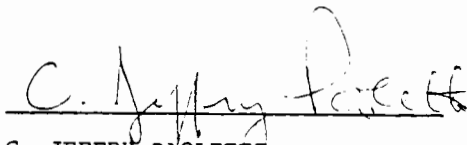
The Board of Bar Commissioners' Findings and Recommendations are reasonable, not arbitrary and supported by substantial evidence. Appellant has not shown facts to the contrary. Applying the standard for review to the facts of this case, the Recommendations of the Board of Bar Commissioners should be affirmed.

CONCLUSION

The Recommendation of the Board of Bar Commissioners of the Utah State Bar should be affirmed and Appellant disbarred from the practice of law in the State of Utah. Appellant has been afforded due process in that a Hearing was held to allow Appellant the opportunity to introduce evidence to mitigate or rebut the evidence submitted against him. He declined the opportunity. This matter should not be remanded for an additional hearing. Appellant has already been afforded his right to a hearing and at the hearing he offered no evidence to dispute the evidence against him.

Appellant's arguments are without substance and merit His appeal should be denied.

Respectfully submitted this 24<sup>th</sup> day of September, 1984.



C. JEFFRY PAOLETTI  
Bar Counsel  
425 East 100 South  
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

I hereby certify that on the 24th day of September, 1984, I mailed two copies of the foregoing brief, postage prepaid, to Joseph H. Bottum, Attorney for Appellant, 2910 Washington Blvd., #305, P.O. Box 151, Ogden, Utah 84402.

  
C. JEFFRY PAOLETTI