

1993

William R. Shupe : Brief of Appellant

Utah Court of Appeals

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William R. Shupe; Pro Se.

Wendell K, Smith.

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UTAH COURT OF APPEALS
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

In Re:

WILLIAM R. SHUPE

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APPELLANT'S BRIEF
F-519 & F-520
No. 930094

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDATION OF DISCIPLINE BY THE
BOARD OF COMMISSIONERS OF THE UTAH STATE BAR

Wendell K. Smith, #3019
Office of Bar Counsel
645 South 200 East
Salt Lake City, UT 84111

Attorney for Appellant

William R. Shupe
333 Civic Center Drive West
Santa Ana, CA 92701

Pro Se

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- / Statement of Issues & Standard of Review (mandatory for appellant).
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APPELLANT'S BRIEF

F-519 & F-520

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Office of Bar Counsel
645 South 200 East
Salt Lake City, UT 84111

Attorney for Appellant

William R. Shupe
333 Civic Center Drive West
Santa Ana, CA 92701

Pro Se

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JURISDICTION

The Utah Supreme Court has jurisdiction to hear this appeal pursuant to the provisions of Rule XIV(a) of the Procedures of Discipline of the Utah State Bar, Article VIII Section 4 of the Utah Constitution and Utah Code Ann. § 78-2-2(3)(c).

STATEMENT OF ISSUES PRESENTED FOR REVIEW THE FOLLOWING ISSUES ARE PRESENTED FOR REVIEW IN

FORMAL COMPLAINT F-519.

a. Whether the Hearing Panel's finding and the Board's Order affirming that a client of the law firm of Jardine, Linebaugh, Brown, & Dunn paid Respondent a personal bonus are arbitrary, capricious, or clearly erroneous. (Page 4 Paragraphs 5 and 7 of Panel findings and Rule XIV of the Procedures of Discipline of the Utah State Bar)

b. Whether the Hearing Panel's finding and the Board's Order affirming that "Respondent chose to interpret this payment as his own personal bonus and not the property of the law firm" are arbitrary, capricious, or clearly erroneous. (Page 4, Paragraph 6 of Panel findings and Rule XIV of the Procedures of Discipline of the Utah State Bar)

c. Whether the Hearing Panel's finding and the Board's Order affirming that "It has not been proved by clear or convincing evidence that respondent's conduct in this matter rose to the level of misappropriation, criminal conduct, dishonesty, misappropriation, theft, fraud, or deceit as set forth in the

Applicable Rules of Professional Conduct, including 1.13(b) and 8.4(c)" are arbitrary, capricious, or clearly erroneous. (Page 5, Paragraph 12 of Panel findings and Rule XIV of the Procedures of Discipline of the Utah State Bar)

d. Whether the Hearing Panel's conclusion of law and the Board's Order affirming that "... the evidence has not been clear nor convincing that this bonus was in fact a fee" are arbitrary, capricious, or clearly erroneous. (Page 5, of Panel findings and Rule XIV of the Procedures of Discipline of the Utah State Bar)

e. Whether the Hearing Panel's recommendation and the Board's Order affirming that "... we do not recommend sanctions regarding this matter" are arbitrary, capricious, or clearly erroneous. (Page 5, of Panel findings and Rule XIV of the Procedures of Discipline of the Utah State Bar)

THE FOLLOWING ISSUES ARE PRESENTED FOR REVIEW IN

FORMAL COMPLAINT F-520:

a. Whether the Hearing Panel's implication and the Board's Order affirming that the default entered in this case had been waived or set aside are arbitrary, capricious, or clearly erroneous. (Page 5, of Panel findings and Rule XIV of the Procedures of Discipline of the Utah State Bar)

b. Whether the Hearing Panel's finding and the Board's Order affirming that Mr. Yagi testified that some trust account money was spent on stock for Mr. Cragun are arbitrary, capricious, or clearly erroneous. (Page 7, Paragraph 11, of

Panel findings and Rule XIV of the Procedures of Discipline of the Utah State Bar)

c. Whether the Hearing Panel's finding and the Board's Order affirming that "Respondent did prepare opinion letters and other documents to facilitate stock purchase transactions for the benefit of Mr. Cragun" are arbitrary, capricious, or clearly erroneous. (Page 8, Paragraph 15 of Panel findings and Rule XIV of the Procedures of Discipline of the Utah State Bar))

d. Whether the Hearing Panel's finding and the Board's Order affirming that all of the \$25,000.00 received by Respondent from Mr. Cragun was deposited in Respondent's trust account are arbitrary, capricious, or clearly erroneous. (Page 8, Paragraph 17 of Panel findings and Rule XIV of the Procedures of Discipline of the Utah State Bar))

e. Whether the Hearing Panel's implication and the Board's Order affirming that checks totaling \$11,250.00 payable to Rick Yagi and a check in the amount of \$1,250.00 payable to Randy Yagi from Respondent's trust account were funds spent for the benefit of Mr. Cragun are arbitrary, capricious, or clearly erroneous. (Page 8, Paragraph 18 of Panel findings and Rule XIV of the Procedures of Discipline of the Utah State Bar))

f. Whether the Hearing Panel's recommendation and the Board's Order affirming that Respondent receive no discipline other than probation for one year and be required to complete a course in ethics are arbitrary, capricious, or clearly erroneous.

(Page 9, and page 11 of Panel findings and Rule XIV of the Procedures of Discipline of the Utah State Bar)

g. Whether the Hearing Panel's finding and the Board's Order affirming that "The duty violated in this matter ... arose out of inexperience and mistakes in judgment which can be remedied" were arbitrary, capricious, or clearly erroneous.

(Page 9, of Panel findings and Rule XIV of the Procedures of Discipline of the Utah State Bar)

h. Whether the Hearing Panel's finding and the Board's Order affirming that "... Respondent's inadequate accounting of Cragun's money was a matter of incompetence" rather than intentional misconduct were arbitrary, capricious, or clearly erroneous. (Page 9, of Panel findings and Rule XIV of the Procedures of Discipline of the Utah State Bar)

i. Whether the Hearing Panel's finding and the Board's Order affirming that it had not been shown by clear and convincing evidence that Respondent's conduct in the handling of Mr. Cragun's money was due to criminal conduct, dishonesty, intentional misappropriation, theft, fraud, or deceit, were arbitrary, capricious, or clearly erroneous. (Page 9, of Panel findings and Rule XIV of the Procedures of Discipline of the Utah State Bar)

DETERMINATIVE STATUTES, ORDINANCES OR RULES

1. Rule XIV of the Procedures of Discipline of the Utah State Bar pertaining to the standard of review of cases appealed to the Utah Supreme Court.

2. Rule 1.13 (a)(b), SAFEKEEPING OF PROPERTY, of the Rules of Professional Conduct of the Utah State Bar.

3. Rule 8.4(c), MISCONDUCT, of the Rules of Professional Conduct of the Utah State Bar.

4. American Bar Association Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE CASE

**NATURE OF THE CASE, THE COURSE OF PROCEEDINGS, AND
DISPOSITION BY THE HEARING PANEL AND
BOARD OF BAR COMMISSIONERS**

1. This appeal is from a final Order entered by the Board of Bar Commissioners of the Utah State Bar on January 28, 1993, wherein the Board affirmed the Findings, Conclusions and Recommendations of a Hearing Panel of the Ethics and Discipline Committee of the Utah State Bar.

2. This matter involves two complaints against the same Respondent arising from separate instances of alleged professional misconduct in violation of the Rules of Professional Conduct of the Utah State Bar. The Screening Panel members who considered the facts of these cases found that there were reasonable grounds to believe Respondent had violated the Rules of Professional Conduct as alleged and voted to issue Formal Complaints.

3. Formal Complaint F-519 alleges that Respondent misappropriated \$4,200.00 from his law firm. The Hearing Panel found that Respondent was entitled to this money as a "personal bonus" and found no misconduct associated with Respondent's taking the money from his law firm.

4. Formal Complaint F-520 alleges that Respondent misappropriated approximately \$19,000.00 from a client. The evidence presented at the hearing established that Respondent misappropriated no less than \$12,500.00 and as much as \$19,000.00. Default was entered against the Respondent in Formal Complaint F-520 and was never waived or set aside. Therefore, the only issue before the Hearing Panel was the appropriate sanction to be entered. Prior to the hearing Respondent made restitution to his client in the amount of \$13,000.00. The Hearing Panel recommended that Respondent be placed on probation for one (1) year, be ordered to take a class in ethics, and make restitution of an additional \$13,000.00. Respondent no longer practices law in Utah which renders the recommendation of probation a nullity. Respondent promised the Hearing Panel he would make restitution of the remaining \$13,000.00 prior to December 31, 1992, but has not done so.

STATEMENT OF FACTS

FORMAL COMPLAINT F-519

1. On or about July 1, 1986, Mr. Blaine W. Savage retained Respondent and the law firm of Jardine, Linebaugh, Brown & Dunn (hereinafter "Law Firm"), to represent him in a civil matter.

These facts are admitted by Respondent in his Answer (hereinafter "RA") filed herein.

2. From on or about July 1, 1986, until on or about December 10, 1986, Respondent provided legal services to Mr. Savage on behalf of the Law Firm, RA.

3. A dispute arose between Respondent and the Law Firm as to the terms of the fee agreement with Mr. Savage. However, assuming Respondent's version of the facts to be true, the fee agreement was at an hourly rate. Mr. Savage paid the Law Firm a total of \$10,000.00 for legal services in four payments.

4. On or about October 1, 1986, Mr. Savage paid the Law Firm the sum of \$1,000.00 with check No. 1367 made payable to the Law Firm, a copy of which is attached hereto as Appendix A and incorporated herein, RA.

5. On or about November 5, 1986, Mr. Savage paid the Law Firm the sum of \$500.00 with check No. 1370 made payable to the Law Firm, a copy of which is attached hereto as Appendix B and incorporated herein, RA.

6. On or about December 7, 1986, Mr. Savage paid the Law Firm the sum of \$3,500.00 with check No. 1374 made payable to William R. Shupe and delivered to Respondent. A copy of this check is attached hereto as Appendix C and incorporated herein. Respondent did not deliver the check or the proceeds of this check to the Law Firm. Instead, retained these funds and converted them to his own use. These facts were established by the testimony of Kent B. Linebaugh and James M. Dunn who

testified that Respondent confessed to them that he had wrongfully converted these funds to his own use. (Record of Hearing Pages 4 through 18)

7. These facts were also established pursuant to Rule 8(d) of the Utah Rules of Civil Procedure which provides that averments in a pleading to which a responsive pleading is required are admitted when not denied. These facts are pleaded in Paragraph 5 of Section III of the Formal Complaint and no responsive pleading thereto was filed. These facts not being denied are admitted.

8. On or about December 10, 1986, Mr. Savage paid the Law Firm the sum of \$5,000.00 with check No. 1622. The check was made payable to William R. Shupe and delivered to Respondent. A copy of this check is attached hereto as Appendix D and incorporated herein. Respondent paid the Law Firm the sum of \$4,300.00 from these funds and retained for himself the sum of \$700.00. These facts are pleaded in Paragraphs 6 and 7, of Section III of the Formal Complaint.

9. Respondent does not deny that he personally retained the sum of \$4,200.00 from the proceeds received from Mr. Savage on December 7 and December 10. Respondent confessed to Kent B. Linebaugh and James M. Dunn that he converted these funds. However, when the complaint was filed with the Bar, Respondent, for the first time, alleged that he was entitled to these funds as a personal bonus from Mr. Savage. (Record of trial pages 4 through 10, and pages 12 through 14)

10. On or about September 1, 1989, December 1, 1990, and August 1, 1990, Respondent signed promissory notes payable to the Law Firm in the principal sum of \$4,200.00 plus interest. These notes were for the purpose of repaying to the Law Firm the amount converted from the payments received from Mr. Savage. These promissory notes are attached here to as Appendices E, F, & G and incorporated herein. These facts are pleaded in Paragraphs 9, 10, and 11 of Section III of the Formal Complaint. Respondent admits in his Answer filed herein that he signed various promissory notes payable to the Law Firm.

Formal Complaint F-519

SUMMARY OF ARGUMENTS

THE FINDINGS OF THE HEARING PANEL ARE CLEARLY
ERRONEOUS IN THE FOLLOWING PARTICULARS

1. The finding of the Hearing Panel that payments to Respondent on December 7, and December 10, 1986, by a client of Respondent's law firm were personal bonuses to Respondent is clearly erroneous.

2. The finding of the Hearing Panel that Respondent violated none of the Rules of Professional Conduct is clearly erroneous.

3. The recommendation that Respondent receive no discipline as a result of his conduct giving rise to the charges in Formal Complaint F-519 is clearly erroneous.

ARGUMENT

I

THE FINDING OF THE HEARING PANEL THAT PAYMENTS TO
RESPONDENT ON DECEMBER 7, AND DECEMBER 10, 1986, BY
A CLIENT OF RESPONDENT'S LAW FIRM WERE PERSONAL
BONUSES TO RESPONDENT IS CLEARLY ERRONEOUS.

Findings 5, 6, and 7 on page 4 of the Hearing Panel's findings are clearly erroneous. Finding 5 states "... Mr. Savage paid to respondent what was termed by Mr. Savage as a 'bonus for you' arising out of what Mr. Savage believed to be a good result from the representation". Finding 6 states: "Respondent chose to interpret this payment as his own personal bonus and not the property of the law firm". Finding 7 states: "Mr. Savage also intended this payment to be a 'personal bonus'".

The finding that Mr. Savage intended this payment to be a personal bonus to Respondent is not supported by any evidence of record. The finding that Respondent chose to interpret this payment as a personal bonus is based only on the contradictory testimony of Respondent. This finding is contrary to Respondent's confession to Mr. Linebaugh and Mr. Savage, is contrary to Respondent's confession at the hearing on this matter as described hereafter, and is contrary to the evidence admitted at the hearing.

Blaine Savage did not testify. However, Respondent did submit an Affidavit from Mr. Savage. In this Affidavit Mr. Savage states "As I prepared to pay my final legal bill, (emphasis added) which would have been approximately \$4,500.00 (\$6,000 less the \$1,500 I had already paid), I told Mr. Shupe

that I wanted to pay the \$10,000.00 I had budgeted and he could consider the excess a bonus for his good work." At no time did Mr. Savage state to Respondent that "this is a bonus for you" or that "this is a personal bonus". Respondent had been practicing law long enough to know that money paid for representation by a law firm belongs to the law firm, not the individual attorney. Mr. Savage's Affidavit is attached hereto as Appendix H and incorporated herein. If Mr. Savage intended this to be a personal bonus to Respondent why did he not say so in his Affidavit? It was stipulated between the parties at trial that if Mr. Savage had been called as a witness he would not testify that he told Respondent this was a personal bonus. (Record of hearing page 17)

Other evidence that shows these findings to be clearly erroneous consists of the testimony of Respondent during the hearing on this complaint. During the hearing, Respondent testified regarding his conversation with his client, Mr. Savage, and the payment of his bill to the law firm. Respondent, referring to Mr. Savage, states: "He didn't say the words 'personal bonus'". Later in his testimony Respondent refers to his conversation with Mr. Linebaugh and Mr. Dunn wherein he states: "... when they confronted me with it, I admitted that I had done wrong". (Record of hearing page 16)

Respondent's testimony bespeaks his state of mind when he took the money belonging to his law firm when he stated "The firm wasn't being damaged because it was receiving every cent of its

billing, and he was happy with me." (Record of hearing page 16)

In other words, he is justifying taking the money from his law firm, with whom he has a fiduciary relationship, because the firm will not miss the money. Respondent then discloses what motivated him to take the money when he stated:

"I think that there was some, probably, residual feelings of resentment for sometimes being passed over for things in the firm that were, perhaps, eating away at me that made me, that allowed the situation to appear proper, logical and okay." (Record of hearing page 16)

This is also an admission that what he had done was not proper, logical and okay. Respondent later said "Believe me, I know I did a wrong thing". He later said "... I know that I messed up, and that I should have disclosed it and given it to the firm." (Record of hearing page 17)

Other evidence that shows the findings of the Hearing Panel to be clearly erroneous consists of the testimony of Mr. Linebaugh and Mr. Dunn, the Affidavit of Mr. Savage, and the physical evidence consisting of the dates and amounts of payments. Mr. Linebaugh and Mr. Dunn appeared and testified, under oath, that when they confronted Respondent about this matter Respondent confessed to them that he had improperly taken the money. They testified that Respondent never alleged that he was entitled to the money or that it was a personal bonus. Upon being confronted by Mr. Linebaugh and Mr. Dunn, Respondent confessed his misappropriation and signed Promissory Notes to repay the funds he had taken. (Record of Hearing Pages 4 through 14)

The evidence supports Mr. Linebaugh and Mr. Dunn's testimony that Respondent misappropriated the funds. The evidence is not consistent with Respondent's allegation that the funds were a personal bonus. In his Affidavit, Mr. Savage states that Respondent was informed of the payment of a bonus on the date of the making of the last payment. The evidence shows that the last payment was made on December 10, 1986, in the amount of \$5,000.00. By this date, Respondent had already misappropriated \$3,500.00. An interim payment of \$3,500.00 was made on December 7, 1986 and Respondent kept the entire amount. When the final payment was made on December 10, 1986, the one which contained the "bonus", Respondent kept an additional \$700.00. According to Mr. Savage's Affidavit there was no mention to Respondent of a bonus in connection with the interim payment of \$3,500.00 kept by Respondent. These facts of record were pointed out to the Hearing Panel.

II

THE FINDING OF THE HEARING PANEL THAT RESPONDENT VIOLATED NONE OF THE RULES OF PROFESSIONAL CONDUCT IS CLEARLY ERRONEOUS.

Finding 12 and the Conclusions of Law on page 5 wherein the Panel found no violations of the Rules of Professional Conduct are clearly erroneous based on the evidence of record described above. Respondent's admissions in his Answer, and in his admissions, his admissions to Mr. Linebaugh and Mr. Dunn, and his admissions before the Hearing Panel, establish the fact that he accepted and retained the sum of \$3,500.00 from a client of the

Law Firm on December 7, 1986 and retained the sum of \$700.00 from a payment made to him by a client of the Law Firm on December 10, 1992, for a total of \$4,200.00. Respondent's admissions in his Answer, and his admissions before the Hearing Panel, establish that he kept the \$4,200.00 and did not pay it to the Law Firm. Respondent's admissions in his Answer, his confession to Kent B. Linebaugh and James M. Dunn, and his confession to the Hearing Panel, establish that he converted the sum of \$4,200.00 to his own use.

Respondent's admissions in his Answer, his admissions before the Hearing Panel, and Appendices E, F, & G, attached hereto, establish that he signed several promissory notes to the Law Firm wherein he agreed to repay the above-described funds. The exhibits establish that the promissory notes were not signed until over two years after the funds had been taken by Respondent.

James M. Dunn and Kent B. Linebaugh testified that, in the summer of 1989, they learned that funds paid by Mr. Savage to Respondent had not been paid to the Law Firm. Mr. Dunn and Mr. Linebaugh testified that, in the summer of 1989, they confronted Respondent about the missing funds and he confessed to them that he had improperly taken the money and agreed to make restitution. They further testified that Respondent admitted to them that the taking of the funds was wrongful and he did not claim at that time that the funds were a personal bonus. (Record of hearing pages 4 through 14) After making these admissions, he signed the

various promissory notes described in the Formal Complaint. If Respondent truly believed he was legitimately entitled to this money why did he confess that the money was improperly taken and sign promissory notes to repay it?

Respondent's allegations that the payment of these funds was a personal bonus is contrary to the evidence. Respondent states that the money he kept was paid to him as a bonus on the day the case was settled. He alleges the amount of his bonus was the difference between the amount of the final bill from the Law Firm and \$10,000.00 which is the amount Mr. Savage was willing to pay for the legal services. The documents admitted into evidence show that Respondent kept the money before the case was settled and before the "bonus" was paid. Respondent kept for himself the sum of \$3,500.00 on December 7, 1986, which was before the case had been settled and before the day of the final payment to the Law Firm. Respondent did keep some money from the "bonus" paid on the day of the settlement and final payment, December 10, 1986. However, the amount he kept on that date was only \$700.00.

III

THE RECOMMENDATION THAT RESPONDENT RECEIVE NO
DISCIPLINE AS A RESULT OF HIS CONDUCT GIVING
RISE TO THE CHARGES IN FORMAL COMPLAINT
F-519 IS CLEARLY ERRONEOUS.

The finding that there was no harm to the public as valid grounds for taking no disciplinary action against an attorney who misappropriates funds from a law firm is clearly erroneous.

(Finding 11 on page 4) In the case of North Carolina State Bar

v. Nelson, 9110NCSB789, October 6, 1992, an attorney received payment for legal services which he failed to deliver to his law firm because he believed the firm owed him money. The Court held that this constituted more than a simple partnership dispute and amounted to dishonesty for which the lawyer was suspended for nine months. A copy of this opinion is attached as Appendix I and incorporated herein.

CONCLUSION

Respondent violated Rule 1.13(b), SAFEKEEPING OF PROPERTY, and Rule 8.4(c), MISCONDUCT, of the Rules of Professional Conduct. Respondent converted money from the law firm with which he was associated and to whom he owed a duty of good faith and fair dealing. He violated the trust and confidence placed in him by his associates. Disbarment or a substantial period of suspension with full restitution as a condition precedent to reinstatement is clearly warranted for this misconduct.

STATEMENT OF FACTS

FORMAL COMPLAINT F-519

1. On or about January 1989, Bryant D. Cragun, entered into negotiations with Mr. Rick Yagi for the acquisition of a publicly held corporation.

2. It was agreed between these parties that Mr. Cragun would deposit \$25,000.00 into Respondent's trust account to be used for the sole purpose of acquiring a corporation satisfactory to and approved by Mr. Cragun.

3. On or about January 19, 1989, Mr. Cragun caused check No. 1021 from WAC Research, one of Mr. Cragun's companies, in the amount of \$5,000.00, made payable to Respondent's trust account, to be delivered to Respondent for the purpose stated above. A copy of this check and Respondent's trust account deposit slip are attached hereto as Appendix J and incorporated herein. This exhibit shows that the entire \$5,000.00 was deposited into the trust account.

4. On or about January 30, 1989, Mr. Cragun caused check No. 491 from Wilmark Corporation, another of Mr. Cragun's companies, in the amount of \$5,000.00, payable to Respondent's trust account, to be delivered to Respondent for the purpose stated above. A copy of this check and Respondent's trust account deposit slip are attached hereto as Appendix K and incorporated herein. This deposit slip shows that \$4,925.00 was deposited into the trust account and that Respondent kept \$75.00 in cash.

5. On or about February 2, 1989, Mr. Cragun caused check No. 1124 from Newcap Scientific Corp., another of Mr. Cragun's companies, in the amount of \$12,000.00, payable to Respondent's trust account, to be delivered to Respondent for the purpose stated above. A copy of this check and Respondent's trust account deposit slip are attached hereto as Appendix L and incorporated herein. This deposit slip shows that \$8,000.00 was deposited into the trust account and that Respondent kept \$4,000.00 in cash.

6. On or about February 14, 1989, Mr. Cragun caused check No. 1125 from Newcap Scientific Corp. in the amount of \$3,000.00, payable to Respondent's trust account, to be delivered to Respondent for the purpose stated above. A copy of this check and Respondent's trust account deposit slip are attached hereto as Appendix M and incorporated herein. This deposit slip shows that \$2,500.00 was deposited into the trust account and that Respondent kept \$500.00 in cash.

7. The above-described exhibits verify that instead of depositing Mr. Cragun's \$25,000.00 in his trust account, as he was required to do, Respondent deposited only \$20,425.00 and kept cash for himself in the amount of \$4,575.00. This was contrary to the express instructions of Mr. Cragun and contrary to Respondent's fiduciary duties as trustee of these funds. Respondent converted the sum of \$4,575.00 by withholding funds that should have been placed in his trust account. These facts are unequivocally established by the record and were apparently ignored by the Hearing Panel.

8. After the above-described funds were delivered to Respondent, Mr. Yagi failed to find a corporation satisfactory to Mr. Cragun. Accordingly, on or about March 7, 1989, Mr. Cragun's attorney directed Respondent to return the \$25,000.00 he was holding in trust for Mr. Cragun.

9. On or about March 16, 1989 Respondent returned to Mr. Cragun the sum of \$6,000.00. On or about October 14, 1992, the day before the hearing on this complaint, Respondent refunded an

additional \$7,000.00. Subsequently, he informed the Hearing Panel that he would reimburse Mr. Cragun the additional sum of \$13,000.00 no later than December 31, 1992. Respondent did not keep this promise to the Hearing Panel as evidenced by the Affidavit of Robert J. Dale attached hereto as Appendix N and incorporated herein. The Board appears to have made it's findings and recommendation partially in reliance upon Respondent's promise to make this additional restitution.

10. On or about March 2, 1990, Mr. Cragun obtained a Default Judgment against Respondent in the Third Judicial District Court for the conversion of the \$19,000.00. A copy of this default judgment is incorporated into the Formal Complaint and was served on Respondent on or about December 30, 1991, in the above-entitled action. A copy of the civil Complaint, Default and Formal Complaint are attached hereto as Appendix O and incorporated herein.

11. Respondent did not respond to the Formal Complaint and, on February 12, 1992, he was served with a Notice of Intent to Default. He still did not respond to the Formal Complaint and on March 5, 1992, Default was entered. Copies of these documents are attached hereto as Appendix P and incorporated herein.

12. The facts set forth in the Formal Complaint are established by Respondent's default in Civil Case No. 890903670CV, in the Third Judicial District Court, which default is incorporated into the Formal Complaint, and also by Respondent's Default to the Formal Complaint in the above-

entitled action. Additionally, Mr. Bryant D. Cragun testified as to the validity of the facts in the Formal Complaint.

13. The bank statement, showing the status of Respondent's trust account at Continental Bank, now West One Bank, for the period of January 31, 1989 through February 28, 1989, verifies that by the end of February, 1989, the balance of the trust account was only \$5,940.48. This means that of the \$20,425.00, deposited in trust for Mr. Cragun, \$14,484.52 was gone in less than 30 days. This is in addition to the \$4,575.00 that was previously converted. A copy of this document is attached as Appendix Q and incorporated herein. In spite of these facts the Hearing Panel did not find Respondent's conduct to be intentional.

14. Notwithstanding that the above stated facts had been established by two defaults, the Office of Bar Counsel offered Respondent the opportunity, in or about March, 1992, to account for these funds as a matter in extenuation or mitigation. Respondent accounted for only about \$5,000.00 of the missing funds. The facts and applicable violations of the Rules of Professional Conduct have been judicially established by default as well as by clear and convincing evidence admitted at the trial.

15. Based on the Default, which was never set aside, Respondent had the burden to submit matters in extenuation, mitigation or explanation as to how or why these funds were converted. He offered no mitigation or extenuation other than

personal problems. The law is unequivocal that personal problems are not justification or excuse for theft, Matter of Bell, Infra.

16. The facts established by the testimony of Mr. Cragun and Mr. Yagi were that the negotiations for the acquisition of a corporation were between Mr. Cragun and Mr. Yagi, that Respondent's involvement was that of trustee of Mr. Cragun's funds. Assuming Respondent's version of the facts to be true, he was to deposit all of those funds in his trust account and only disburse them for the purpose of purchasing a corporation for Mr. Cragun. The facts of record are that Respondent did not deposit the entire \$25,000.00 in his trust account, but that he withheld \$4,575.00 in cash, that Mr. Cragun never approved the purchase of any corporation, that no stock in any corporation was given or tendered to Mr. Cragun and that, when Respondent's services were terminated, he returned only \$6,000.00 to Mr. Cragun.

17. During the course of the trial, Respondent attempted to account for the missing \$19,000.00 by alleging that stock had been purchased for Mr. Cragun. In support of that allegation, Respondent offered into evidence stock certificates of National Thoroughbred Corporation that contained nothing on their face to indicate when they were purchased or for whom they were purchased. In rebuttal, Mr. Cragun testified these stock certificates were not purchased for him, that he had never heard of National Thoroughbred Corporation, and he was never provided stock in this or any corporation by Respondent or Mr. Yagi. Mr. Yagi also testified the most he had ever been given by Respondent

from the Cragun funds was \$5,000.00 which was for expenses, not for the purchase of stock.

18. Respondent also provided a letter he had written on September 21, 1992, wherein he lists checks from his trust account totaling \$19,250.00. In that letter Respondent states that he and Mr. Yagi had together identified these checks as being checks that were issued on behalf of Mr. Cragun. At the trial Mr. Yagi refuted Respondent's letter by testifying he had not assisted Respondent in identifying the checks listed in his letter and by reaffirming his Affidavit that the most he had ever received from Respondent's trust account for Mr. Cragun was \$5,000.00 and that was for expenses not for stock.

Formal Complaint F-520

SUMMARY OF ARGUMENTS

THE FINDINGS OF THE HEARING PANEL ARE CLEARLY ERRONEOUS IN THE FOLLOWING PARTICULARS

1. The finding of the Hearing Panel that Respondent prepared opinion letters and other documents to facilitate the purchase of stock for his client are clearly erroneous.

2. The finding of the Hearing Panel that Respondent received only \$1250.00 from the funds on deposit in his trust account for the benefit of Mr. Cragun is clearly erroneous.

3. The implication of the Hearing Panel that checks payable to Rick Yagi from his trust account in the amount of \$11,250.00 were legitimate expenses on behalf of his client Mr. Cragun is clearly erroneous.

4. The Hearing Panel's findings that the misappropriation of Mr. Cragun's funds by Respondent is explained by inexperience and incompetence are clearly erroneous.

5. The matters set forth in Formal Complaint F-520 are established by default. The default was never set aside.

6. The Hearing Panel's finding, and recommendation, that the appropriate sanction is an admonition and a class in ethics is clearly erroneous.

I

THE FINDING OF THE HEARING PANEL THAT RESPONDENT
PREPARED OPINION LETTERS AND OTHER DOCUMENTS
TO FACILITATE THE PURCHASE OF STOCK FOR HIS
CLIENT IS CLEARLY ERRONEOUS.

Finding 15 on page 8 is clearly erroneous. This finding states: "Respondent did prepare opinion letters and other documents to facilitate stock purchase transactions for the benefit of Mr. Cragun." The only testimony in support of this finding is the testimony of Respondent and some letters dated March 21, 1989, that he introduced into evidence with the explanation that these were opinion letters written to facilitate the purchase of stock for Mr. Cragun. These letters are attached as Appendix R.

The evidence which shows this finding to be clearly erroneous consists of the testimony of Mr. Cragun, Mr. Yagi, and the letters themselves. The letters bear nothing on their face to show they were written for the benefit of Mr. Cragun. Further, the letters were dated March 21, 1989. Mr. Cragun

terminated his relationship with Respondent on or before March 16, 1989, and demanded the return of the money being held in trust by Respondent in his trust account. Respondent refunded the balance of the money remaining in his trust account, \$6,000.00, on March 16, 1989, before the letters were allegedly written for Mr. Cragun.

It is inconceivable that Respondent would continue to purchase stock for Mr. Cragun after he had cancelled the agreement and demanded the return of his money. Additionally, Mr. Cragun testified that he was never informed by Respondent or Mr. Yagi that they had purchased any stock in any corporation on his behalf, they never provided him any stock and he had never heard of National Thoroughbred Corporation, the corporation allegedly purchased for Mr. Cragun. (Record of Hearing Pages 89 through 91) Mr. Yagi testified that he only received \$5,000.00 from Respondent's trust account in connection with his dealings for Mr. Cragun was for expenses not for the purchase of stock. (Record of Hearing Pages 63 through 89)

II

THE FINDING OF THE HEARING PANEL THAT RESPONDENT
RECEIVED ONLY \$1250.00 FROM THE FUNDS ON
DEPOSIT IN HIS TRUST ACCOUNT FOR THE BENEFIT
OF MR. CRAGUN IS CLEARLY ERRONEOUS.

Portions of finding 18 on page 8 are clearly erroneous.

This finding states:

Yagi received approximately \$5,000 for expenses. Shupe received a fee of \$1,250. There were presented by the bar copies of checks totaling \$11,250 all of which was paid to Yagi except \$1,250.00 paid to Yagi's brother,

Randy Yagi, for expenses. Records were not kept documenting the reasons for these disbursements.

Two portions of this finding are clearly erroneous. The first is the finding and implication that Respondent received only \$1,250.00 of the funds entrusted to him by Mr. Cragun. The evidence of record shows that Respondent drafted a check payable to himself from his trust account in this amount on or about January 19, 1989. A copy of this check is attached hereto as Appendix S and incorporated herein. The Office of Bar Counsel does not dispute that Respondent paid himself this amount in fees. However, the evidence of record shows that, in addition to the \$1,250.00 which Respondent paid to himself from the trust account, Respondent also received \$4,575.00 from funds paid to him by Mr. Cragun that were never deposited in his trust account.

The record showing that Respondent received \$4,575.00 in cash consists of the trust account deposit slips relating to the four payments made to Respondent by Mr. Cragun. Respondent was given checks from Mr. Cragun totaling \$25,000.00 for deposit into his trust account. He deposited only \$20,425.00 and kept cash for himself in the amount of \$4,575.00. These documents were admitted into evidence at the Hearing. At the Hearing Respondent was asked about this cash he had retained from the deposits. In each instance he claimed that he gave this cash to Mr. Yagi.

(Record of Hearing Pages 99 through 100)

This explanation is inconsistent with the evidence. When Respondent's services were terminated by Mr. Cragun, on or before March 16, 1989, he refunded \$6,000.00 to Mr. Cragun leaving

unaccounted for the sum of \$19,000.00. In his letter of September 21, 1992, Respondent explained that the missing \$19,000.00 belonging to Mr. Cragun was fully accounted for by the checks listed in the letter. If Respondent's allegations are true, that the entire \$19,000.00 is accounted for in the checks listed in his letter of September 21, 1992, then is testimony that he gave Mr. Yagi almost \$5,000.00 in cash is false. If he gave Mr. Yagi almost \$5,000.00 in cash then his allegation that the missing \$19,000.00 is accounted for in the checks listed in his letter of September 21, 1992, is false.

Both of Respondent's contradictory explanations conflict with the testimony of Mr. Yagi which was that he never got more than \$5,000.00 from Respondent's trust account and he made no mention of these payments being in currency. Mr. Yagi never specifically stated whether he got the money in cash or checks, however, in reading his testimony, he said he went to Mr. Shupe when he needed money for the Cragun deal and Mr. Shupe gave him money out of his trust account. (Record of Hearing page 65) The plain meaning of this testimony is that he funds were paid to him by check from the trust account. It would indeed be a coincidence that Respondent happened to be depositing a check from Mr. Cragun each time Mr. Yagi needed money so that cash could be obtained from the deposit in lieu of issuing him a check. It is also important to note that in his letter of September 21, 1992, Respondent claims that all of the money paid

to Mr. Yagi was paid by check. He makes no mention of ever having given Mr. Yagi any cash.

Respondent never provided any evidence, other than his unsubstantiated allegation, that the cash he took from the deposit of Mr. Cragun's checks was spent on behalf of Mr. Cragun. In fact, the record contradicts Respondent's testimony regarding his disposition of this cash. This misappropriation of funds was apparently ignored by the Hearing Panel.

III

THE IMPLICATION OF THE HEARING PANEL THAT CHECKS
PAYABLE TO RICK YAGI FROM RESPONDENT'S TRUST
ACCOUNT IN THE AMOUNT OF \$11,250.00 WERE
LEGITIMATE EXPENSES ON BEHALF OF
MR. CRAGUN IS CLEARLY ERRONEOUS.

The implication that checks, totaling \$11,250.00, paid to Rick Yagi and a check in the amount of \$1,250.00 paid to Yagi's brother, Randy Yagi, were disbursements made on behalf of Mr. Cragun is clearly erroneous. Mr. Yagi testified and submitted an Affidavit to the effect that the most he received from Respondent on behalf of Mr. Cragun was \$5,000.00. (Record of Hearing Page 64 and page 76) He further testified that he did a lot of deals with Respondent for which he received funds from Respondent's trust account and that they were unrelated to this deal with Mr. Cragun. Many checks to Mr. Yagi from Respondent bore notations to indicate they were unrelated to Mr. Cragun. Therefore, it was clearly erroneous for the Hearing Panel to conclude or imply that Respondent gave Mr. Yagi more than \$5,000.00 of Mr. Cragun's money. There is virtually no evidence that Mr. Yagi's brother

was ever given any funds from the trust account for the benefit of Mr. Cragun.

IV

THE HEARING PANEL'S FINDINGS THAT THE MISAPPROPRIATION OF MR. CRAGUN'S FUNDS BY RESPONDENT IS EXPLAINED BY INEXPERIENCE AND INCOMPETENCE ARE CLEARLY ERRONEOUS.

The Hearing Panel's findings on page 9 of their Findings to the effect that the misappropriation of Mr. Cragun's funds is explained by inexperience and incompetence are clearly erroneous. There is no evidence of record to support a finding of negligence or incompetence. The evidence shows that about \$5,000.00 was paid to Mr. Yagi, Respondent paid himself \$1,250.00 by check and \$6,000.00 was returned to Mr. Cragun on March 16, 1989. Taking the evidence in a light most favorable to Respondent, by assuming these payments to Mr. Yagi and Respondent were legitimate expenditures, this accounts only for \$12,250.00 or less than half of the \$25,000.00 given to Respondent.

The evidence that shows Respondent misappropriated no less than \$12,750.00. He did this by skimming \$4,575.00 from the four payments given him for deposit in the trust account, as evidenced by his trust account deposit slips. This leaves a balance of \$8,175.00 which was missing from the trust account. Respondent provided no evidence to show it was spent for the benefit of Mr. Cragun and there is no evidence in the record that Respondent spent this money through inexperience, mistake, or incompetence. The money was inexplicably missing. This is conversion as a

matter of law, Nebraska State Bar v. Veith, 470 N.W.2d 549 (Neb. 1991). A copy of this case was provided to the Hearing Panel and is attached hereto as Appendix T and incorporated herein.

V

THE MATTERS SET FORTH IN FORMAL COMPLAINT
F-520 WERE ESTABLISHED BY DEFAULT AND THE
DEFAULT WAS NEVER SET ASIDE.

The matters set forth in Formal Complaint F-520 were established by default. The default was never set aside by the Hearing Panel. The Office of Bar Counsel never waived the default but did give Respondent wide latitude to present matters in extenuation and mitigation.

On page 5 of their findings the Hearing Panel implies that the Office of Bar Counsel waived the entry of the Default Judgment in this case. This conclusion is clearly erroneous. During the course of the Hearing Respondent made a verbal Motion to Set Aside the Default. The Hearing Panel denied the verbal motion and informed Respondent that if he wanted to make such a motion that he should do so in writing. (Record of Hearing page 44) Respondent never submitted a written motion to set aside the default. The Office of Bar Counsel has always proceeded on this case under the belief that the allegations in the Formal Complaint were already established and that this was a Sanctions Hearing. If it was the intention of the Hearing Panel to set aside the default they should have specifically done so and afforded the Office of Bar Counsel the opportunity to try this case accordingly.

Formal Complaint F-520 incorporates by reference a default judgment entered against Respondent in the Third Judicial District Court, Salt Lake County, Utah, a copy of which is attached hereto as Appendix O. In this judgment Respondent was found to have wrongfully converted the funds of Mr. Cragun which entitled Mr. Cragun to punitive damages in the amount of \$100,000.00.

VI

THE HEARING PANEL'S FINDING, AND RECOMMENDATION,
THAT THE APPROPRIATE SANCTION IS AN ADMONITION
AND A CLASS IN ETHICS IS ARBITRARY, CAPRICIOUS,
AND CLEARLY ERRONEOUS.

This recommendation of the Hearing Panel is inconsistent. If Respondent's misconduct is explained by incompetence and inexperience then why did the Hearing Panel require that he take a course in ethics? If the Hearing Panel really believed that incompetence and inexperience explains his conduct then he should be required to take a course in law office management.

The appropriate sanction, considering that there were multiple acts of misappropriation and considering the amount of money involved, is disbarment absent strong mitigating or extenuating circumstances. With strong mitigating and extenuating circumstances, Respondent should receive no less than a substantial period of suspension with restitution as a condition precedent to reinstatement. There is no strong mitigation or extenuation.

The fact that Respondent made restitution of an additional \$7,000.00 the day before the trial is not mitigation. The commentary in ABA Standard 9.4 states:

Lawyers who make restitution only after a disciplinary proceeding has been instituted against them, however, cannot be regarded as acting out of a sense of responsibility for their misconduct, but, instead, as attempting to circumvent the operation of the disciplinary system. (emphasis added)

The guidelines for imposing sanctions in attorney discipline cases are set forth in the American Bar Association Standards for Imposing Lawyer Sanctions and were adopted by the Utah Supreme Court in the case of In Re Crandall, 784 P.2d 1193 (Utah 1989)

Standard 3.0 of the American Bar Association Standards for Imposing Lawyer Sanctions states that the factors to be considered in imposing sanctions include the duty violated, the lawyer's mental state, the actual or potential injury caused, and the existence of aggravating or mitigating factors. Standard 4.11 states: Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client. The least amount of discipline described in this section is Standard 4.14 dealing with admonitions and states that an admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client. There is virtually no evidence that Respondent's conduct regarding the money he took from his law firm or the money he took from Mr. Cragun was the result of negligence. There is no evidence to support the conclusion that Respondent's failure to return or account for all

of Mr. Cragun's money constituted little or no actual or potential injury. There is no evidence to support the conclusion that Respondent's theft of the money from his law firm caused little or no harm to the firm.

Standard 5.11(b) of the American Bar Association Standards for Imposing Lawyer Sanctions states that disbarment is generally appropriate when a lawyer engages in any intentional misconduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Standard 7.1 states: Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

Standard 9.22 sets forth the matters that can be considered in aggravation. These include, dishonest or selfish motive and a pattern of misconduct. The evidence in Formal Complaint F-520 conclusively established that Respondent converted no less than \$12,750.00. Additionally, the facts in Formal Complaint F-519 show that Respondent misappropriated funds with which he was entrusted that were the property of his former law firm. These two cases show a pattern of misconduct that demand disbarment or other severe sanction.

Standard 9.22 also states that another matter to be considered in aggravation is a Respondent's refusal to acknowledge the wrongful nature of his conduct. In both

F-519 and F-520, Respondent has refused to acknowledge the wrongful nature of his misconduct in the face of overwhelming evidence. A person who cannot or will not recognize that he is engaging in prohibited conduct will repeat that conduct if afforded the opportunity to do so.

In the Matter of Bell, 596 A.2d 752 (N.J. 1991), the Supreme Court of the State of New Jersey found that knowing misappropriation of funds, even though the use of the funds was not for the attorney's personal gain, was grounds for disbarment despite severe personal problems being experienced by the attorney. A copy of this case is attached hereto as Appendix U and incorporated herein. The Supreme Court of Nebraska found that misappropriation of funds is grounds for disbarment. The court also found that the act of conversion is complete when the trust account balance falls below the amount that should be in the account for the client. Nebraska State Bar v. Veith, 470 N.W.2d 549 (Neb. 1991). The Supreme Court of California held that misappropriation of client funds warrants disbarment in Grim v. The State Bar of California, 805 P.2d 941 (CA 1991). A copy of this case is attached as Appendix V and incorporated herein.

On March 8, 1993 the Board of Bar Commissioners entered an Order and Recommendation for Discipline in the case of Churchy v. Wahlquist, F-484 wherein they recommended disbarment based upon two incidents of misappropriation of funds. A copy of this Order is attached as Appendix W and incorporated herein. The action taken in the Wahlquist case was clearly appropriate. The

even handed administration of attorney discipline demands that Mr. Shupe receive substantially the same discipline as Mr. Wahlquist.

These cases show that states from the east coast through the midwest to the west coast have adopted and follow the rule that misappropriation of funds warrants disbarment. The Office of Bar Counsel submits that the citizens of the State of Utah have every right to expect that attorneys in this State will be held to the same high standards as the attorneys in our sister states.

CONCLUSION

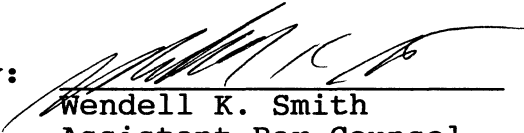
The facts and law applicable to Formal Complaints F-519 and F-520 lead to the just and proper conclusion that the Findings, Conclusions, and Recommendations of the Hearing Panel are clearly erroneous. There is also a substantial indication that the Hearing Panel entered its recommendation of discipline based upon Respondent's promise to reimburse Mr. Cragun the sum of \$13,000.00 not later than December 31, 1992. Respondent failed to keep that promise. The appropriate sanction to be entered against Respondent is disbarment, or a substantial period of suspension with restitution, and payment of costs. As a minimum Respondent should be suspended from the practice of law

for not less than two (2) years with full restitution as a condition precedent to reinstatement.

DATED this 13th day of APRIL, 1993.

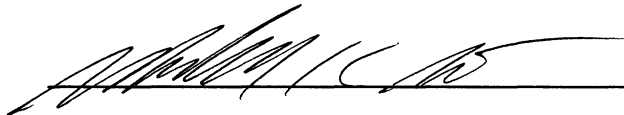
OFFICE OF BAR COUNSEL

By:


Wendell K. Smith
Assistant Bar Counsel

CERTIFICATE OF SERVICE

I hereby certify that I mailed four true and correct copies of the foregoing Appellant's Brief to William Shupe, at 333 Civic Center Drive West, Santa Ana, CA 92701, on this 13th day of APRIL, 1993.



APPENDIX A

✓
SAVAGE ENTERPRISES
2257 SOUTH 11TH EAST, SUITE 2A
SALT LAKE CITY, UTAH 84106
487-0727

UTAH FIRSTBANK
3185 SOUTH 1300 EAST
SALT LAKE CITY, UTAH
31-257/1240

HANDIBANK UHR
10073-1000
10073-1000

PAY

DOLLARS

ELECTRONIC DEPOSIT

1367

10/1/86

1,000.00

DATE

NUMBER

PAY THIS AMOUNT

TO
THE
ORDER
OF

Jardine, Linebaugh, Brown & Dunn
c/o Bill Shupe
370 East South Temple
Salt Lake City, Utah 84111

SAVAGE ENTERPRISES

Blaine W. Savage

⑈001367⑈ ⑈124002573⑈11 01346 3⑈

⑈0000100000⑈

APPENDIX B

SAVAGE ENTERPRISES

2257 SOUTH 11TH EAST SUITE 2A

SALT LAKE CITY, UTAH 84106

487-0727

UTAH FIRSTBANK

3185 SOUTH 1300 EAST

SALT LAKE CITY, UTAH

91-257/1249

PAY

DOLLARS

1370

11/05/86

\$ 500.00

NUMBER

DATE

PAY THIS AMOUNT

JARDINE, LINEDAUGH, DOROTHY E. DUM

C/O BILL SHUPE

370 EAST SOUTH TEMPLE

SALT LAKE CITY, UTAH 84101

SAVAGE ENTERPRISES

Blaine W. Davis

⑈001370⑈ ⑆124002573⑆11 01346 3⑈

⑈0000050000⑈

APPENDIX C

15-100575-18

SAVAGE ENTERPRISES

2257 SOUTH 11TH EAST - SUITE 2A
SALT LAKE CITY, UTAH 84106

487-0727

UTAH FIRSTBANK
3165 SOUTH 1300 EAST
SALT LAKE CITY, UTAH

31-257/1240

PAY Three thousand Five hundred DOLLARS

1374

12-7-86

\$ 3500.⁰⁰

NUMBER

DATE

PAY THIS AMOUNT

TO
THE
ORDER
OF

William A. Shyne

SAVAGE ENTERPRISES

Blaine W. Savage

⑈001374⑈ ⑆124002573⑆11 01346 3⑈

⑈0000350000⑈

APPENDIX D

15-1005-254 1E2.

10-10 1991 10-10

William B. Hayes : 3000

RESULTS

Page 1 of 1

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PAY ANT BARE FOR
 FIVE CENTS
 OF THE
 BALT LAKH OTT, OTAR

Amesbury

APPENDICES E, F & G

APPENDIX R

FILED

APR 21 1993

**CLERK SUPREME COURT,
UTAH**

030014

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST CO.
201 Bloomfield Avenue
Vernon, NJ 07044

RE: DELIVERY OF STOCK CERTIFICATES AND ESCROW ACCOUNT

Dear Mr. Manger:

Pursuant to the ten (10) enclosed opinion letters for Mssrs. Goldberg; Hammond; Jacobson; Lake; Lieberman; Mauro; Pagano; Rinaldi; Rosenthal; and Zipern (the "**Shareholders**"), I will inform you that the share certificates you issued to the Shareholders will be delivered to my escrow account. As soon as the shares represented by the share certificates are sold, Mr. Yagi will arrange for payment therefor in the amount of thirty-five thousand dollars (\$35,000).

Your cooperation in assisting the Shareholders is greatly appreciated.

Very truly yours,

William R. Shupe

WRS/bk

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Bernard
C. Zipern; Number of Shares held: 55,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the "**Company**"), you have requested our opinion (this "**Opinion**") as to whether the shares of stock held by Mr. Bernard C. Zipern (the "**Shares**") under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Bernard C. Zipern which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a) (3);
2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;
3. That to the best of Mr. Zipern's knowledge, no members of Mr. Zipern's immediate family or others have sold any shares of the Company within the three (3) preceding years;
4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

Mr. Hyman Manger
New Jersey Transfer
March 21, 1989
Page 2

5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Zipern paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Zipern is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Zipern on July 25, 1985, and have been held by Mr. Zipern in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Zipern's knowledge, no members of Mr. Zipern's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

Mr. Hyman Manger
New Jersey Transfer
March 21, 1989
Page 3

8. That Mr. Zipern is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Zipern's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Seymour Rosenthal; Number of Shares held: 44,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the "**Company**"), you have requested our opinion (this "**Opinion**") as to whether the shares of stock held by Mr. Seymour Rosenthal (the "**Shares**") under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Seymour Rosenthal which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a) (3);
2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;
3. That to the best of Mr. Rosenthal's knowledge, no members of Mr. Rosenthal's immediate family or others have sold any shares of the Company within the three (3) preceding years;
4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

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5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Rosenthal paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Rosenthal is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Rosenthal on July 25, 1985, and have been held by Mr. Rosenthal in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Rosenthal's knowledge, no members of Mr. Rosenthal's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

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8. That Mr. Rosenthal is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Rosenthal's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Frank Rinaldi; Number of Shares held: 40,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the "**Company**"), you have requested our opinion (this "**Opinion**") as to whether the shares of stock held by Mr. Frank Rinaldi (the "**Shares**") under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Frank Rinaldi which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a) (3);
2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;
3. That to the best of Mr. Rinaldi's knowledge, no members of Mr. Rinaldi's immediate family or others have sold any shares of the Company within the three (3) preceding years;
4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

Mr. Hyman Manger
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5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Rinaldi paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Rinaldi is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Rinaldi on July 25, 1985, and have been held by Mr. Rinaldi in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Rinaldi's knowledge, no members of Mr. Rinaldi's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

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8. That Mr. Rinaldi is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Rinaldi's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Frank X. Pagano; Number of Shares held: 55,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the "**Company**"), you have requested our opinion (this "**Opinion**") as to whether the shares of stock held by Mr. Frank X. Pagano (the "**Shares**") under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Frank X. Pagano which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a) (3);
2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;
3. That to the best of Mr. Pagano's knowledge, no members of Mr. Pagano's immediate family or others have sold any shares of the Company within the three (3) preceding years;
4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

Mr. Hyman Manger
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5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Pagano paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Pagano is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Pagano on July 25, 1985, and have been held by Mr. Pagano in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Pagano's knowledge, no members of Mr. Pagano's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

Mr. Hyman Manger
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8. That Mr. Pagano is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Pagano's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Salvatore Mauro; Number of Shares held: 40,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the "**Company**"), you have requested our opinion (this "**Opinion**") as to whether the shares of stock held by Mr. Salvatore Mauro (the "**Shares**") under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Salvatore Mauro which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);
2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;
3. That to the best of Mr. Mauro's knowledge, no members of Mr. Mauro's immediate family or others have sold any shares of the Company within the three (3) preceding years;
4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

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5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Mauro paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Mauro is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Mauro on July 25, 1985, and have been held by Mr. Mauro in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Mauro's knowledge, no members of Mr. Mauro's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

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8. That Mr. Mauro is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Mauro's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Daniel L. Liberman; Number of Shares held: 55,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the "**Company**"), you have requested our opinion (this "**Opinion**") as to whether the shares of stock held by Mr. Daniel L. Liberman (the "**Shares**") under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Daniel L. Liberman which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a) (3);
2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;
3. That to the best of Mr. Liberman's knowledge, no members of Mr. Liberman's immediate family or others have sold any shares of the Company within the three (3) preceding years;
4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

Mr. Hyman Manger
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5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Liberman paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Liberman is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Liberman on July 25, 1985, and have been held by Mr. Liberman in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Liberman's knowledge, no members of Mr. Liberman's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

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8. That Mr. Liberman is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Liberman's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Walter J. Lake, Sr.; Number of Shares held: 46,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the "Company"), you have requested our opinion (this "Opinion") as to whether the shares of stock held by Mr. Walter J. Lake, Sr. (the "Shares") under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Walter J. Lake, Sr. which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);
2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;
3. That to the best of Mr. Lake's knowledge, no members of Mr. Lake's immediate family or others have sold any shares of the Company within the three (3) preceding years;
4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

Mr. Hyman Manger
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5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Lake paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Lake is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Lake on July 25, 1985, and have been held by Mr. Lake in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Lake's knowledge, no members of Mr. Lake's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently onemillion sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

Mr. Hyman Manger
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8. That Mr. Lake is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Lake's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Marc Jacobson; Number of Shares held: 50,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the "**Company**"), you have requested our opinion (this "**Opinion**") as to whether the shares of stock held by Mr. Marc Jacobson (the "**Shares**") under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Marc Jacobson which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a) (3);
2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;
3. That to the best of Mr. Jacobson's knowledge, no members of Mr. Jacobson's immediate family or others have sold any shares of the Company within the three (3) preceding years;
4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

Mr. Hyman Manger
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5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Jacobson paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Jacobson is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Jacobson on July 25, 1985, and have been held by Mr. Jacobson in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Jacobson's knowledge, no members of Mr. Jacobson's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

Mr. Hyman Manger
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8. That Mr. Jacobson is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Jacobson's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Richard Hammond; Number of Shares held: 40,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the "**Company**"), you have requested our opinion (this "**Opinion**") as to whether the shares of stock held by Mr. Richard Hammond (the "**Shares**") under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Richard Hammond which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);
2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;
3. That to the best of Mr. Hammond's knowledge, no members of Mr. Hammond's immediate family or others have sold any shares of the Company within the three (3) preceding years;
4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

Mr. Hyman Manger
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5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Hammond paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Hammond is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Hammond on July 25, 1985, and have been held by Mr. Hammond in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Hammond's knowledge, no members of Mr. Hammond's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d) of the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

Mr. Hyman Manger
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8. That Mr. Hammond is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Hammond's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

March 21, 1989

Mr. Hyman Manger
JERSEY TRANSFER AND TRUST COMPANY
201 Bloomfield Avenue
Vernon, New Jersey 07044

RE: Removal of legend restrictions for shares held by Mr. Harvey M. Goldberg; Number of Shares held: 46,000 Shares Plus Warrants

Dear Mr. Manger:

As the transfer agent for National Thoroughbred Corporation (the "**Company**"), you have requested our opinion (this "**Opinion**") as to whether the shares of stock held by Mr. Harvey M. Goldberg (the "**Shares**") under the circumstances contemplated in this letter, would meet the requirements to lift their legend restrictions and be in compliance with the Securities Act of 1933. It is our understanding that the Shares are currently restricted securities within the meaning of Securities Act Rule 144(a) (3).

In connection with the preparation of this Opinion, we have relied upon representations by Mr. Harvey M. Goldberg which are relevant to the lifting of the restriction on the Shares. The following representations have been made to us:

1. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);
2. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;
3. That to the best of Mr. Goldberg's knowledge, no members of Mr. Goldberg's immediate family or others have sold any shares of the Company within the three (3) preceding years;
4. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d)8 the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

Mr. Hyman Manger
New Jersey Transfer
March 21, 1989
Page 2

5. That the Company has represented to you there are currently, at the time of its most recent annual report, one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock;

6. That Mr. Goldberg paid for the Shares in full on July 25, 1985, and he has owned the Shares beneficially since such date free and clear of any liens and encumbrances up to the present time; and

7. That Mr. Goldberg is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the above, we are of the following opinion:

1. That the Shares were fully paid for by Mr. Goldberg on July 25, 1985, and have been held by Mr. Goldberg in excess of three (3) years;

2. That information regarding the Company is publicly available information and accessible to potential purchasers;

3. That the Shares are restricted securities, within the meaning of Securities Act Rule 144(a)(3);

4. That you have not transferred, and will not transfer, any of the Shares unless instructed otherwise by this office;

5. That to the best of Mr. Goldberg's knowledge, no members of Mr. Goldberg's immediate family or others have sold any shares of the Company within the three (3) preceding years;

6. That the Company has provided information to you establishing that it has been subject to the reporting requirements of Sections 13 and 15(d) of the Securities Act of 1934 for a period of at least ninety (90) days and has filed all reports required thereunder during the preceding year;

7. That the Company has represented to you that at the time of its most recent annual report, there are currently one million sixty-nine thousand (1,069,000) shares of the Company's issued and outstanding common stock; and

Mr. Hyman Manger
New Jersey Transfer
March 21, 1989
Page 3

8. That Mr. Goldberg is not an officer, director, employee or affiliate of the Company and has not been an officer, director, employee or affiliate for at least the preceding three (3) months.

Based on the foregoing, and upon the information provided to us, it is our opinion that Mr. Goldberg's holding of the Shares meets the requirements of Rule 144(k) of the Securities Act, and all restrictions on the Shares should be lifted.

Very truly yours,

William R. Shupe

WRS/bk

(L\wrs\njtrnsfr.op2 3.9)

\$5,344.75

Salt Lake City, Utah
1 September 1989

Promissory Note

FOR VALUE RECEIVED, the undersigned, WILLIAM R. SHUPE, whose address is 7050 Union Park Boulevard, Suite 545, Midvale, Utah 84047 ("Maker"), promises to pay to the order of JARDINE, LINEBAUGH, BROWN & DUNN, A PROFESSIONAL CORPORATION, and to any subsequent holders hereof (such parties being collectively referred to herein as "Holder"), at 370 East South Temple, Suite 400, Salt Lake City, Utah 84111, or at such other place as Holder may designate from time to time in writing, in lawful money of the United States of America, the principal amount of Five Thousand Three Hundred Forty-four and 75/100ths Dollars (\$5,344.75), together with interest on the declining unpaid principal balance hereunder at the rate of ten percent (10%) per annum from the date hereof until paid, according to the terms and conditions that are set forth in this promissory note (this "Note"):

1. Payments. Maker shall pay Holder (a) quarterly interest installments of \$133.62 each on 1 December 1989, 1 March 1990 and 1 June 1990 and (b) the total unpaid principal balance hereof, together with all interest that is due thereon, on or before 1 September 1990.

2. Penalty for Past Due Payments. Notwithstanding the provisions of paragraph 1 or any other provisions of this Note to the contrary, if Maker defaults hereunder, the entire unpaid principal balance of this Note, all accrued but unpaid interest thereon and all other amounts that are payable hereunder shall bear interest for the period beginning with the date of occurrence of such default at the rate of eighteen percent (18%) per annum until the default is cured. This default rate of interest shall remain in effect (both before and after judgment) until the delinquent payments hereunder and all costs of collection have been paid in full. Payment of the increased interest amount, together with any other amounts that are due under this Note, shall be a condition precedent to curing the default.

3. Application of Payments. All payments and prepayments that are made hereunder shall be applied first toward the payment and satisfaction of accrued but unpaid interest and second toward reduction of the principal balance.

4. Prepayment. The outstanding principal balance hereof, together with accrued interest thereon, may be prepaid at any time before maturity, in whole or in part, without penalty. Maker's partial prepayment under this Note shall not relieve Maker of the obligation to make installment payments hereunder in their next

obligation to make installment payments hereunder in their next succeeding order of due date; provided, however, that the amount of such installments shall be applied in accordance with the provisions of paragraph 3 of this Note.

5. Security. This Note is unsecured.

6. Default. Maker shall be in default under this Note if a payment or any part thereof that is due under this Note is not made within five (5) days after the due date of such payment. If default does so occur then Holder, at Holder's option and without notice to Maker, may declare the entire unpaid principal balance hereunder, together with all accrued interest thereon, immediately due and payable, and Maker shall pay all costs and expenses that are incurred by Holder (including, but not limited to, a reasonable attorneys' fee) to collect such past due amounts, whether such costs and expenses are incurred with or without suit or before or after judgment.

7. Assumability of Note. Maker's obligations under this Note shall not be assumable by any person or entity without Holder's prior written consent. Notwithstanding any such assumption, however, the original Maker shall remain fully liable to Holder for the performance of all of the obligations under this Note.

8. Waiver. Holder may accept late payments or partial payments under this Note and may delay enforcing any of Holder's rights hereunder without losing or waiving any of Holder's rights under this Note.

9. Liability of Parties Under Note. The makers, sureties, guarantors and indorsers hereof, jointly and severally: (a) waive presentment for payment, protest, demand and notice of dishonor and nonpayment of this Note and all other requirements necessary to hold them liable hereunder; and (b) consent to any and all extensions of time, renewals, waivers or modifications that may be granted by Holder with respect to the payment or other provisions of this Note. Holder's enforcement of any security for the payment of this Note shall not constitute an election by Holder of remedies so as to preclude Holder's exercise of any other remedy available to Holder.

10. Interpretation; Jurisdiction. The provisions of this Note: (a) shall be interpreted and governed in accordance with the laws of the state of Utah; and (b) shall be deemed to be independent and severable. The invalidity or partial invalidity of any one provision or portion of this Note shall not affect the validity or enforceability of any other provision of this Note. Time is the essence of this Note. Further, in consideration of the financial accommodations represented by this Note and in order to induce Holder to extend those accommodations, the parties constituting Maker hereby expressly subject themselves to the

connection with this Note.

11. Joint and Several Liability; Jurisdiction. All of the obligations of Maker under this Note shall be the joint and several obligations of each party that composes Maker from time to time.

This Promissory Note replaces a Promissory Note of 1 December 1990 in the principal amount of \$5,669.42



WILLIAM R. SHUPE

Office Address:

923 Executive Park Drive, #C
Salt Lake City, Utah 84107

Home Address:

46 West 300 South, #1702
Salt Lake City, Utah 84101.

KBL\d\0166

\$5,669.42

Salt Lake City, Utah
1 December 1990

Promissory Note

FOR VALUE RECEIVED, the undersigned, WILLIAM R. SHUPE, whose address is 923 Executive Park Drive, #C, Salt Lake City, Utah 84107 ("Maker"), promises to pay to the order of JARDINE, LINEBAUGH, BROWN & DUNN, A PROFESSIONAL CORPORATION, and to any subsequent holders hereof (such parties being collectively referred to herein as "Holder"), at 370 East South Temple, Suite 400, Salt Lake City, Utah 84111, or at such other place as Holder may designate from time to time in writing, in lawful money of the United States of America, the principal amount of Five Thousand Six Hundred Sixty-nine and 42/100ths Dollars (\$5,669.42), together with interest on the declining unpaid principal balance hereunder at the rate of ten percent (10%) per annum from the date hereof until paid, according to the terms and conditions that are set forth in this promissory note (this "Note"):

1. Payments. Maker shall pay Holder monthly interest installments of \$47.25 each on January 1, 1991 and the same day of each consecutive calendar month thereafter until June 1, 1991, when the entire principal balance, together with all interest that is due thereon, shall be due and payable in full.

2. Penalty for Past Due Payments. Notwithstanding the provisions of paragraph 1 or any other provisions of this Note to the contrary, if Maker defaults hereunder, the entire unpaid principal balance of this Note, all accrued but unpaid interest thereon and all other amounts that are payable hereunder shall bear interest for the period beginning with the date of occurrence of such default at the rate of eighteen percent (18%) per annum until the default is cured. This default rate of interest shall remain in effect (both before and after judgment) until the delinquent payments hereunder and all costs of collection have been paid in full. Payment of the increased interest amount, together with any other amounts that are due under this Note, shall be a condition precedent to curing the default.

3. Application of Payments. All payments and prepayments that are made hereunder shall be applied first toward the payment and satisfaction of accrued but unpaid interest and second toward reduction of the principal balance.

4. Prepayment. The outstanding principal balance hereof, together with accrued interest thereon, may be prepaid at any time before maturity, in whole or in part, without penalty. Maker's partial prepayment under this Note shall not relieve Maker of the

obligation to make installment payments hereunder in their next succeeding order of due date; provided, however, that the amount of such installments shall be applied in accordance with the provisions of paragraph 3 of this Note.

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7. Assumability of Note. Maker's obligations under this Note shall not be assumable by any person or entity without Holder's prior written consent. Notwithstanding any such assumption, however, the original Maker shall remain fully liable to Holder for the performance of all of the obligations under this Note.

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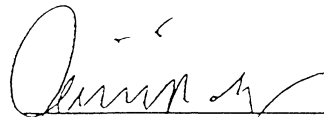
9. Liability of Parties Under Note. The makers, sureties, guarantors and indorsers hereof, jointly and severally: (a) waive presentment for payment, protest, demand and notice of dishonor and nonpayment of this Note and all other requirements necessary to hold them liable hereunder; and (b) consent to any and all extensions of time, renewals, waivers or modifications that may be granted by Holder with respect to the payment or other provisions of this Note. Holder's enforcement of any security for the payment of this Note shall not constitute an election by Holder of remedies so as to preclude Holder's exercise of any other remedy available to Holder.

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connection with this Note.

11. Joint and Several Liability; Jurisdiction. All of the obligations of Maker under this Note shall be the joint and several obligations of each party that composes Maker from time to time.

This Promissory Note replaces a Promissory Note of 1 September 1989 in the principal amount of \$5,344.75.



WILLIAM R. SHUPE

Office Address:

923 Executive Park Drive, #C
Salt Lake City, Utah 84107

Home Address:

46 West 300 South, #1702
Salt Lake City, Utah 84101.

KBL\d\0129

<u>Date</u>	<u>amt</u>	<u>Prin</u>	<u>Interest</u>	<u>Balance</u>
1-1-91	\$47.25	0	47.25	\$5669.42
2-26-91	48. ⁰⁰	0	48. ⁰⁰	5669.42
3-6-91	50. —	0	50. ⁰⁰	5669.42
4-25-91	50. —	0	50. —	5669.42
5-10-91	50. —	0	50. —	5669.42
6-17-91	50. —	0	50. —	5669.42
7-5-91	50. —	0	50. —	5669.42

\$5,669.42

Salt Lake City, Utah
1 August 1991

Promissory Note

FOR VALUE RECEIVED, the undersigned, WILLIAM R. SHUPE, whose address is 923 Executive Park Drive, #C, Salt Lake City, Utah 84107 ("Maker"), promises to pay to the order of JARDINE, LINEBAUGH, BROWN & DUNN, A PROFESSIONAL CORPORATION, and to any subsequent holders hereof (such parties being collectively referred to herein as "Holder"), at 370 East South Temple, Suite 400, Salt Lake City, Utah 84111, or at such other place as Holder may designate from time to time in writing, in lawful money of the United States of America, the principal amount of Five Thousand Six Hundred Sixty-Nine and 42/100ths Dollars (\$5,669.42), together with interest on the declining unpaid principal balance hereunder at the rate of ten percent (10%) per annum from the date hereof until paid, according to the terms and conditions that are set forth in this promissory note (this "Note"):

1. Payments. Maker shall pay Holder monthly interest installments of \$47.25 each on September 1, 1991 and the same day of each consecutive calendar month thereafter until November 1, 1991, when the entire principal balance, together with all interest that is due thereon, shall be due and payable in full.

2. Penalty for Past Due Payments. Notwithstanding the provisions of paragraph 1 or any other provisions of this Note to the contrary, if Maker defaults hereunder, the entire unpaid principal balance of this Note, all accrued but unpaid interest thereon and all other amounts that are payable hereunder shall bear interest for the period beginning with the date of occurrence of such default at the rate of eighteen percent (18%) per annum until the default is cured. This default rate of interest shall remain in effect (both before and after judgment) until the delinquent payments hereunder and all costs of collection have been paid in full. Payment of the increased interest amount, together with any other amounts that are due under this Note, shall be a condition precedent to curing the default.

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Date	Amount	Interest	Principal	5719.42 Balance
10-8-91	50.-	18 days @ 18% 50.-	- 0 -	5719.42 w/ interest pd to 8-19-91
12-27-91	2500.-	130 days @ 18% 367. <u>00</u>	2133.-	3586.42

jurisdiction of the Third Judicial District Court in and for Salt Lake County, Utah in connection with any action arising in connection with this Note.

11. Joint and Several Liability; Jurisdiction. All of the obligations of Maker under this Note shall be the joint and several obligations of each party that composes Maker from time to time.

WILLIAM R. SHUPE

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APPENDIX H

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In the Matter of)	
the Complaint by)	
KENT LINEBAUGH	)	AFFIDAVIT OF BLAINE
	)	SAVAGE
against	)	F-519
WILLIAM R. SHUPE)	
)	

I, Blaine Savage, state the following of my own personal knowledge:

1. In approximately 1986, I approached Mr. William Shupe to assist me in a dispute with the general partner of two partnerships with which I was associated.

2. I felt that the general partner of these partnerships had violated numerous securities laws and that I had a chance of unwinding the partnership, or best case of getting my investment back from the partnership.

3. In our initial conversation, I told Mr. Shupe that I had budgeted approximately \$10,000 for legal fees. He told me that he would bill me on an hourly rate, which was approximately \$100 per hour. I understood that this was an hourly case and not meant to be a case that paid a percentage of settlement. Other than Mr. Shupe, I never spoke with any other attorney in his law office

regarding legal fees or any other substantive matter in my case.

4. Mr. Shupe sent progress billings to me.

5. I paid two checks of \$1,000 and \$500 during the course of our negotiations with the general partner. I realized that litigation could erupt in this matter, which would have drawn out the eventual resolution for some time at considerable expense.

6. I knew that Mr. Shupe and other members of his firm were spending time on my case and I felt that we were making progress.

7. In October of 1986 we finally reached a tentative settlement with the general partner. We set to close the settlement in December.

8. On the day of closing, Mr. Shupe arrived with numerous settlement documents. Included in the settlement documents was a final billing for approximately \$6,000, representing the amount the law firm billed me for my case.

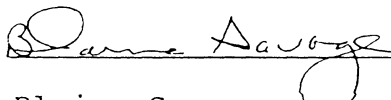
9. As I prepared to pay my final legal bill, which would have been approximately \$4,500 (\$6,000 less the \$1,500 I had already paid), I told Mr. Shupe that I wanted to pay the \$10,000 I had budgeted and he could consider the excess a bonus for his good work.

10. I then paid the additional \$4,000 to Mr. Shupe.

11. I was aware that this payment was in excess of the billing, but I felt the law firm was receiving the full amount of its billed fees with the final \$4,500 payment. I feel that I have no remaining obligation to either Mr. Shupe or the Jardine law firm.

12. On or about March 15, 1989, I received a letter from Mr. Harold Reiser of the Jardine law firm. He set forth several statements in this letter relative to my association with the law firm and Mr. Shupe. I did not completely read this letter, but rather sent it to my attorney and asked him to deal with the law firm. I received no other correspondence from the Jardine firm. I do not agree with the contents of the letter sent to me since I did not read it.

Dated this 16th day of July, 1992.


Blaine Savage

APPENDIX I

NO. 9110NCSB789

NORTH CAROLINA COURT OF APPEALS

Filed: 6 October 1992

FILED

92 OCT -6 AM 7:37

CLERK OF COURT
NORTH CAROLINA
COURT OF APPEALS

NORTH CAROLINA STATE BAR

v.

EDWARD DANIELS NELSON

From the Disciplinary
Hearing Commission of the
North Carolina State Bar
No. 89 DHC 34

Appeal by defendant from order filed 23 January 1991 by Chairman John Shaw before the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 27 August 1992.

In June 1983 the appellant began practicing law with the New Bern law firm of Beaman, Kellum & Stallings (firm). The Disciplinary Hearing Commission (DHC) found that at the time the appellant was hired, the firm was organized as a professional association and all stock was held by Norman Kellum and Joseph Stallings. During the summer of 1984 Kellum and Stallings met with the appellant to discuss the possibility of the appellant becoming an owner in the firm. Appellant's account of what transpired there differed substantially from separate testimony given by Kellum, Stallings and Bill Hollows, an associate with the firm.

Stallings testified that in June of 1984 Hollows approached him and said that he and the appellant would like to meet with Stallings and Kellum at the end of the day. Stallings agreed and the four men had a brief meeting later that evening. Kellum, Stallings and Hollows each testified that Hollows was present and

-2-

began the meeting by stating that he and the appellant wished to talk about becoming part owners in the firm. Kellum and Stallings voiced no objection to the idea of Hollows and the appellant becoming owners, but said they would need to discuss it further. Stallings said he would draft some documents for purposes of discussion and get back with the appellant and Hollows. The men also discussed the possibility of changing the firm's name. Upon conclusion of the meeting Kellum, Stallings and Hollows each believed that Hollows and the appellant remained employees of the firm.

Stallings further testified that in late fall of 1984 appellant asked Stallings how the paperwork was coming along. Stallings told the appellant that he had turned the responsibility for drafting the necessary documents over to Hollows and that the matter was in Hollows' hands. Hollows testified that the appellant asked him on more than one occasion whether any of the paperwork had been prepared. Hollows responded each time that the paperwork had not been prepared. Stallings also testified that sometime later he and Kellum met to discuss raising appellant's salary. After discussing the proposed raise with the appellant, appellant's annual salary was increased from \$40,000 per year to \$48,000 per year.

Appellant testified that one morning in late May or early June of 1984 he received a phone call from Stallings asking him to meet with Stallings and Kellum. He agreed. At the meeting appellant testified that Stallings said that he and Kellum had decided to

-3-

make the appellant a partner. Accordingly, appellant testified that they agreed that the appellant would receive shares in the firm and an increase in salary from \$40,000 per year to \$48,000 per year. Stallings agreed to do the necessary paperwork and appellant assumed that he had been made a partner in the firm. According to appellant, Hollows was not present at that meeting but was present at another meeting between Kellum, Stallings and himself. At that subsequent meeting the four discussed changing the name of the firm. Appellant testified that Kellum said he was not opposed to changing the name of the firm as long as Beaman was kept the first name in the firm name. Stallings did not voice any objection.

The appellant also testified that after his first meeting with Kellum and Stallings he placed an ad in the News and Observer announcing his addition to the firm as a partner. He did this because he wanted it announced and he thought it would be good for the firm's business. He did not think he needed the approval of Kellum and Stallings because, in his view, he had already been made a partner. The firm paid for the ad. No meeting was ever called to discuss the ad and no reprimand or disciplinary measures were taken against appellant for submitting the ad to the newspaper.

In the fall of 1984 Kellum also changed the firm's name in the yellow pages of the local telephone book by adding the names of Hollows and the appellant. Kellum authorized the change "[b]ecause [he] thought the work, the paperwork would be done, and those guys would own some shares, have their name on the door, make them work

-4-

better, feel a part of it." The following year, Kellum had the appellant's name deleted from the listing.

In the fall of 1986 appellant began working on a rate case for the North Carolina Department of Insurance which required him to spend time in Raleigh, rather than at the firm offices in New Bern. During this same period of time Stallings and Kellum became dissatisfied with the appellant's work largely because they felt that the appellant was devoting too much time to the rate case and neglecting his other cases.

On 22 April 1987 the appellant tendered his resignation to Kellum and left the firm to practice in Raleigh. On 11 May 1987 appellant submitted a bill to the North Carolina Department of Insurance for work he performed in the rate case between 30 December 1986 and 30 April 1987. On 21 May 1987 the Department of Insurance issued a check to the plaintiff in the amount of \$38,646.62. The appellant received the check during May. He did not inform the firm that he had billed the Department of Insurance or received the check. Rather, he deposited the check into a personal account. Appellant testified that he retained the funds upon advice of two separate attorneys, Jim Mills and Robert Bode, as an offset for funds he thought the firm owed him. In June of 1987, Kellum and Stallings found out that the Department of Insurance had issued the check to the appellant.

In September of 1987 the appellant filed a suit against the firm and against Kellum and Stallings individually in which he alleged inter alia that he had been made a partner and that the

-5-

firm owed him money. The appellant and the firm entered into a settlement agreement and release effective 23 March 1989 which provided that the appellant could retain all but \$12,500 of the Department of Insurance check and that the firm would pay the appellant \$4,387.31 in full settlement of all claims the appellant might have.

On 13 December 1989 appellant received a summons and complaint from the DHC of the North Carolina State Bar. After a full hearing, the Commission made the following findings of fact which are contested by appellant:

17. Prior to his departure from the firm, Nelson never made any statements to Hollows, Stallings or Kellum which indicated that Nelson thought he had been made an owner or partner in the firm.

22. Neither Stallings nor Kellum ever promised that Nelson's compensation was or would be based on some portion of fees brought into the firm. Neither Stallings nor Kellum ever promised that Nelson would be entitled to bonuses or any additional compensation other than his annual salary.

24. Prior to this departure from the firm, Nelson never made any statements to Kellum, Hollows, Stallings or to the firm bookkeeper which indicated that Nelson thought he was entitled to any additional sums of money beyond his usual salary.

35. Nelson did not have a reasonable, good faith belief that he was a partner in the firm or that he was entitled to additional sums of money at the time he billed the Department of Insurance and received and retained the \$38,646.62 check.

40. Defendant's Ex. B contains a list of legal matters pending when Nelson left B, K & S in April 1987. Defendant's Ex. G contains a list of fees which Nelson alleged he was due

-6-

from B, K & S. Nelson did not deliver either exhibit or any copies thereof to Kellum or Stallings at any time prior to instituting the civil action in September 1987.

The DHC also made findings that the appellant acted improperly while handling personal injury cases for Ms. Margaret Slipsager and Mr. Clarence Dewberry. The DHC then concluded:

1. By retaining the \$38,646.62 Department of Insurance Company check when he did not have a reasonable, good faith belief that he had a legitimate claim to any funds from B, K & S, Nelson engaged in conduct involving dishonesty, in violation of Rule 1.2(C).

2. By failing to file a notice of claim or lawsuit on Ms. Slipsager's behalf in a timely fashion, Nelson neglected a legal matter entrusted to him in violation of Rule 6(B)(3) and DR 6-101(A)(3) and prejudiced a client in violation of Rule 7.1(A)(3) and DR 7-101(A)(3).

3. By failing to respond to Ms. Slipsager's requests for information respecting her case, Nelson failed to communicate adequately with a client, in violation of Rule 6(B)(1).

4. By failing to file a notice of claim or lawsuit on Dewberry's behalf in a timely fashion, Nelson neglected a legal matter in violation of Rule 6(B)(3) and DR 6-101(A)(3).

5. By falsely assuring Dewberry that a claim had been filed on his behalf and that negotiations were underway respecting Dewberry's claim, Nelson engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 1.2(C) and DR 1-102(A)(4) and engaged in conduct adversely reflecting on his fitness to practice, in violation of DR 1-102(A)(6).

Accordingly, the Commission entered an Order of Discipline which inter alia suspended the appellant from practicing law for nine months. Appellant appeals.

-7-

Carolyn Bakewell for the plaintiff-appellee.

Cheshire, Parker, Hughes & Manning, by Joseph B. Cheshire, V.
and Alan M. Schneider for the defendant-appellant.

EAGLES, Judge.

I

Initially we note that appellant raised seventeen assignments of error on appeal. However, appellant failed to support assignments 1, 3, 8, 9, 10, 12, 13, 14, 15 or 16 with reason, argument or authority. Accordingly, those assignments have been abandoned. N.C.R. App. Pro. 28(b)(5).

II

Appellant argues that findings of fact numbers 17, 22, 24, 35 and 40 made by the DHC are not supported by clear, cogent and convincing evidence drawn from the whole record. We disagree and affirm.

The standard of proof and the standard for judicial review for attorney discipline cases is set out in North Carolina State Bar v. Whitted, 82 N.C. App. 531, 347 S.E.2d 60 (1986), affirmed, 319 N.C. 398, 354 S.E.2d 501 (1987).

The standard of proof in attorney discipline and disbarment proceedings is one of "clear, cogent and convincing" evidence. Rules of the North Carolina State Bar, Art IX, Sec. 14(18). See In re Palmer, 296 N.C. 638, 647-48, 252 S.E.2d 784, 789-90 (1979) (adopting standard); N.C. State Bar v. Sheffield, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323, cert. denied, 314 N.C. 117, 332 S.E.2d 482, cert. denied, --- U.S. ---, 88 L.Ed.2d 338, 106 S.Ct. 385 (1985). "Clear, cogent and convincing describes an evidentiary standard stricter

-8-

than the preponderance of the evidence, but less stringent than proof beyond a reasonable doubt.... It has been defined as 'evidence which should fully convince.'" Sheffield, supra (citations omitted).

The standard for judicial review of attorney discipline cases is the "whole record" test. N.C. State Bar v. DuMont, 304 N.C. 627, 642, 286 S.E.2d 89, 98 (1982). "Under the whole record test there must be substantial evidence to support the findings, conclusions and result.... The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion." Id. at 643, 286 S.E.2d at 98-99.

* * *

"The 'whole record' test does not allow the reviewing court to replace the [Committee's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo." Thompson v. Board of Education, 292 N.C. 406, 410 233 S.E.2d 538, 541 (1977).

Whitted, 82 N.C. App. at 536, 347 S.E.2d at 63 (1986).

On appeal the appellant, both in his brief and during oral argument, highlighted evidence in the record which tends to establish facts contra to those found by the DHC. However, this Court's task is not to replace the DHC's judgment with our own. Id. Rather, our task is to determine whether after applying the whole record test, the DHC's findings are properly supported by the record even though we might have reached a different result had the matter been before us de novo. We hold that the record before us contains substantial evidence to support the contested findings of fact. Accordingly, we find no error.

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Appellant also argues that the DHC lacked authority to determine whether the firm was a partnership or a professional association. We are not required to address this question. If the firm was a partnership, the DHC found that the appellant had no reasonable good faith belief that he was a partner. If the firm was a professional association, the DHC found that neither Kellum nor Stallings ever promised the appellant that his compensation would be based on a portion of the fees he brought into the firm, nor did they ever promise him a bonus or additional compensation above his annual salary. Under either interpretation the appellant, according to the DHC's findings, could not have had a reasonable good faith belief that he was entitled to additional sums over his salary. This argument is overruled.

III

Appellant next argues that the DHC wrongfully concluded that appellant acted dishonestly by retaining the Department of Insurance check without a reasonable good faith belief that he had a legitimate claim to any of the funds. We disagree.

Appellant first argues that he acted pursuant to a good faith belief that he was entitled to additional sums from the firm when he retained the Department of Insurance check. This argument is essentially a restatement of the argument addressed under heading II supra and we disagree for the reasons stated there.

Appellant next argues that he acted reasonably because he acted in conformity with the advice of counsel. However, the DHC made the following findings of fact: On 11 May 1987 appellant

-10-

billed the Department of Insurance, which issued a check to the appellant on 21 May 1987. Appellant did not inform the firm that he had billed the Department of Insurance or that he had received the check. The DHC also found that the appellant first sought the advice of legal counsel, James Mills, in late June or early July, and that appellant did not seek the counsel of Bob Bode until September 1987. We note that the back of the check indicates that the appellant negotiated the check on 21 May 1987. DHC's findings are sufficient to support the conclusion that the appellant was not acting upon the advice of counsel when he retained and deposited the Department of Insurance check into his personal account. Accordingly, this argument fails.

IV

In his final assignment, appellant argues that the DHC abused its discretion by suspending the appellant from the practice of law for nine months. We disagree.

Appellant contends that "neither the North Carolina State Bar nor the Disciplinary Hearing Commission were the proper parties to bring or hear this case under the authority granted it in Chapter 84 of the General Statutes of North Carolina and the Rules and Regulations of the North Carolina State Bar." According to the appellant, "[t]here is no rule in the Code of Professional Responsibility or the North Carolina Rules of Professional Conduct that governs accounting procedures for law firm funds and under no circumstances should the State Bar have involved itself in an intra-partnership accounting dispute." In support of its argument

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appellant cites Matter of Rice, 99 Wash. 2d 275, 661 P.2d 591 (1983). During oral argument, however, the appellant conceded that whenever there is a question of dishonesty, beyond the rudimentary need for an accounting to resolve internal law firm disputes, the DHC has jurisdiction to hear matters involving internal law firm disputes. Here, the DHC specifically concluded that the appellant engaged in dishonest conduct by retaining the Department of Insurance check without a reasonable good faith belief that he was entitled to any funds from the firm. This assignment is without merit.

Finally, appellant argues that the DHC abused its discretion by suspending him from the practice of law for nine months. "The discipline imposed was within the statutory limits. N.C. Gen. Stat. 84-28(b),(c). This Court [has] stated that 'so long as the punishment imposed is within the limits allowed by the statute this Court does not have the authority to modify or change it.'" Whitted, 82 N.C. App. at 539-40, 347 S.E.2d at 65 (quoting N.C. State Bar v. Wilson, 74 N.C. App. 777, 784, 330 S.E.2d 280, 284 (1985)). This assignment is likewise without merit and therefore overruled.

Affirmed.

Judges JOHNSON and PARKER concur.

A TRUE COPY
CLERK OF THE COURT OF APPEALS
OF NORTH CAROLINA
BY *Doris F. Cole*
DEPUTY CLERK.
10-6-92

APPENDIX J

150

2

WAC RESEARCH INC. - 6-98
3834 WEST 12300 SOUTH BOX 879-8900
SALT LAKE CITY, UT 84104

021

Pay to the
order of

William R. Shupe Trust Account

15,000.00

0000000000

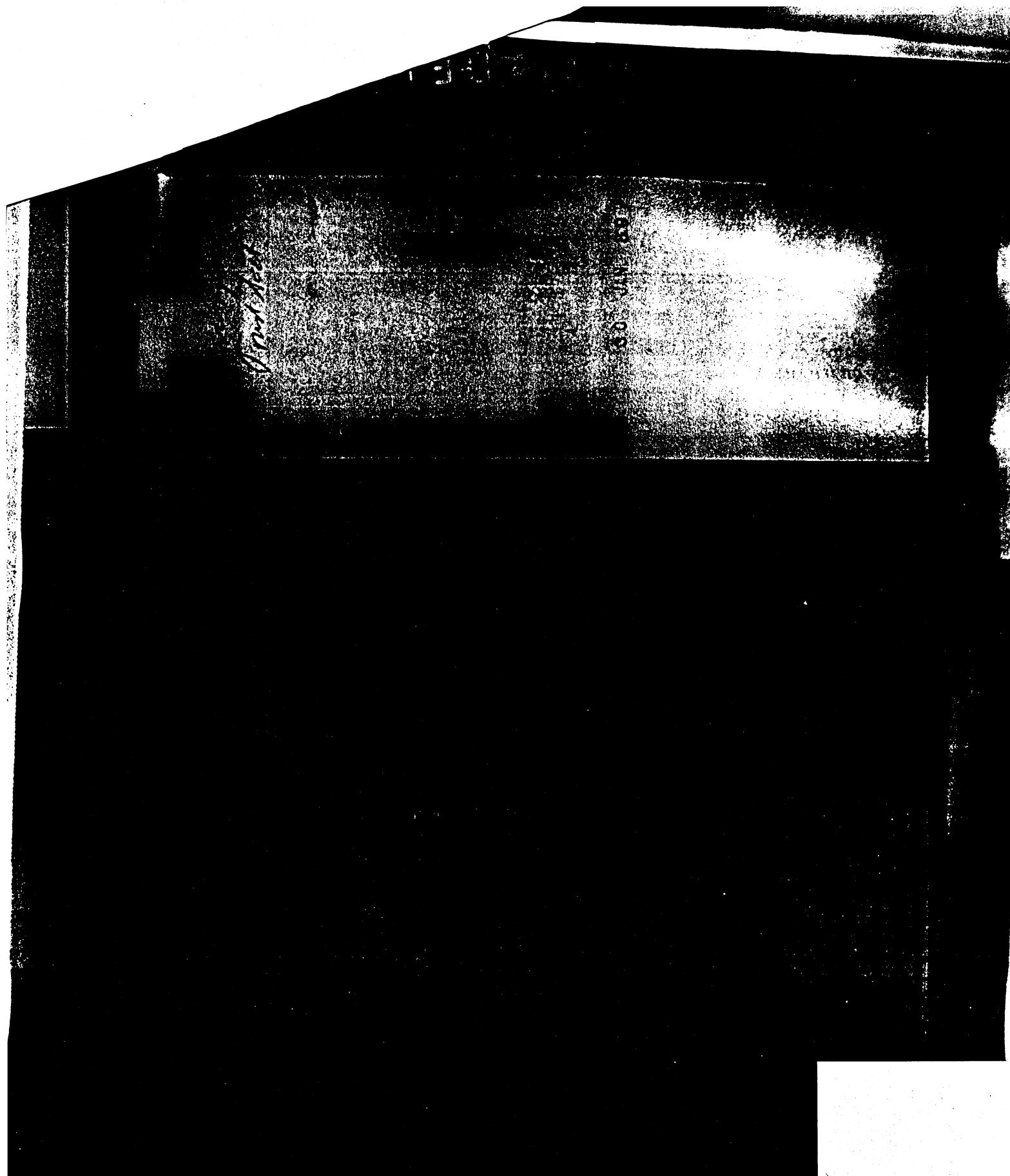
050

DEPOSIT SLIP
WILLIAM R. SHUPE 6-28
CLIENT TRUST ACCOUNT
310 EAST 4500 SOUTH 2310 888-0801
SALT LAKE CITY, UT 84107

DATE 10 14 1989

AMOUNT	5000.00
DATE	10-14-89
TOTAL	5000.00

APPENDIX K



APPENDIX L

2739537
Lump
Price

Handwritten text on lined paper, possibly a ledger or notebook page. The text is mostly illegible due to heavy noise and poor image quality. Some faint, possibly handwritten, words are visible, including "Handwritten" and "Price".

APPENDIX M

Guaranty Trust

5313 9 5 0
5313 9 5 0
5313 9 5 0

AMERICAN SCIENTIFIC CORP.
100 E. SOUTH TEMPLE, SUITE 4000, 800-6000
SALT LAKE CITY, UT 84111-1100

February 14, 1989

Pay to the order of William R. Shupe Trust Account

\$ 3,000.00

Three thousand dollars and no/100

Dollar

FOR DEPOSIT ONLY

GUARANTY TRUST
100 E. SOUTH TEMPLE, SUITE 4000
SALT LAKE CITY, UT 84111

David Shupe

[illegible]

7-ε

ה'רנ"ח

APPENDIX N

Wendell K. Smith, #3019
Assistant Bar Counsel
OFFICE OF BAR COUNSEL
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

Hearing Panel:
Harold L. Petersen, Chair
Barbara K. Polich

In the Matter of the)	
Complaint by)	
	)	AFFIDAVIT OF
BAR COUNSEL	)	ROBERT J. DALE
)	
against)	
	)	F-520
WILLIAM R. SHUPE)	
DOB: 08-20-54)	
ADM: 10-15-84)	

STATE OF UTAH :
: ss
COUNTY OF SALT LAKE :

I, Robert J. Dale, being first duly sworn, affirm and state that:

1. I am an attorney admitted to practice law in the State of Utah, a member of the law firm of McMurray, McMurray, Dale, & Parkinson, and counsel to Bryant D. Cragun

2. On or about October 14, 1992, William R. Shupe paid to Mr. Cragun the sum of \$7,000.00 by delivering a check in that amount, payable to Mr. Cragun, to the law firm of McMurray, McMurray, Dale & Parkinson. This was a refund of part of the \$25,000.00 he was holding in trust for Mr. Cragun.

3. Mr. Shupe informed me that he would refund to Mr. Cragun the additional amount of \$13,000.00, by delivering the funds to the law firm of McMurray, McMurray, Dale & Parkinson, not later than December 31, 1992. As of the date of the signing of this Affidavit Mr. Shupe has not delivered to this law firm the additional \$13,000.00.

4. I have verified that Respondent has not made this payment directly to Mr. Cragun.

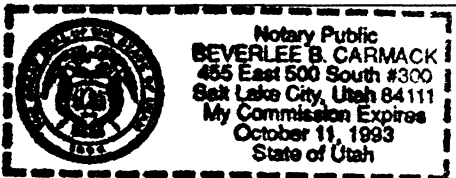
FURTHER AFFIANT SAYETH NOT.

DATED this 12th day of January, 1993.

Robert J. Dale
Robert J. Dale

Subscribed and sworn before me this 12th day of January, 1993.

My Commission Expires:



Beverlee B. Carmack
Notary Public
Residing in Bountiful, Utah

APPENDIX O

1. 1000

Vicki Allen

75⁰⁰/₅₀
1180358

BRYANT D. CRAGUN,
Plaintiff,
vs.
WILLIAM R. SHUPE, individually,
RICHARD YAGI, individually,
and JOHN DOES I - V,
Defendants.

GENERAL ALLEGATIONS

1. Plaintiff is an individual residing in Davis County and doing business in Salt Lake County, State of Utah.
2. Defendant William R. Shupe (hereinafter "Shupe") is an individual residing, doing business, and practicing law as a licensed attorney, in Salt Lake County, State of Utah.
3. Defendant Richard Yagi (hereinafter "Yagi") is an individual residing in and doing business in Salt Lake County,

State of Utah.

4. Defendants John Does I - V are all individuals or entities presently unknown to Plaintiff who, on information and belief, participated in or otherwise facilitated the misconduct and omissions hereinafter alleged. Plaintiff will amend his Complaint to include the actual names of Defendants John Does I - V when the facts and the true names of such parties are ascertained.

5. During the latter part of 1988, and prior to and during January, 1989, Yagi and Plaintiff discussed the possibility of Plaintiff purchasing from Yagi a controlling interest in a publicly held corporation (hereinafter the "Corporation").

6. During negotiations for the purchase of the controlling interest in the Corporation Plaintiff, at Yagi's request, deposited the amount of Twenty-Five Thousand Dollars (\$25,000.00) (the "Funds") in the trust account(s) of Shupe to be held by Shupe as escrow agent for Plaintiff's potential purchase of the stock of the Corporation and to be used and delivered to Yagi only in the event such purchase was actually consummated. Yagi and Plaintiff agreed that the Funds would not be disbursed to Yagi and would be returned to Plaintiff in the event Plaintiff did not purchase the controlling interest in the Corporation from Yagi.

7. The Funds were deposited into the trust account(s) of Shupe by checks issued in the following amounts:

A. Check No. 1021, dated January 19, 1989, in

the amount of \$5,000.00;

B. Check No. 491, dated January 30, 1989, in the amount of \$5,000.00;

C. Check No. 1124, dated February 2, 1989, in the amount of \$12,000.00; and

D. Check No. 1125, dated February 14, 1989, in the amount of \$3,000.00, for a total deposit of \$25,000.00. True and correct copies of said checks are attached hereto and incorporated herein by reference as Exhibits "A" through "D", respectively.

8. In receiving Plaintiff's Funds, Shupe was informed that the Funds deposited into Defendant Shupe's trust account(s) were Plaintiff's Funds and were to be used for the express and sole purpose of paying for stock of the Corporation in the event Plaintiff purchased the controlling interest in the Corporation.

9. On information and belief, the Funds were in fact deposited in the trust account(s) of Shupe. Shupe was therefore serving in a fiduciary capacity and owed the highest duty of care and fair dealing to Plaintiff. As such, Shupe was directly and primarily responsible for the safe-keeping, proper receipt, and proper disbursement of the Funds deposited into his trust account(s).

10. Shupe was personally responsible for the Funds and was not authorized to use or disburse to Yagi any portion of the Funds unless and until such time as: (a) The transfer of the Corporation's stock to Plaintiff was made, if that transaction was ever consummated; and (b) express approval was given to

Shupe by Plaintiff to disburse the Funds to Yagi (the contents of subparagraphs "a" and "b" of this paragraph are hereinafter collectively referred to as the "Corporate Purchase").

11. The Corporate Purchase was never completed and never occurred, and Plaintiff, individually and through counsel, therefore requested and demanded that Shupe return the Funds to Plaintiff.

12. Despite Plaintiff's repeated demands for the return of the Funds, and Shupe's subsequent repeated promises to return the same, Shupe has only returned the amount of \$6,000.00 to Plaintiff.

13. Based upon information and belief, the balance of the Funds (\$19,000.00) were wrongfully delivered by Shupe to Yagi and/or otherwise diverted, comingled, misapplied, and/or improperly disbursed (hereinafter separately and collectively referred to as the "Misappropriation(s)"/"Misappropriated").

14. On information and belief, the Misappropriation of the Funds was a conspiratorial act of both Defendants Shupe and Yagi, and done at the expense of Plaintiff for Defendants' mutual benefit.

15. The circumstances surrounding the deposit of Funds by Plaintiff with Shupe and the Misappropriation of the Funds were more than sufficient to put Shupe on reasonable notice to make inquiry into and to prevent and/or cure the Misappropriation, even if the Misappropriation was not done knowingly.

16. Shupe, through the use and exercise of reasonable diligence on his part, could and should have prevented and

remedied any improper disbursement to Yagi or any other Misappropriation.

17. Yagi and Shupe were agents of each other with respect to the receipt, deposit, and disbursement of Plaintiff's Funds, and as such are each charged with the knowledge and liability of the other regarding the receipt, deposit, and disbursement of Plaintiff's Funds.

FIRST CAUSE OF ACTION

(Conversion)

18. Plaintiff hereby incorporates into and makes a part of his First Cause of Action each and every other paragraph in this Complaint.

19. The escrowed Funds wrongfully Misappropriated by Defendants were the property of Plaintiff.

20. Defendants, and each of them, knew or reasonably should have known that the Funds being wrongfully Misappropriated were Funds belonging to the Plaintiff and could not be legally used by the Defendants.

21. Defendants, and each of them, further knew or reasonably should have known that the Funds were being wrongfully Misappropriated.

22. Through their conduct and omissions, as alleged herein, including the Misappropriation of the Funds, Defendants have converted to their own use and for their own benefit, directly or indirectly, such Funds in the remaining principal amount of not less than \$19,000.00.

23. Plaintiff is entitled to judgment against the Defendants, and each of them, jointly and severally, in the principal amount of not less than \$19,000.00, together with interest thereon at the rate of not less than ten percent (10%) per annum from the time of the Misappropriation until judgment, and with post-judgment interest on the whole thereof until paid at the rate of twelve percent (12%) per annum.

24. Plaintiff further is entitled to judgment against Defendants, jointly and severally, for any and all consequential damages proximately caused by Defendants' misconduct and omissions, as alleged herein, as a result of the Misappropriation and in otherwise intentionally converting such Funds to Defendants' own use, directly or indirectly, including, without limitation, for Plaintiff's attorneys' fees and costs and lost opportunities to be shown at trial.

25. Defendants' conversion was willful, intentional, and/or was undertaken in clear and reckless disregard of the rights of Plaintiff, and was performed with an express appreciation of the damages and losses that would likely result from the conversion, including damages and losses to Plaintiff.

26. Defendants converted the Funds because, in part, they believed that liability for their tortious conduct would be limited to a return of the Funds. Unless punished by the Court herein, Defendants are likely to repeat this or similar conduct in the future. Defendants' actions justify an award of exemplary and punitive damages to Plaintiff in an amount of not less than \$100,000.00, to deter further instances of lawless behavior by

Defendants.

SECOND CAUSE OF ACTION

(Breaches of Fiduciary Duties)

27. Plaintiff incorporates into and makes a part of his Second Cause of Action, each and every other paragraph in this Complaint.

28. Shupe, as a licensed attorney and in his capacity as escrow-holder of the Funds, owed the highest fiduciary duties and obligations to Plaintiff, and a high standard of care towards Plaintiff, to safeguard and properly apply the Plaintiff's Funds and, further, to not make disbursement of the Funds without Plaintiff's approval and not to make any Misappropriation of the Funds.

29. Plaintiff reposed trust and confidence in Shupe to properly safeguard and apply the Funds, and thereupon there arose a relationship of trust and confidence between Plaintiff and Shupe.

30. In his position and capacity as attorney and escrow-holder of Plaintiff's Funds, Shupe, by Misappropriating the Funds, has breached his fiduciary duties and obligations, and his high standard of care, owed to Plaintiff.

31. As a direct result of Defendant Shupe's aforesaid violations and breaches of his fiduciary duties, Plaintiff has suffered damages in the principal amount of at least \$19,000.00, and will continue to suffer damages as a result of Defendants' Misappropriation of the Funds.

32. Plaintiff is entitled to punitive and exemplary damages for and based upon Defendant Shupe's aforesaid violations and breaches of his fiduciary duties in an amount not less than \$100,000.00.

THIRD CAUSE OF ACTION

(Breaches of Express Contract)

33. Plaintiff incorporates into and makes a part of his Third Cause of Action, each and every other paragraph in this Complaint.

34. Defendants have breached their express agreement with Plaintiff regarding the deposit, holding, disbursement, and safeguarding of the Funds, by Misappropriating the Funds prior to any completion of the Corporate Purchase.

35. As a direct result of Defendants' breaches, Plaintiff has suffered damages in the principal amount of \$19,000.00 plus legal interest.

36. As a further direct and proximate cause of Defendants' breach, Plaintiff has suffered consequential damages and lost opportunities in an amount to be proven at trial, including Plaintiff's legal fees and costs incurred herein.

FOURTH CAUSE OF ACTION

(Breaches of Implied Contract and
Implied Covenants of Good Faith and Fair Dealing)

37. Plaintiff incorporates into and makes a part of his Fourth Cause of Action, each and every other paragraph in

this Complaint.

38. By Misappropriating the Funds, Defendants have breached their implied contract with Plaintiff to properly receive, hold, safeguard, and disburse Plaintiff's Funds and not to Misappropriate Plaintiff's Funds.

39. By Misappropriating Plaintiff's Funds, Defendants further have breached their implied and express duties of good faith and fair dealing with Plaintiff to properly receive, hold, safeguard, and disburse Plaintiff's Funds.

FIFTH CAUSE OF ACTION

(Negligence, Gross Negligence, and Recklessness)

40. Plaintiff incorporates into and makes a part of his Fifth Cause of Action each and every other paragraph in this Complaint.

41. Defendants owed certain duties of care to Plaintiff with respect to the Funds including properly and diligently safeguarding and applying the Funds.

42. Defendants further owed duties and obligations to Plaintiff to exercise reasonable care, skill, and diligence, under the circumstances, with respect to the Funds.

43. Due to Defendant Shupe's unique position as an attorney, and specifically as the attorney for Yagi, Shupe was intimately familiar with the proposed business transactions between Plaintiff and Yagi and therefore had a high duty to not cause or permit any Misappropriation or improper disbursement of the Funds.

44. In spite of the information Defendants had or should have known, and notwithstanding the information available to Defendants, Defendants acted in a negligent, grossly negligent, and/or reckless manner in failing to properly safeguard, segregate, and apply the Funds, and in Misappropriating the Funds.

45 Defendants breached their duties and obligations owed to Plaintiff with respect to the Funds by negligently, gross negligently and/or recklessly accomplishing, participating in, acquiescing in, and/or ratifying the Misappropriation of the Funds

46 As a direct and proximate cause of Defendants' negligence, gross negligence and/or recklessness, Plaintiff has been damaged in the principal amount of \$19,000 00, plus accruing interest and other consequential damages to be shown at trial, including Plaintiff's legal fees and costs incurred herein.

SIXTH CAUSE OF ACTION

(Negligent Misrepresentation)

47 Plaintiff hereby incorporates into and makes a part of his Sixth Cause of Action each and every other paragraph in this Complaint.

48. Plaintiff is informed and believes that Defendants had a pecuniary interest in promoting the Corporate Purchase and otherwise in receiving the Funds from Plaintiff.

49. Defendants actually and impliedly, and carelessly, negligently, grossly negligently, and recklessly represented to

Plaintiff that one or all of the following was true:

A. That Plaintiff's Funds would be kept safe and returned to Plaintiff in the event the Corporate Purchase was not consummated;

B. That the Funds would not be Misappropriated.

50. The representations made by the Defendants were material and false when they were made.

51. Defendants expected Plaintiff to rely and act upon the false representations.

52. Plaintiff reasonably relied upon the false, material representations of Defendants to his injury and damage.

53. Plaintiff suffered a loss as a result of the false representations of the Defendants in the amount of \$19,000.00, representing the amount of Funds not returned to Plaintiff when the Corporate Purchase was not consummated, and such consequential damages as shall be shown at the trial hereof, including Plaintiff's legal fees and costs incurred herein.

SEVENTH CAUSE OF ACTION

(Unjust Enrichment)

54. Plaintiff incorporates into and makes a part of his Seventh Cause of Action, each and every other paragraph in this Complaint.

55. By their Misappropriation of the Funds, Defendants, and each of them, have been unjustly enriched at Plaintiff's expense, in an amount not less than \$19,000.00, plus accrued interest and consequential damages.

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, as follows:

1. For general damages in the sum of \$19,000.00.
2. For special damages due to lost opportunities and other consequential damages, including without limitation attorneys' fees and costs, in a sum to be determined by the Court.
3. For pre-judgment interest at the rate of ten percent (10%) per annum from January 19, 1989, through the date of judgment.
4. For post-judgment interest at the rate of twelve percent (12%) per annum.
5. For Plaintiff's costs of suit herein incurred, including collection expenses and attorneys' fees.
6. For punitive damages in an amount not less than \$100,000.00.
7. For such other and further relief as the Court may deem proper.

DATED this 12th day of June, 1989.

McMURRAY, McMURRAY, DALE
& PARKINSON, P.C.

By: Robert J. Dale
Robert J. Dale
Tad D. Draper

UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION
Robert J. Dale, No. 0808
Tad D. Draper, No. 4311
McMURRAY, McMURRAY, DALE & PARKINSON
455 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5125

RECEIVED CLERK
FEB 28 1990
FEB 28 1990
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

BRYANT D. CRAGUN,	:	
	:	
Plaintiff,	:	JUDGMENT BY DEFAULT
	:	
vs.	:	
	:	
WILLIAM R. SHUPE, individually,	:	Civil No. 89 C 779A
RANDY YAGI, individually, and	:	
JOHN DOES I - X,	:	Judge Aldon J. Anderson
	:	
Defendants.	:	

IN THIS ACTION, the Defendant, William R. Shupe, having been regularly served with process and having failed to appear and answer the Complaint filed herein, the legal time for answering having expired, and the Default of the said Defendant in the premises having been duly entered according to law, now upon the written application of the Plaintiff to the above entitled court and oral argument and presentation of evidence on February 1, 1990, the Court makes the following Findings of Fact and Conclusions of Law and enters Judgment as set forth herein:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Defendant William R. Shupe has been duly served with process and the Default of the said Defendant has been duly entered according to law.

2. The Court finds that the factual allegations alleged by the Plaintiff against Defendant William R. Shupe, are correct and true based upon the written documentation in the court's file as well as the Affidavit of Bryan D. Cragun of December 23, 1989.

3. The Court further finds that the material facts of Plaintiff's Complaint justify a Default Judgment and award against Defendant Shupe as supported by the representations of counsel that Plaintiff has not received payment or reimbursement for funds invested in a stock offering proposed and presented by Defendant Shupe.

4. The Court specifically finds the elements of common law fraud and securities violations to be amply supported and justified, with the exception of Section 17 of the Federal Act

5. The Court specifically finds that Plaintiff initially invested the sum of \$15,000.00 in this stock purchase transaction and that the costs of cover for a subsequently attempted sale of Plaintiff's stock leave Plaintiff with an out of pocket expenditure and loss of \$187,500.00.

6. The Court further finds the specific application of Utah Code Ann. §61-1-22 and finds a violation of said statute,

resulting in trebling of Plaintiff's initial \$15,000.00 investment.

7. Accordingly, the amount of \$187,500.00 as an out-of-pocket expenditure of Plaintiff, and an additional \$30,000.00 awarded so as to treble the amount of Plaintiffs initial investment is just and proper.

8. The Court further finds that attorneys' fees and costs incurred in bringing this action in the amount of \$4,395.40 is just and proper.

9. The Court then considered the issue of punitive damages and finds that an award of punitive damages is supported by the evidence, pleadings and affidavits and documents contained in the file.

10. Plaintiff's counsel requested a \$100,000.00 punitive award but this figure was rejected inasmuch as there was a lack of sufficient financial information on Defendant William R. Shupe to justify this amount. Accordingly, based upon the egregious nature of Defendant Shupe's actions, activities and liabilities, an award of \$25,000.00 in punitive damages is proper.

11. The Court further finds that it is just and proper to augment the amount of attorneys' fees and costs which will be expended in enforcing this Judgment and retains jurisdiction for the purpose of augmenting any additional expended amounts as part of this original Judgment.

WHEREFORE, by virtue of the law, and by reasons of the premises aforesaid, IT IS HEREBY ORDERED, ADJUDGED AND DECREED

that except for the claim under Section 17 of the Federal Act, Plaintiff is hereby awarded Judgment against Defendant William Shupe on his Complaint as follows:

1. Actual and consequential damages for the replacement value of the stock in the amount of \$187,500.00 (said amount including the initial investment of \$15,000.00);

2. An additional \$30,000.00 so as to treble the initial investment amount pursuant to Utah Code Ann. 61-1-22;

3. For attorneys' fees and costs incurred in bringing this action in the amount of \$4,395.40;

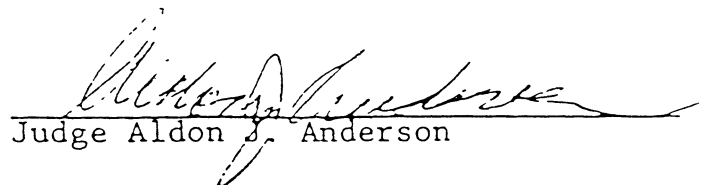
4. For punitive damages in the amount of \$25,000.00;

5. For interest on all amounts awarded at the rate of 12% per annum from the date of this Judgment until collected;

6. It is further ordered that this Court shall retain jurisdiction in this matter in order to augment this Judgment to cover amount of reasonable costs and attorneys fees expended in enforcing this Judgment; any request for augmentation shall be established by Affidavit filed before this Court by Plaintiff or his counsel.

DATED this 7th day of ^{Mar}~~February~~, 1990.

BY THE COURT:


Judge Aldon J. Anderson

Cragun
tad21

RECEIVED

MAR 17 1993

OFFICE OF BAR COUNSEL

Robert J. Dale, No. 0808
Tad D. Draper, No. 4311
McMURRAY, McMURRAY, DALE & PARKINSON
Attorneys for Plaintiff
455 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5125

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

BRYANT D. CRAGUN,
Plaintiff,

vs.

WILLIAM R. SHUPE, individually,
RICHARD YAGI, individually, and
JOHN DOES I - X,
Defendant.

NOTICE OF
ENTRY OF JUDGMENT

Civil No. 890903670CV

Judge John A. Rokich

Pursuant to Rule 58A(d), Utah Rules of Civil Procedure,
notice is hereby given of the signing and entry of a Default
Judgment against Defendants.

DATED this 15th day of February, 1990.

McMURRAY, McMURRAY, DALE
& PARKINSON

By:

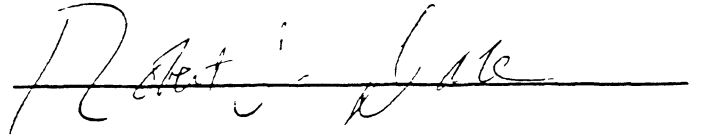
Robert J. Dale
Robert J. Dale

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing NOTICE OF ENTRY OF JUDGMENT this 15th day of February, 1990 to:

Richard B. Yagi
875 Donner Way,
Salt Lake City, UT 84108

William R. Shupe
7050 South Union Park Blvd., #545
Midvale, Utah 84047

A handwritten signature in cursive script, appearing to read "Richard B. Yagi", is written over a horizontal line.

APPENDIX P

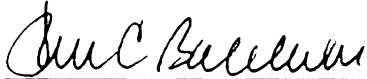
Wendell K. Smith, #3019
Office of Bar Counsel
645 South 200 East
Salt Lake City, UT 84111-3834
801-531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In The Matter of the)	
Complaint by)	
)	
BAR COUNSEL	)	DEFAULT
)	
against	)	F-520
)	
WILLIAM R. SHUPE)	
DOB: 08-20-54)	
ADM: 10-15-84)	

The Respondent having been regularly served with process, and having failed to appear and answer the Formal Complaint on file in the above-captioned matter, and the time allowed by the Procedures of Discipline of the Utah State Bar and the Summons for answering having expired, the default of the Respondent is hereby entered, upon the request of the Office of Bar Counsel.


DATED this 5th day of March, 1992.



John C. Baldwin
Executive Director

CERTIFICATE OF CERTIFIED MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Default in the matter of Bar Counsel against William Shupe, F-520, was mailed certified mail, postal certification number PX74-345-351, return receipt requested to William R. Shupe at 333 Civic Center Dr. West, Santa Ana, CA 92701 on this 11th day of March, 1992.



Wendell K. Smith, #3019
Office of Bar Counsel
645 South 200 East
Salt Lake City, UT 84111-3834
801-531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR


In The Matter of the)	
Complaint by)	
)	
BAR COUNSEL	)	REQUEST FOR ENTRY
	)	OF DEFAULT
)	
against	)	F-520
)	
WILLIAM R. SHUPE)	
DOB: 08-20-54)	
ADM: 10-15-84)	

TO: John C. Baldwin
Executive Director

The Respondent having been regularly served with process, and having failed to appear and answer the Formal Complaint on file in the above-captioned matter, and the time allowed by the Procedures of Discipline of the Utah State Bar and the Summons for answering having expired, the Office of Bar Counsel hereby requests that you enter the default of the Respondent.

DATED this 5th day of MARCH, 1992.

OFFICE OF BAR COUNSEL

By: 
Wendell K. Smith
Assistant Bar Counsel

Wendell K. Smith, #3019
Office of Bar Counsel
645 South 200 East
Salt Lake City, UT 84111-3834
801-531-9110

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In The Matter of the)	
Complaint by)	
)	
BAR COUNSEL	)	NOTICE OF INTENT TO DEFAULT
)	
against	)	F-520
)	
WILLIAM R. SHUPE)	
DOB: 08-20-54)	
ADM: 10-15-84)	

To: William R. Shupe, Respondent
333 Civic Center Dr. West
Santa Ana, CA 92701

PLEASE TAKE NOTICE That an Answer to the Summons and Formal Complaint not having been filed within the time fixed by the Summons, the Commission through the Executive Director, shall enter your default if said answer is not filed within five (5) days of the date hereof.

DATED this 12th day of FEBRUARY, 1992.

OFFICE OF BAR COUNSEL

By: 
Wendell K. Smith
Assistant Bar Counsel

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Notice of Intent To Default in the matter of Bar Counsel against William Shupe, F-520, was mailed certified mail, postal certification number P 879 345 367, return receipt requested to William R. Shupe at 333 Civic Center Dr. West, Santa Ana, CA 92701 on this 12th day of February, 1992.

David Anderson

P 879 345 367



Certified Mail Receipt

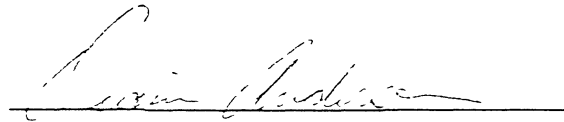
No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

Sent to	
<u>William R. Shupe, Esq.</u>	
Street & No.	
<u>333 Civic Center Dr. W.</u>	
P.O., State & ZIP Code	
<u>Santa Ana, UT 92701</u>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	
Return Receipt Showing to Whom, Date, & Address of Delivery	
TOTAL Postage & Fees	\$
Postmark or Date	
2/12/92	

<p>PS Form 3811, November 1990 *U.S. GPO: 1991-287-066</p> <p>DOMESTIC RETURN RECEIPT</p>		<p>5. Signature (Addressee) <i>William R. Shupe</i></p> <p>6. Signature (Agent) <i>David Anderson</i></p>		<p>3. Article Addressed to: William R. Shupe, Esq. 333 Civic Center Dr. West Santa Ana, CA 92701</p>		<p>SENDER:</p> <ul style="list-style-type: none"> • Complete items 1 and/or 2 for additional services. • Complete items 3 and 4a & b. • Print your name and address on the reverse address form so that we can return this card to you. • Attach this form to the front of the mailpiece, or on the back if space does not permit. • Write "Return Receipt Requested" on the mailpiece below the article number. • The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery. 	
<p>7. Date of Delivery 2/12/92</p> <p>8. Addressee's Address (Only if requested and fees paid) 333 Civic Center Dr. W. Santa Ana, UT 92701</p>		<p>4a. Article Number P 879 345 367</p> <p>4b. Service Type <input checked="" type="checkbox"/> Certified <input type="checkbox"/> Registered <input type="checkbox"/> Insured <input type="checkbox"/> COD <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Express Mail </p>		<p>1. Also wish to receive the following services (for an extra fee): <input type="checkbox"/> Addressee's Address <input type="checkbox"/> Restricted Delivery </p> <p>2. <input type="checkbox"/> Restricted Delivery</p> <p>Consult postmaster for fee.</p>			

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Request for Entry of Default in the matter of Bar Counsel against William Shupe, F-520, was mailed postage pre-paid to William R. Shupe at 333 Civic Center Dr. West, Santa Ana, CA 92701 on this 11th day of March, 1992.



APPENDIX Q

MAIN OFFICE, 203 SOUTH MAIN STREET, SALT LAKE CITY, UTAH, 84101 PHONE (801) 534-6199

WILLIAM R STUPE
CLIENT "RUST ACCOUNT"
310 EAST 4500 SOUTH 300
SALT LAKE CITY UT 84107
STATEMENT DATE. FROM 01/31/89
THRU 02/28/89
PAGE 001 OF 001

50-01391537 DT 00015 001016

ACCOUNT NUMBER	ACCOUNT TYPE	PREVIOUS BALANCE	INCREASES NO	INCREASES AMOUNT	DECREASES NO	DECREASES AMOUNT	ENDING BALANCE
150-0 391537 CHECKING		2,471.48	4	13,420.00	15	9,951.00	5,940.48

DEPOSITS AND OTHER INCREASES TO CHECKING

DESCRIPTION	DATE	AMOUNT
DEPOSIT	02/09	\$ 1,500.00
DEPOSIT	02/10	8,000.00
DEPOSIT	02/15	2,900.00
DEPOSIT	02/24	1,020.00
	4 INCREASES	\$ 13,420.00

WITHDRAWALS AND OTHER NON-CHECK DECREASES TO CHECKING

DATE	DESCRIPTION	AMOUNT
	0 DECREASES	\$.00

DETAIL OF CHECKING

DATE	CHECK NO	AMOUNT	DATE	CHECK NO	AMOUNT
02/09	51	500.00	02/17	163	50.00
02/10	52	650.00	02/18	164	400.00
02/11	53	200.00	02/23	165	450.00
02/12	54	200.00	02/24	166	300.00
02/13	55	25.00	02/24	167	60.00
				1450*	

unable to find file

5 CHECKS TOTALING \$9,951.00

* - 349 IN CHECK SEQUENCE

DAILY BALANCE SUMMARY

DATE	BALANCE	DATE	BALANCE	DATE	BALANCE
02/31	2,471.48	02/08	821.48	02/09	1,621.48
02/01	6,621.48	02/13	6,421.48	02/16	7,696.48
02/02	7,546.48	02/22	7,130.48	02/24	5,940.48

CHARGE WITH THE UTAH JAZZ GET YOUR UTAH JAZZ/CONTINENTAL BANK
MASTERCARD WITH MANY NEW FEATURES

APPENDIX R

The Office of Bar Counsel has not been provided a copy of this appendix. A copy has been requested from the Clerk of the Court but has not yet been made available. Upon receipt of the documents referenced in this appendix they will be forwarded to the Clerk of the Supreme Court and to the Respondent for inclusion.

APPENDIX S

148
WILLIAM R SHUPE 6-1
CLIENT TRUST ACCOUNT
310 EAST 4500 SOUTH #310 265-0801
SALT LAKE CITY UT 84107
1-15-54 31-47240
Pay to the order of Cont. Trust Acct
\$1,250.00
CONTINENTAL BANK

WILLIAM R SHUPE 6-1
CLIENT TRUST ACCOUNT
310 EAST 4500 SOUTH #310 265-0801
SALT LAKE CITY UT 84107
1-15-54 31-47240
Pay to the order of Cont. Trust Acct
\$2,500.00
Two Thousand Five Hundred
CONTINENTAL BANK

WILLIAM R SHUPE 6-58
CLIENT TRUST ACCOUNT
310 EAST 4500 SOUTH #310 265-0801
SALT LAKE CITY UT 84107
1-15-54 31-47240
Pay to the order of William R. Shupe
\$1,250.00
One Thousand Two Hundred Fifty
CONTINENTAL BANK

1138
31-47240
148
WILLIAM R SHUPE 6-88
CLIENT TRUST ACCOUNT
310 EAST 4500 SOUTH #310 265-0801
SALT LAKE CITY UT 84107
1-24-54 31-47240
Pay to the order of F. & L. Shupe & Co.
\$53.40
Fifty Three and 40/100
CONTINENTAL BANK

APPENDIX T

every one of two or more persons or things composing the whole, *separately* considered

Black's Law Dictionary 455 (5th ed 1979) (emphasis added) The term "each," in the 1980 agreement, plainly refers to the separate lifetimes of George and Phyllis. The wills do not contradict this interpretation of their agreement. George breached the 1980 agreement when he added codicils to his 1980 will during Phyllis' lifetime, and also when he changed his will after Phyllis' death.

IV

[9] This type of action is not based on wills but upon an agreement 'of which the Will is but evidence' *Mosloski v Gamble*, 191 Minn 170, 174, 253 N.W. 378, 381 (1934). Here, the competing policies are the enforceability of the contract and George's right to bequeath property as he desired. George could change his will, but the contract may be enforced in equity if it is valid and enforcement is necessary for

the prevention of fraud. See *id.* at 176, 253 N.W. at 381.

DECISION

We reverse the trial court and hold that appellants have standing as intended beneficiaries of the 1980 agreement to bring this action. The 1980 agreement is a valid contract supported by sufficient consideration where George and Phyllis made mutual promises not to revoke or change their wills. George breached the 1980 agreement when he changed his will. We remand to the trial court to address the breach of contract claim and to fashion any appropriate relief.

Reversed and remanded.



Cite as 470 N.W.2d 549 (Neb. 1991)

238 Neb. 239

STATE of Nebraska ex rel
NEBRASKA STATE BAR
ASSOCIATION, Relator,

v

Douglas VEITH, Respondent

No. 90-461

Supreme Court of Nebraska

May 31, 1991

Attorney disciplinary proceeding was brought. The Supreme Court held that commingling of trust funds with law office funds and willful appropriation warrant disbarment.

Disbarment ordered.

1 Attorney and Client \S 44(2)

A proceeding to discipline an attorney is a trial de novo on record in which the Supreme Court reaches conclusion independent of findings of referee provided where credible evidence is in conflict on material issue of fact, Supreme Court considers and may give weight to fact that referee heard and observed witnesses and accepted one version of facts rather than another.

2 Attorney and Client \S 53(2)

Supreme Court, in its de novo review of record must find that particular complaint has been established by clear and convincing evidence in order to sustain it against an attorney in a disciplinary proceeding.

3 Attorney and Client \S 38 44(1)

An attorney's violation of a disciplinary rule and failure to act competently by neglecting a matter entrusted to him or her is conduct violative of an attorney's oath as member of bar. Neb. Rev. St. \S 7-104 Code of Prof. Resp. DR 1-102 DR 9-102.

4 Attorney and Client \S 44(2)

In attorney discipline proceedings "conversion" refers to an attorney's misappropriation of a client's property to the

attorney's own use or some other improper use.

See publication Words and Phrases for other judicial constructions and definitions.

5 Attorney and Client \S 44(2)

In attorney discipline proceedings misappropriation is any unauthorized use of client's funds entrusted to a lawyer including not only stealing but also unauthorized temporary use for lawyer's own purpose whether or not he or she derives any personal gain or benefit therefrom.

See publication Words and Phrases for other judicial constructions and definitions.

6 Attorney and Client \S 44(2)

An attorney's failure to use entrusted funds for purpose for which they were entrusted constitutes misappropriation for disciplinary purposes.

7 Attorney and Client \S 44(2)

For purposes of attorney discipline misappropriation caused by serious inexcusable violation of duty to oversee entrusted funds is deemed willful even in absence of deliberate wrongdoing.

8 Attorney and Client \S 44(2)

Mere fact that an attorney's trust account balance falls below the amount deposited in and purportedly held in trust supports finding of misappropriation. Neb. Rev. St. \S 7-104 Code of Prof. Resp. DR 1-102 DR 9-102.

9 Attorney and Client \S 44(2)

For purposes of attorney discipline an act of conversion is complete when the client's trust account is overdrawn or when, through mismanagement or misconduct on part of attorney, balance of account is less than client's interest in it. Neb. Rev. St. \S 7-104 Code of Prof. Resp. DR 1-102 DR 9-102.

10 Attorney and Client \S 44(2)

An attorney's intent to defraud or lack thereof is irrelevant when drawing checks on client's trust account to pay personal expenses. Neb. Rev. St. \S 7-104 Code of Prof. Resp. DR 1-102 DR 9-102.

11 Attorney and Client §44(2)

An attorney has a duty to keep separate and properly account for client trust funds entrusted to him or her and promptly pay over and deliver such funds to the client upon request. Neb Rev St § 7-104, Code of Prof Resp, DR 1-102, DR 9-102

12 Attorney and Client §44(2)

An attorney may not use client trust funds to cover business expenses. Neb Rev St § 7-104, Code of Prof Resp, DR 1-102 DR 9-102

13 Attorney and Client §58

To determine whether and to what extent attorney discipline should be imposed it is necessary to consider the following factors: nature of offense, need for deterring others, maintenance of reputation of bar as a whole, protection of public, attitude of offender generally, and offender's present or future fitness to continue practice of law.

14 Attorney and Client §58

Misappropriation of client funds, as one of the most serious violations of duty an attorney owes to client, public, and courts, typically warrants disbarment. Neb Rev St § 7-104, Code of Prof Resp, DR 1-102 DR 9-102

15 Attorney and Client §44(2)

Receiving clients' funds and converting them to personal use by placing them in an office account without consent of client is illegal conduct involving moral turpitude. Neb Rev St § 7-104, Code of Prof Resp DR 1-102 DR 9-102

16 Attorney and Client §58

Mitigating circumstances shown in record should be considered in determining appropriate discipline imposed on attorney violating Code of Professional Responsibility. Neb Rev St § 7-104, Code of Prof Resp DR 1-102, DR 9-102

17 Attorney and Client §53(1)

Intent of attorney to misappropriate client funds may be inferred from circumstantial evidence.

18 Attorney and Client §58

Cumulative acts of attorney misconduct are distinguishable from isolated inci-

dents of neglect and therefore justify more serious sanctions.

19 Attorney and Client §58

If misappropriation occurs through an attorney's laxity rather than a wrongful intent, and if this lack of intent is reinforced by attorney's having taken remedial action immediately upon discovery of problem, less discipline than disbarment may be appropriate. Neb Rev St § 7-104, Code of Prof Resp DR 1-102, DR 9-102

20 Attorney and Client §58

Fact that no client suffered any financial loss is no excuse for a lawyer to misappropriate clients' funds nor any reason why lawyer should not receive severe sanction. Neb Rev St § 7-104, Code of Prof Resp, DR 1-102 DR 9-102

21 Attorney and Client §58

To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in light of particular facts and circumstances. Neb Rev St § 7-104, Code of Prof Resp, DR 1-102 DR 9-102

22 Attorney and Client §58

Commingling of trust funds with law office funds and willful appropriation warrant disbarment despite mitigation of prior good standing and freedom from disciplinary complaint, manifestations of regret, counseling, community reputation, cooperation and pro bono work.

Syllabus by the Court

1 Disciplinary Proceedings Appeal and Error A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.

2 Disciplinary Proceedings Proof Appeal and Error The Supreme Court, in its de novo review of the record, must find

that the particular complaint has been established by clear and convincing evidence in order to sustain it against an attorney in a disciplinary proceeding.

3 Disciplinary Proceedings Every attorney admitted to practice law in Nebraska shall take and subscribe an oath swearing to support the Nebraska and U.S. Constitutions and to faithfully discharge the duties of an attorney and counselor to the best of his or her abilities. An attorney's violation of a disciplinary rule and failure to act competently by neglecting a matter entrusted to him or her is conduct violative of an attorney's oath as a member of the bar. The oath requires lawyers to observe the established codes of professional ethics.

4 Disciplinary Proceedings Conversion Words and Phrases In attorney discipline proceedings conversion refers to an attorney's misappropriation of a client's property to the attorney's own use or some other improper use.

5 Disciplinary Proceedings Words and Phrases Misappropriation is any unauthorized use of clients' funds entrusted to a lawyer, including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.

6 Disciplinary Proceedings Intent Words and Phrases An attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation. Misappropriation caused by serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful even in the absence of a deliberate wrong doing.

7 Disciplinary Proceedings Proof The mere fact that an attorney's trust account balance falls below the amount deposited in and purportedly held in trust supports a finding of misappropriation.

8 Disciplinary Proceedings Conversion An act of conversion is complete when the client's trust account is overdrawn or when through mismanagement or misconduct on the part of the attorney

the balance of the account is less than the client's interest in it.

9 Disciplinary Proceedings Fraud Intent An attorney's intent to defraud or lack thereof is irrelevant when drawing checks on clients' trust account to pay personal expenses.

10 Disciplinary Proceedings An attorney has a duty to keep separate and properly account for client trust funds entrusted to the attorney and to promptly pay over and deliver such funds to the client upon request.

11 Disciplinary Proceedings An attorney may not use client trust funds to cover business expenses.

12 Disciplinary Proceedings To determine whether and to what extent discipline should be imposed it is necessary that the following factors be considered: (1) the nature of the offense; (2) the need for deterring others; (3) the maintenance of the reputation of the bar as a whole; (4) the protection of the public; (5) the attitude of the offender generally; and (6) his present or future fitness to continue in the practice of law.

13 Disciplinary Proceedings Misappropriation of client funds as one of the most serious violations of duty an attorney owes to his client, the public, and the courts, typically warrants disbarment.

14 Disciplinary Proceedings In the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the list.

15 Disciplinary Proceedings Misappropriation affects both the bar and the public because it is a serious offense involving moral turpitude.

16 Disciplinary Proceedings Conversion Receiving a client's funds and converting them to personal use by placing them in an office account without consent of the client is illegal conduct involving moral turpitude.

17 Disciplinary Proceedings Misappropriation is more than a grievous breach of professional ethics. It violates basic notions of honesty and endangers public confidence in the legal profession.

RECEIVED
MAY 1 1991

18. **Disciplinary Proceedings.** The paramount purpose of the "moral turpitude" standard is not to punish practitioners but to protect the public, the courts, and the profession 1241 against unsuitable practitioners.

19. **Disciplinary Proceedings.** Mitigating circumstances shown in the record should be considered in determining the appropriate discipline imposed on an attorney violating the Code of Professional Responsibility.

20. **Disciplinary Proceedings: Intent: Circumstantial Evidence.** Intent to misappropriate client funds may be inferred from circumstantial evidence.

21. **Disciplinary Proceedings.** Cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions.

22. **Disciplinary Proceedings: Intent.** If a misappropriation occurs through an attorney's laxity rather than wrongful intent, and if this lack of intent is reinforced by the attorney's having taken remedial action immediately upon discovery of the problem, less discipline than disbarment may be appropriate.

23. **Disciplinary Proceedings.** The fact that no client suffered any financial loss is no excuse for a lawyer to misappropriate clients' funds nor any reason why a lawyer should not receive a severe sanction.

24. **Disciplinary Proceedings.** To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances.

Alison L. Larson, Asst. Counsel for Discipline, for relator.

Jon S. Reid and Mark E. Novotny of Kennedy, Holland, DeLacy & Svoboda, for respondent.

HASTINGS, C.J., and BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

In this attorney disciplinary proceeding we find that since he knowingly and willfully transferred and commingled client trust funds with funds in his and his associated lawyers' law office business account and because he misappropriated some of those funds to his own use and to other improper purposes, Douglas Veith should be disbarred.

Specifically, we find that the record reveals by clear and convincing evidence that Veith violated his oath of office as an attorney and Canon 1, DR 1-102, and Canon 9 DR 9-102, of the lawyers' Code of Professional Responsibility. We agree with the relator, the Nebraska State Bar Association (NSBA), that the 8-month suspension recommended by the referee is 1242 inappropriate under the circumstances of this case. The 2-year suspension suggested by the NSBA Counsel for Discipline is also too lenient.

[1, 2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991); *State ex rel. NSBA v. Rhodes*, 234 Neb. 799, 453 N.W.2d 73 (1990), cert. denied — U.S. —, 111 S.Ct. 153, 112 L.Ed.2d 119. The Supreme Court, in its de novo review of the record, must find that the particular complaint has been established by clear and convincing evidence in order to sustain it against an attorney in a disciplinary proceeding. *Id.*

FACTUAL BACKGROUND

The undisputed facts in the record here reveal that Veith was admitted to the practice of law in the State of Nebraska in June 1982. At all times relevant, Veith was the managing attorney in a five-attorney office-sharing arrangement in Bellevue, Ne-

braska. As managing attorney, Veith received the monthly bank statements regarding the general law business and client trust accounts. Each of the attorneys used the trust account for his respective clients' trust funds.

In July 1988, Veith was informed by the bank that it had transferred funds from the trust account to the general law business account to cover a shortage of funds. At various other times Veith transferred or authorized the transfer of funds to the business account from the client trust account.

During the period of August 1988 through February 1989, Veith, although he was generally aware of periodic deficits in both the trust and business accounts, failed to reconcile the accounts or take other action to avoid the deficit problem. Between September 1988 and March 1989, the trust account had negative balances. At a minimum, throughout this period, it should have contained \$16,900 in client trust funds. Between 1243 July 1988 and March 1989, Veith withdrew as income \$70,000 from the business account. On March 3, 1989, one of the associated attorneys questioned Veith about the trust account balance. Veith acknowledged that the trust account had over a \$3,000 negative balance. He secured a \$10,000 personal loan from a bank and deposited that money into the trust fund that same day to cover the deficiency in the client trust fund account of the complaining associated lawyer. Subsequently, Veith borrowed \$25,000 from a friend to cover deficiencies in the other associated attorneys' trust funds. On March 27, 1989, Veith secured a loan from a relative in the amount of \$10,600, which he deposited in the trust account to cover trust funds for which Veith was accountable to his own clients.

Meanwhile, on March 9, 1989, all the attorneys in the office-sharing arrangement, including Veith, made a conference call to the NSBA Counsel for Discipline, explaining the matter and setting in motion an investigation.

The Committee on Inquiry of the Fourth Disciplinary District, after an October 16,

1989, hearing, recommended that formal charges be filed against Veith. These charges were reviewed by the Disciplinary Review Board and were filed as an original action in this court on May 29, 1990. The formal charges allege that the actions of Veith, as set forth above, constitute a violation of his oath of office, as provided by Neb.Rev.Stat. § 7-104 (Reissue 1987), and of DR 1-102 and DR 9-102.

[3] Section 7-104 provides that every attorney admitted to practice law in Nebraska shall take and subscribe an oath swearing to support the Nebraska and U.S. Constitutions and to faithfully discharge the duties of an attorney and counselor to the best of his or her abilities. An attorney's violation of a disciplinary rule and failure to act competently by neglecting a matter entrusted to him or her is conduct violative of an attorney's oath as a member of the bar. *State ex rel. Nebraska State Bar Assn. v. Davis*, 212 Neb. 699, 325 N.W.2d 652 (1982). See *State ex rel. NSBA v. Hahn*, 218 Neb. 508, 356 N.W.2d 885 (1984) (the oath requires lawyers to observe the established codes of professional ethics). DR 1-102 and DR 9-102 provide as follows:

1244 DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

....

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is

exception from exceptions not applicable here).

(B) A lawyer shall:

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding time.

Following a formal hearing on November 16, 1990, a referee, on December 7, 1990, filed her report with this court. The referee found that Veith had violated the disciplinary rules with which he was charged. The referee recommended, among five components, that Veith be suspended from the practice of law for a period of 8 months. The NSBA filed an exception to the report, arguing that the referee's recommendation of suspension for a period of 8 months was too lenient under the facts and circumstances as established by the record of this case.

In his answer to the formal charges, Veith admits violating DR 1-102(A)(1) and DR 9-102(B)(3) but none of the other enumerated provisions of DR 1-102 or DR 9-102. In essence, ¹²⁴⁵Veith admits to commingling the business and client trust fund accounts but attributes it to negligence. He denies attempting to intentionally or dishonestly convert the funds, perpetrate a fraud, or deceive or misrepresent matters to his associated counsel or clients. In contrast, the NSBA argues that Veith has gone beyond commingling and has converted or willfully misappropriated the client trust funds.

COMMINGLING AND MISAPPROPRIATION

[4-10] In attorney discipline proceedings, conversion refers to an attorney's misappropriation of a client's property to the attorney's own use or some other improper use. See ABA/BNA Lawyers' Manual on Professional Conduct 45:106 (1985). Misappropriation is "any unauthorized use ... of clients' funds entrusted to [a lawyer], including not only stealing, but

derives any personal gain or benefit therefrom." *In re Wilson*, 81 N.J. 451, 455 n.1, 409 A.2d 1153, 1155 n.1 (1979). See *Bar v. State Bar of California*, 52 Cal.3d 291, 801 P.2d 412, 276 Cal.Rptr. 169 (1990) (an attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation). Misappropriation caused by serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of a deliberate wrongdoing. *Edwards v. State Bar of California*, 52 Cal.3d 28, 801 P.2d 396, 276 Cal.Rptr. 153 (1990). See, *Giovanazzi v. State Bar of California*, 28 Cal.3d 465, 619 P.2d 1005, 169 Cal.Rptr. 581 (1980) (mere fact that an attorney's trust account balance falls below the amount deposited in and purportedly held in trust supports a finding of misappropriation); *Matter of Iversen*, 51 A.D.2d 422, 381 N.Y.S.2d 711 (1976) (an act of conversion is complete when the client's trust account is overdrawn or when, through mismanagement or misconduct on the part of the attorney, the balance of the account is less than the clients' interest in it). Thus, under DR 9-102, wrongful or improper intent is not an element of misappropriation. See, *In re Wilson*, *supra*; *Archer v. State*, 548 S.W.2d 71 (Tex.Civ.App.1977) (DR 9-102 does not require elements of fraud, culpability, or willfulness); *State v. Stoveken*, 68 Wis.2d 716, 229 N.W.2d 224 (1975) (attorney's intent to defraud or lack thereof is irrelevant when drawing checks on clients' trust account to pay personal expenses).

[11, 12] We have held that an attorney has a duty to keep separate and properly account for client trust funds entrusted to the attorney and to promptly pay over and deliver such funds to the client upon request. See *State ex rel. NSBA v. Stalmore*, 218 Neb. 138, 352 N.W.2d 875 (1984). See, also, DR 9-102. An attorney may not use client trust funds to cover business expenses. See, *In re Lewis*, 118 Ill.2d 357, 113 Ill.Dec. 287, 515 N.E.2d 96 (1987) (professional corporation's operating account);

(1981) (business debts); *Bar Assn. v. Thompson*, 69 Ohio St.2d 667, 433 N.E.2d 602 (1982) (overhead and operating expenses). Based upon Veith's admissions and other clear and convincing evidence in the record, this court finds that Veith, by knowingly commingling and misappropriating trust funds, inexcusably breached his oath of office and his duty to his clients and to the clients of the lawyers sharing office space with him. In short, the clear and convincing evidence reflects that Veith is guilty of each of the charges brought against him.

DISCIPLINE

[13] The next step is to determine the appropriate sanction. To determine whether and to what extent discipline should be imposed it is necessary that the following factors be considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) his present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991); *State ex rel. NSBA v. Rhodes*, 234 Neb. 799, 453 N.W.2d 73 (1990), *cert. denied* — U.S. —, 111 S.Ct. 153, 112 L.Ed.2d 119.

[14] There is no question that misappropriation of client funds, as one of the most serious violations of duty an attorney owes to his client, the public, and the courts, typically warrants disbarment. See, *State ex rel. Hunter v. Hatteroth*, 134 Neb. 451, 279 N.W. 153 (1938) (misappropriation by an attorney of ¹²⁴money belonging to his client is such a disregard of duty as to warrant disbarment); *State ex rel. Hunter v. Boe*, 134 Neb. 162, 278 N.W. 144 (1938) (an attorney is subject to disbarment because of delinquency in accounting to clients for money received in his professional capacity, in violation of his duty to the public); *State ex rel. Spillman v. Priest*, 118 Neb. 47, 223 N.W. 635 (1929) (delinquency in accounting for money re-

tain respect due courts). "In the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the list." *The Florida Bar v. McShirley*, 573 So.2d 807, 808 (Fla.1991), quoting *The Florida Bar v. Tunsil*, 503 So.2d 1230 (Fla. 1986).

[15] Misappropriation affects both the bar and the public because it is a serious offense involving moral turpitude. See, *In re Phillips*, 767 S.W.2d 16 (Mo.1989) (receiving client's funds and converting them to personal use by placing them in office account without consent of client is illegal conduct involving moral turpitude); *Bambic v. State Bar of California*, 40 Cal.3d 314, 707 P.2d 862, 219 Cal.Rptr. 489 (1985) (misappropriation of client funds involves moral turpitude and undermines public confidence in legal profession); *In re Patt*, 81 Ill.2d 447, 43 Ill.Dec. 737, 410 N.E.2d 870 (1980) (conversion of a client's funds is an act involving moral turpitude). "Misappropriation is more than a grievous breach of professional ethics. It violates basic notions of honesty and endangers public confidence in the legal profession." *Grim v. State Bar of California*, 53 Cal.3d 21, 29, 805 P.2d 941, 943, 278 Cal.Rptr. 682, 684 (1991). "The most common definition of an act of moral turpitude is one that is 'contrary to honesty and good morals.' [citations.] ... 'The paramount purpose of the 'moral turpitude' standard is not to punish practitioners but to protect the public, the courts, and the profession against unsuitable practitioners....'" *In re Scott*, 52 Cal.3d 968, 978, 802 P.2d 985, 991, 277 Cal.Rptr. 201, 207 (1991).

This court disagrees with Veith's assessment that his violation did not involve moral turpitude. At various times, by his own admission, Veith knowingly transferred money from the client trust account to the business account of his law office. He ¹²⁴⁸admitted that during this period 20 percent of the money from the trust fund was used by him personally and 80 percent was used for salaries and other office expenses.

new leased computer system that cost \$2,000 per month, and updated his law library, all so he would appear successful.

This court also disagrees with Veith's assessment that his conduct does not affect his present or future fitness to continue in the practice of law. In his new partnership arrangement Veith has taken steps so that he cannot sign checks on either the trust or business account. While admirable, this situation creates a paralogism. Veith asks this court and his clients to trust him, yet he apparently has some question as to his own trustworthiness.

MITIGATING FACTORS

[16] This court must next determine whether there are factors which would mitigate the sanction of disbarment, suggesting that a lesser sanction may be more appropriate. Mitigating circumstances shown in the record should be considered in determining the appropriate discipline imposed on an attorney violating the Code of Professional Responsibility. *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987).

Respondent presents an array of arguments, starting with a lack of intent. "As the term is used in attorney discipline cases, 'willful misappropriation' covers a broad range of conduct varying significantly in the degree of culpability." *Edwards v. State Bar of California*, 52 Cal.3d 28, 38, 801 P.2d 396, 402, 276 Cal.Rptr. 153, 159 (1990). Therefore, misconduct, although technically willful, may be less culpable if committed as a result of negligence and not as a result of a deliberate act. Veith's argument is that he negligently rather than deliberately breached his duty. The record does not support this contention. He was aware that the bank transferred funds from the trust account to the business account but he took no action. He also transferred or authorized some transfers from the client trust fund account to the business account. That Veith knowingly and intentionally misappropriated

trust account to the law office business account because he was running short of money. The minister understood Veith considered the transfer to be a temporary "quick-fix" which he would fix later.

[17, 18] Intent to misappropriate client funds may be inferred from circumstantial evidence. See *In re Phelps*, 306 Or. 508, 760 P.2d 1331 (1988). See, also, *NJI 14.1* ("Intent is a mental process and it therefore generally remains hidden within the mind where it is conceived. It is rarely ever susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct"). Perhaps the initial transfer of funds was due to Veith's negligence. However, the first transfer was not an isolated incident. There were repeated incidents in which Veith knew that the bank was transferring funds from the client trust fund account to the business account after the initial transaction. There were various times he authorized a transfer or personally transferred funds from the trust account to the business account. See *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989) (cumulative acts of attorney misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions). Veith never made an accounting over the period in question. At the same time he received a salary of approximately, \$70,000.

[19] Veith's next argument is that no client was injured because he made full restitution. He relies upon *State ex rel. NSBA v. Fitzgerald*, 227 Neb. 90, 416 N.W.2d 28 (1987), for the proposition that restitution of the misused funds prior to being faced with accountability may mitigate the discipline to be imposed and apparently evidences a lack of wrongful intent. The problem for Veith is that, although he was not yet faced with formal accountability, the restitution he provided was not made until after he was confronted by an

attorney from a surge of conscience. The California Supreme Court has recognized the principle that if the misappropriation occurs through the attorney's laxity rather than wrongful intent, and if this lack of intent is reinforced by the attorney's having taken remedial action immediately upon discovery of the problem, less discipline than disbarment may be appropriate. See *Waysman v. State Bar of California*, 41 Cal.3d 452, 714 P.2d 1239, 224 Cal.Rptr. 101 (1986); *Palomo v. State Bar of California*, 36 Cal.3d 785, 685 P.2d 1185, 205 Cal.Rptr. 834 (1984). Even if this court were to accept Veith's position that he was merely negligent, he would not fall within this sound principle because over a course of almost 8 months, although he knew and participated in the transfer of funds from the trust account to the law office business account, he took no action to restore the trust funds. It was not until he was confronted that he confessed to any wrongdoing. Cf. *State ex rel. NSBA v. Miller*, *supra* (attorney made restitution of converted funds more than 2 years prior to a complaint filed against him and without threat of disciplinary action).

One of the purposes of DR 1-102 and DR 9-102 of the Code of Professional Responsibility is to protect innocent persons from suffering any financial loss because of any misappropriation of funds by lawyers. In this case, Veith's contention that any sanction should be mitigated because no lawyer's client suffered any financial loss is not persuasive. Veith borrowed \$10,000 from a bank, \$25,000 from a friend, and \$10,600 from a relative to restore those funds in the trust account which he had misappropriated. On October 16, 1989, when asked by a member of the Committee on Inquiry where he stood on these loans, Veith replied: "Very seriously within the last 48 to 72 hours my wife and I have seriously sat down and talked about bankruptcy and that's a very serious consideration to the point where we've formulated a plan to potentially do that."

[20] Because Veith borrowed money and reimbursed the funds he misappropriated

may not suffer financial loss because of Veith's misappropriation. Veith filed bankruptcy both personally and for his business on January 13, 1990. His innocent lenders may or may not suffer a financial loss. Regardless of whether the lenders are or are not reimbursed, the fact that no client suffered any financial loss is no excuse for a lawyer to misappropriate clients' funds nor any reason why a lawyer should not receive a severe sanction. See, *In the Matter of Galloway*, 278 S.C. 615, 300 S.E.2d 479 (1983) (restitution of converted funds may have little or no effect in mitigating the sanction); *Greenbaum v. State Bar*, 15 Cal.3d 893, 544 P.2d 921, 126 Cal.Rptr. 785 (1976) (fact that client was not and would not be harmed by attorney's action was irrelevant); *Heavey v. State Bar*, 17 Cal.3d 553, 551 P.2d 1238, 131 Cal.Rptr. 406 (1976) (fact that client suffers no harm is mere fortuity). But see, *Louisiana State Bar Ass'n v. Larré*, 457 So.2d 649 (La.1984) (repayment of funds along with severe depression and lack of prior disciplinary record may act as mitigating factors); *The Florida Bar v. Whitlock*, 426 So.2d 955 (Fla.1982) (depositing personal funds into client trust accounts to bring them back to their proper balances will not excuse the lawyer of his conversion, but where there is no permanent financial loss to client a lighter sanction may be imposed).

Factors which do favor mitigation are that Veith (1) was in good standing and free from disciplinary complaint or penalty, (2) has exhibited an attitude of regret and remorse, (3) has sought and received counseling, (4) has a good reputation in the community, (5) has cooperated fully with the Counsel for Discipline, and (6) has apparently provided many pro bono hours.

CONCLUSION

[21, 22] Veith cites a myriad of cases comparing various misconduct violations and their resulting sanctions. None of those are binding on this court's decision. To determine what sanction is appropriate,

each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances *State ex rel NSBA v Miller*, 225 Neb 261, 404 N.W.2d 40 (1987). Disbarment has been, and continues to be, a viable sanction in cases involving serious breach of disciplinary rules.

There has been a trend in recent years toward lighter sanctions, a trend this court is convinced must be reversed. The correlation between the decline of public confidence in the legal profession and the trend toward lighter attorney discipline sanctions is no coincidence.

"[Excuses such as] a 'lack of intent to deprive the client of his money' or 'personal hardship' stand out like an invitation to the lawyer who is in financial difficulty for one reason or another. All too often he is willing to risk a slap on the wrist, and even a little ignominy, hoping he won't get caught, but knowing that if he is he can plead restitution, but [sic] duly contrite, and escape the ultimate punishment. The profession and the public suffer as a consequence. The willful misappropriation of client funds should be the Bar's equivalent of a capital offense. The [sic] should be no excuses."

The Florida Bar v Breed, 378 So.2d 783, 784 (Fla. 1979) (Florida Supreme Court quoting a referee and giving notice that it would not be reluctant to disbar an attorney for this type of offense, reversing past trend of suspension as only discipline).

Notwithstanding the mitigating factors in Veith's favor, the facts that Veith commingled trust funds with his law office funds and willfully misappropriated them lead this court to conclude that in this case disbarment is the only appropriate sanction. Veith is directed to pay costs in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1987).

JUDGMENT OF DISBARMENT

WHITE, J., not participating.



238 Neb. 268

STATE of Nebraska, Appellee,

v

Aaron C. GIBBS, Appellant

Nos. 81-920, 82-026 and 82-027

Supreme Court of Nebraska

June 7, 1991

Defendant was convicted and sentenced following guilty pleas to felony charges of burglary, escape, and counts of receiving stolen property by the District Court, Douglas County, John E. Clark and Donald J. Hamilton, JJ. Defendant's consolidated appeals were reinstated as direct appeals by decision from the United States Court of Appeals on grounds of ineffective assistance of counsel, raised in habeas corpus petition, 881 F.2d 1080. The Supreme Court, Colwell, District Judge, Retired, held that (1) photographic array in burglary investigation was not unduly suggestive, (2) trial court's failure to advise that guilty pleas could result in consecutive sentences was not error, (3) eight-month unexplained trial delay was not denial of defendant's right to speedy trial, (4) claims of ineffective assistance of appellate counsel were remedied by reinstatement of direct appeal, and (5) aggregate sentence of ten to nineteen years' imprisonment was not excessive.

Affirmed

1. Criminal Law — 1158(4)

In determining correctness of trial court's ruling on suppression motion, Supreme Court will uphold trial court's findings of fact unless those findings are clearly erroneous.

2. Criminal Law — 1158(4)

In reviewing trial court's findings of fact in its ruling on suppression motion, Supreme Court does not reweigh evidence

or resolve conflicts in evidence, but rather, recognizes trial court as finder of fact and takes into consideration that trial court has observed witness testifying in regard to such motions.

3. Criminal Law — 339.7(1)

Whether photographic array identification procedures are unduly suggestive and conducive to substantial likelihood of irreparable mistake in identification is to be determined by consideration of totality of circumstances surrounding procedures.

4. Criminal Law — 339.7(4)

Photographic array used to identify burglary defendant was not unduly suggestive, even though defendant was only individual depicted without facial hair since array included five individuals victim remembered defendant because of defendant's face, nose, and eyes and defendant was not singled out from other four individuals by dress, height, weight, age or hair style. Neb. Rev. Stat. § 28-507(1).

5. Criminal Law — 1169.1(5)

Any error in photographic array identification procedure was harmless since victim's identification of defendant at trial was supported independently by victim's observations at time of burglary, thus denial of suppression motion was not error. Neb. Rev. Stat. § 28-507(1).

6. Criminal Law — 273.1(4)

In order to support finding that plea of guilty or nolo contendere has been voluntarily entered, trial court must inform defendant concerning nature of charge, right to assistance of counsel, right to confront witnesses against defendant, right to jury trial, privilege against self-incrimination and possible range of penalties for each crime. U.S.C.A. Const. Amend. 6.

7. Criminal Law — 273.1(4)

Trial court's failure to inform defendant that sentences for escape and theft guilty pleas might run consecutively did not make defendant's guilty pleas involuntary, explanation of possible range of penalties for each crime was sufficient. Neb. Rev. Stat. §§ 28-517, 28-518, 28-912(1).

8. Criminal Law — 577.10(3)

Failure to move for discharge prior to trial or entry of guilty plea or nolo contendere constitutes waiver of right to speedy trial. Neb. Rev. Stat. § 29-1209. U.S.C.A. Const. Amend. 6, Const. Art. 1 § 13.

9. Criminal Law — 228

Right to speedy preliminary hearing in trial is relative and depends upon existing circumstances; right is not denied where delay is satisfactorily explained by government and defendant is brought to trial as soon as reasonably possible. U.S.C.A. Const. Amend. 6, Const. Art. 1 § 13.

10. Criminal Law — 228, 264

Unexplained delay between arrest and arraignment or preliminary hearing does not demonstrate violation of right to speedy trial in absence of prejudice. U.S.C.A. Const. Amend. 6, Const. Art. 1 § 13.

11. Criminal Law — 577.10(3), 577.15(1)

Eight-month delay between date of burglary defendant's preliminary hearing and trial did not violate right to speedy trial where there was no showing that delay was purposeful or oppressive and defendant made no showing that pretrial delay caused substantial prejudice to right to fair trial. Neb. Rev. Stat. § 29-1207. U.S.C.A. Const. Amend. 6, Const. Art. 1 § 13.

12. Criminal Law — 641.13(1)

To sustain claim of ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that such deficient performance prejudiced defendant; prejudice requires demonstration of reasonable probability that but for counsel's deficient performance, result of proceedings would have been different. U.S.C.A. Const. Amend. 6, Const. Art. 1 § 11.

13. Criminal Law — 1131(7)

Claims that defendant received ineffective assistance of counsel at time of direct appeals from four felony convictions were remedied by reinstatement of appeals. U.S.C.A. Const. Amend. 6, Const. Art. 1 § 11.

APPENDIX U

would be excused for his naivete, but whether he must be disbarred in spite of it.

To the extent *Wilson* precludes us from considering the entire record in misappropriation cases, I am no longer satisfied that it is necessary for the Court to follow its mandate unreservedly. I believe the *Wilson* rule should continue to guide the Court in determining the discipline to be imposed in the vast majority of misappropriation cases. Those determinations, however, would in my view better reflect the collective wisdom of the Court and better serve the interests of the bar and the public if they were tempered by a recognition that under special circumstances discipline short of disbarment may occasionally be appropriate in knowing misappropriation cases. All of this Court's resources—its experience, discretion, compassion, insight, and judgment—are brought to bear in deciding the wide variety of cases on its docket. We need not limit our available resources when we decide attorney-discipline cases involving the alleged misappropriation of clients' funds.

Justices O'HERN and GARIBALDI join in this opinion.

¹²⁶⁰For suspension—Chief Justice WILENTZ and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN—7.

Opposed—None.

ORDER

It is ORDERED that MICHAEL A. KONOPKA of PASSAIC, who was admitted to the bar of this State in 1971, is hereby suspended for six months, effective October 28, 1991, and until the further Order of the Court; and it is further

ORDERED that respondent shall be restrained and enjoined from practicing law during the period of his suspension and that he shall comply with Administrative Guideline 23 of the Office of Attorney Ethics, which governs suspended attorneys; and it is further

ORDERED that all funds, if any, presently existing in any New Jersey financial institution maintained by MICHAEL KONOPKA, pursuant to Rule 1:21-6, be restrained from disbursement except upon application to this Court, for the cause shown, pending the further Order of this Court, and it is further

ORDERED that respondent shall reimburse the Ethics Financial Committee for appropriate administrative costs incurred in the prosecution of this matter.



126 N.J. 261

¹²⁶¹In the Matter of Michael J. BELL,
an Attorney-at-Law.

Supreme Court of New Jersey.

Argued Sept. 26, 1989.

Decided Oct. 4, 1991.

In attorney disciplinary proceedings, the Supreme Court held that knowing misappropriation of client funds, even if not for personal gain, warrants disbarment.

Disbarment ordered.

Stein, J., filed opinion concurring in part and dissenting in part, with which O'Hern and Garibaldi, JJ., joined.

Attorney and Client ⇄ 58

Knowing misappropriation of client funds warrants disbarment, even though use of funds is not for personal gain, and despite personal problems. Code of Prof. Resp., DR 9-102.

John J. Janasie, Deputy Ethics Counsel, Westfield, argued the cause on behalf of Office of Attorney Ethics.

MATTER OF BELL

Cite as 596 A.2d 752 (N.J. 1991)

N.J. 753

Matthew Boylan, for respondent (Lowenstein, Sandler, Kohl, Fisher & Boylan, Roseland, attorneys).

PER CURIAM.

This matter stems from three complaints filed against respondent following an audit of his books and records. The District VI Ethics Committee (Ethics Committee) found that respondent had engaged in conduct involving dishonesty and misrepresentation, in violation of DR 1-102(A)(4); had overreached clients in charging excessive fees, in violation of DR 2-106(D); had violated record keeping regulations, R. 1:21-6 and DR 9-102(B)(3) and (C); had failed to preserve the identity of client funds, in violation of DR 1-102(A); and had engaged in other ¹²⁶²activities adversely reflecting on his fitness to practice law, in violation of DR 1-102(A)(6). Although it found that respondent had misused trust funds, the Ethics Committee did not determine whether the misuse was knowing.

The Disciplinary Review Board (DRB) agreed substantially with the Ethics Committee's findings. In addition, the DRB found that respondent knowingly misappropriated client funds in three separate matters. Accordingly, the DRB recommended that respondent be disbarred. Three dissenting members of the DRB found respondent's misuse of client funds to be negligent and recommended a three-year suspension.

Our independent review of the record leads us to conclude that respondent knowingly misappropriated client funds and that he must be disbarred. Because of that conclusion, this opinion is concerned, to the exclusion of other allegations of attorney misconduct, solely with the issue of knowing misappropriation. Within that context, we further limit the opinion to the acts of misappropriation that occurred after the publication of *In re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979).

I

The record clearly and convincingly establishes that respondent knowingly misap-

propriated trust funds in two post-*Wilson* matters. In the first, his clients were James and Maryann Maguire, and in the second, his client was his cousin, Maurice Spagnoletti.

The DRB summarized the facts in these two matters:

In the *Maguire* matter, for instance, respondent deposited two checks in his trust account, one for \$9,300 and the other for \$1,000, representing the deposit tendered by the purchasers of the Maguires' property. Those deposits were made on December 1, 1979, and January 9, 1980, respectively. Notwithstanding the fact that no disbursements were made on the Maguires' behalf until March 31, 1980, the trust account balance was only \$1,697.12 on December 31, 1979, \$968.98 on January 7, 1980, \$1,053.07 on January 31, 1980, and \$12.98 on February 29, 1980. However, respondent should have held \$10,300 in trust for the Maguires until March 31, 1980. Thus, the trust account shortage in *Maguire* ranged from more than \$8,000 to more than \$10,000. \$8,000 of that ¹²⁶³shortage resulted from two payments to respondent in December: one check for \$3,000 which cleared on December 12, 1979, and a second check for \$5,000 payable to respondent, which cleared on December 17, 1979.

At the ethics hearing of January 14, 1987, respondent conceded that there was a trust account shortage in connection with the *Maguire* transaction. He testified that he was unable to explain the reason for the shortage as a result of the destruction of all his records by a fire in his office in late 1979. He recalled, however, that "there were monies that were supposed to come from (client) Malfettone which did not come which caused a shortage. And I believe the same day, I made a loan which satisfied the overdraft." Indeed, the record shows—and respondent so admitted—that in April 1980 he obtained a \$35,000 loan which he deposited in his trust account to cover a shortage in connection with "one

of the two real estate transactions."¹

Similarly, in the *Spagnoletti* matter, on June 18, 1980, respondent's trust liability to his client consisted of \$20,074.64. On that date, however, the trust account balance was only \$18,137.68. From June 23 through July 7, 1980, respondent's trust liability to Spagnoletti amounted to \$15,051.44. On June 23, however, the trust account balance was only \$12,022.04 and, by July 7, 1980, it had declined to \$1,903.60. The three largest decreases in the trust account balance were the result of three checks of \$3,000 each made payable to respondent. Those checks were dated July 1, July 2, and July 5, 1980. (Exhibit P-9 attached to the complaint). The July 1 and July 2 checks were cashed on those same days; the July 5 check was cashed on July 7, 1980 (Exhibit P-8 attached to the complaint).

[Footnote and transcript references omitted.]

From these facts, the DRB concluded: It matters not that respondent might not have utilized those funds for his own gain, as he contends. *In re Wilson*, supra, 81 N.J. at 455 n. 1 [409 A.2d 1153]; *In re Noonan*, [102 N.J. 157, 160, 506 A.2d 722 (1986).]

The record is replete with clear instances of knowing misappropriation of trust funds. In the absence of an outright admission, circumstantial evidence can lead to the conclusion that a lawyer knew or had to know clients' funds were being invaded. *Matter of Johnson*, 105 N.J. 249, 258 [520 A.2d 3] (1987).

By respondent's own admission, beginning in December, when he had a coronary bypass operation, and during the relevant times mentioned in the complaint, 1978 through 1980, "I really didn't feel I was practicing law." I had no "outside office. I was using my home. I wasn't listed. I (did not) believe I had an office phone. I didn't have a secre-

tary.... I had no sign; and I was doing was for people I had a personal relationship with." Accordingly, respondent cannot argue that the "of his practice, combined with the fact that he was a sole practitioner, precluded him from closely examining his trust account records and that, consequently, any misuse of client funds was necessarily not intentional. As the Court stated in *Matter of Johnson*, supra, 105 N.J. 260 [520 A.2d 3] (1987):

[We do not intend to suggest that henceforth a respondent who walks away from his fiduciary obligation as safekeeper of client funds can expect this Court to take an innocent view of any misappropriation. We will view "defensive ignorance" with a jaundiced eye. The intention and purposeful avoidance of knowing what is going on in one's trust account will not be deemed a shield against proof of what would otherwise be "knowing misappropriation." There may be semantical inconsistencies, but we are confident that within our legal system, there is sufficient difference between intentional ignorance and legitimate lack of knowledge. (Transcript references omitted.)]

In *Wilson*, we declared, in now familiar language, that a misappropriation is an unauthorized use by the lawyer of client funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." 81 N.J. at 455 n. 409 A.2d 1153. Knowing misappropriation "consists simply of a lawyer's taking client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking." *In re Noonan*, 102 N.J. 157, 160 [506 A.2d 722 (1986)]. In both the Maguire and Spagnoletti matters, as the DRB concluded:

sale of the Maguire's existing home the cost of that sale and of the purchase of their new home. On April 14, respondent brought the account into balance by depositing the above-described \$35,000 loan.

the record is replete with clear instances of knowing misappropriation of trust funds."

Our examination of the record reveals that during the period he handled the Maguire and Spagnoletti matters, respondent used his trust account both as a business account and as a personal account to accommodate some of his friends, generally family acquaintances whose bills respondent paid. Respondent regularly paid these bills regardless of whether sufficient funds were in his trust account to cover the expenditures. The practice began before the publication of *Wilson* and continued thereafter. Respondent described his use of trust funds for his friends in the late 1970s:

A. Well, at the time, I know I had a lot of personal problems; and, quite honestly, I don't think I was putting in the attention to the accounts that probably normally I would have had before 1976. But I had records. I knew who had money in the account, and who had to give me money, you know, at all times. Q. Well, would it ever come an occasion where you made an advance for [your friend], and he owed the money, and you paid out money on his behalf despite the fact that you didn't have it?

A. (No response.)

Q. You didn't have it from him to make the disbursement?

A. Oh, yeah. That happened a number of times.

Q. And would that be the reason that your trust account might have been deficient in those areas by virtue of doing the work you were doing for these particular [friends]?

A. Well, at certain times, yeah, I would assume it would.

Respondent justifies his misuse of clients' funds because of his personal problems. In 1975, respondent's father died, and in the following year, respondent underwent double bypass heart surgery. After this operation, respondent essentially ceased accepting clients. He completed pending matters and accepted new matters

from friends only. In 1977, respondent's brother committed suicide. The following year respondent developed a nervous condition and impotency due to a diabetic condition. In 1979, because of an automobile accident, he was hospitalized for one month with two herniated discs and related back ailments. In December of that year, his residence, in which his office was located, burned down. Finally, in May 1980, his mother suffered a stroke.

The thrust of respondent's argument is that his personal problems so distracted him that he could not diligently manage his trust account. He admitted, however, that he knew that it was unethical to use client funds without authorization. Furthermore, contrary to his asserted inability to manage his trust account from 1978 to 1980, respondent perceived himself during this period as possessing sufficient financial expertise to manage the affairs of others. In this regard, he testified:

Q. Now, going back to the Maguire real estate transactions with Burch [the pre-*Wilson* matter], could you, as an attorney since 1960—did you understand that when you received the funds of \$9300 and \$1000, that these funds were to be held by you and not to be disbursed until the closing?

A. As a lawyer, as a matter of general knowledge, of course, I know that I have to say, though, my state of mind was such that whatever you want to call it, neglect, lack of concern, whatever . . .

I was not conducting a law practice, although I may have filed a tax return listing myself as a lawyer; but I certainly was not the same lawyer I was . . .

Q. I won't argue with you; but despite the fact that you might not have been the same lawyer that you were, you did know even at that time that this is what was supposed to be done with the money?

A. I admit that, yes.

Q. Mr. Bell, other than your practice as an attorney at law, would you consider yourself to have any expertise in any other area.

1. Respondent admitted to allegations of the Ethics Committee complaint that on April 19, 1980, he was out-of-trust to the Maguires by over \$21,000. The Ethics Committee established the deficit by deducting from the proceeds of the

A. Yes.

Q. What area would that be?

A. Financial.

Q. During the years 1978, 1979, and 1980, would you still have considered yourself to be an expert in the area of finances?

A. Yes.

Respondent does not deny that using his business account as a trust account was improper or that his record keeping was shoddy and haphazard. Lawyers, as we have said, "have a duty to assure that their accounting practices are sufficient to prevent misappropriation of trust funds." *In re Fleischer*, 102 N.J. 440, 447, 508 A.2d 1115 (1986). As fiduciaries, lawyers are obliged to know whether their trust accounts are in balance. Here, the conclusion is inescapable that respondent knew he was using client funds without authorization. It makes no difference that respondent did not use any of the funds for his own purposes or that no client suffered from his misappropriation. *In re Noonan*, *supra*, 102 N.J. at 160, 506 A.2d 722.

Respondent's claim that his physical and mental problems excuse or mitigate his misappropriations are likewise unavailing. Nothing in the record establishes that his problems caused his misappropriations. *In re Jacob*, 95 N.J. 132, 137, 469 A.2d 498 (1984). Absent a "demonstration by competent medical proofs that respondent suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct," his physical or mental condition will not excuse the knowing misuse of client funds. *Ibid*.

II

Although respondent may have endured more grief within several years than many endure in a lifetime, his suffering did not prevent him from knowing what he was doing when he misused client funds. Accordingly, we find that respondent knowingly misappropriated funds in violation of DR 9-102 and must be disbarred.

Respondent shall reimburse the Ethics Financial Committee for appropriate admin-

istrative costs, including the costs of transcripts.

STEIN, J., concurring in part and dissenting in part.

I expressed the view in *In re Kon*, 126 N.J. 225, 596 A.2d 733 (1991) although the *Wilson* rule is the rule for the vast majority of misappropriation cases, the inflexibility with which it can be applied runs the risk of creating within our attorney-discipline system almost reflexive approach to such obscuring and ignoring the individual circumstances to an intolerable degree. [*Id.* at 241, 596 A.2d 733.]

I observed that the Court's disposition of misappropriation cases "would in my better reflect the collective wisdom of the Court and better serve the interests of the bar and the public if they were tempered by a recognition that under special circumstances discipline short of disbarment occasionally be appropriate in knowing misappropriation cases." *Id.* at 259, 596 A.2d 733.

The Court's opinion cites two instances of respondent's knowing misappropriation, both of which allegedly occurred after respondent had undergone double bypass heart surgery and had ceased accepting new matters other than for friends. At the District Ethics Committee hearing in 1980, respondent was unable to justify the account shortage in one client's funds that concededly had existed in 1980, explaining that a fire had destroyed his office records in 1979. The evidence of knowing misappropriation was sufficiently ambiguous that three members of the Disciplinary Review Board concluded that respondent's conduct was negligent, not knowing. The record also reflects that any funds withdrawn improperly were replaced, no client having sustained any financial loss. I also note that respondent voluntarily placed his name on the inactive list in 1980, and had not practiced law since then.

The most distinctive aspect of this record is that respondent attributes his inattention to his practice and the resultant misuse of clients' funds to a devastating sequence of

MATTER OF BELL

Cite as 596 A.2d 752 (N.J. 1991)

N.J. 757

events affecting respondent and his family. Acknowledging that "respondent may have endured more grief within several years than many endure in a lifetime," *ante* at 596 A.2d 752, the Court's opinion enumerates the personal tragedies that respondent sustained during the period preceding the alleged misappropriation:

In 1975, respondent's father died, and in the following year, respondent underwent double by-pass heart surgery. After this operation, respondent essentially ceased accepting clients. He completed pending matters and accepted new matters for friends only. In 1977, respondent's brother committed suicide. The following year respondent developed a nervous condition and impotency due to a diabetic condition. In 1979, because of an automobile accident, he was hospitalized for one month with two herniated discs and related back ailments. In December of that year, his residence, in which his office was located, burned down. Finally, in May 1980, his mother suffered a stroke. [*Ante* at 265, 596 A.2d 752.]

In its application of the *Wilson* rule the Court has ignored instances of personal tragedy in determining discipline for knowing misappropriation, see *In re Noonan*, 102 N.J. 157, 160, 506 A.2d 722 (1986), in the absence of proof that the lawyer's problems actually caused the misappropriation of clients' funds. See *In re Jacob*, 95 N.J. 132, 137, 469 A.2d 498 (1984). That standard of proof heretofore has been unattainable by lawyers whose misappropriation of funds has occurred during periods of alcohol or drug impairment or in the course of personal or family tragedy.

In my view, insistence on proof that this respondent's personal suffering caused him to misappropriate funds is both unrealistic and pointless. Our human experience is sufficient to infer a relationship between severe personal stress and acts of imprudence or even desperation. The question should not be one of causation, but rather whether our disciplinary system is sufficiently flexible in unique circumstances to temper the imposition of discipline by taking into account the influence

of extraordinary events. It should be in this case.

Accordingly, I would not vote to disbar. In my view, respondent should be suspended indefinitely from the practice of law, with leave to apply for reinstatement at such time as respondent is able to demonstrate his fitness to resume practice

For disbarment—Chief Justice WILENTZ, and Justices CLIFFORD, HANDLER and POLLOCK—4

Concurring in part, dissenting in part—Justices O'HERN, GARIBALDI and STEIN—3.

ORDER

It is ORDERED that MICHAEL J. BELL of JERSEY CITY, who was admitted to the bar of this State in 1960, be disbarred and that his name be stricken from the roll of attorneys of this State, effective immediately; and it is further

ORDERED that MICHAEL J. BELL be and hereby is permanently restrained and enjoined from practicing law, and it is further

ORDERED that all funds, if any, currently existing in any New Jersey financial institution maintained by MICHAEL J. BELL, pursuant to Rule 1.21-6, shall be restrained from disbursement except upon application to this Court, for good cause shown, and shall be transferred by the financial institution to the Clerk of the Superior Court who is directed to deposit the funds in the Superior Court Trust Fund, pending further Order of this Court, and it is further

ORDERED that MICHAEL J. BELL comply with Administrative Guideline No. 23 of the Office of Attorney Ethics dealing with disbarred attorneys, and it is further

ORDERED that MICHAEL J. BELL reimburse the Ethics Financial Committee for appropriate administrative costs.



APPENDIX V

is denied. The finding as to the torture murder special circumstance is reversed. In all other respects we affirm the judgment and the penalty imposed by the superior court.

LUCAS, CJ, PANELLI, KENNARD and ARABIAN, JJ, and EAGLESON J Assigned *

MOSK, Associate Justice, concurring
I concur in the judgment.

I am much disturbed by the fact that the People considered it desirable to call three jailhouse informants to testify against defendant at his trial. Common experience teaches that such persons "may have good reason to lie." (*United States v Garcia* (5th Cir 1976) 528 F.2d 580, 588, *cf. On Lee v United States* (1952) 343 U.S. 747, 757, 72 S.Ct. 967, 973, 96 L.Ed. 1270 [stating that "[t]he use of informers accessories, accomplices, false friends or any of the other betrayals which are dirty business may raise serious questions of credibility"]). Recent events reveal that they may also have effective means—sometimes supplied by governmental authorities—sometimes not—to make their falsehoods appear rational and persuasive. (See Report of the 1989-90 Los Angeles County Grand Jury Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County.)

In spite of the foregoing review of the record, I am convinced that the majority's disposition is sound. Therefore, I agree with the result.



Honorable David N. Eagleson, retired Associate Justice of the Supreme Court, sitting under assignment by the Chairperson of the Judicial Council.

PEOPLE, Respondent,

v

Jose Martinez RAZO et al Appellants

No S014126

Supreme Court of California

In Bank

Feb 28 1991

Prior Report Cal App 266 Cal Rptr 158

Pursuant to rule 29.4(c), California Rules of Court, the above entitled review is DISMISSED and cause is remanded to the Court of Appeal, Fourth Appellate District, Division Two.

LUCAS, CJ, and MOSK
BROUSSARD, PANELLI, KENNARD,
ARABIAN and BAXTER, JJ concur



DONALD SCHRIVER

INCORPORATED

Respondent

v

CALIFORNIA FAIR EMPLOYMENT
AND HOUSING COMMISSION,
Appellant

No L A 32294

Supreme Court of California,
In Bank

Feb 28 1991

Prior Report Cal App 230 Cal Rptr 620

Pursuant to rule 29.4(c), California Rules of Court, the above entitled review is DISMISSED and cause is remanded to the Court of Appeal, Second Appellate District, Division Four. Pursuant to rule 97.8 of the California Rules of Court, the Reporter of Decisions is directed to publish the opinion in the above entitled case in the Official Appellate Reports. See Subdivision (c) of Rule 97.8, California Rules of Court.

Assignment by the Chairperson of the Judicial Council.

LUCAS, CJ, and MOSK
BROUSSARD, PANELLI, KENNARD
and BAXTER, JJ concur

ARABIAN, J. did not participate.



53 Cal 3d 21

Douglas Paul GRIM, Petitioner,

v

The STATE BAR OF
CALIFORNIA, Respondent

No S014192

Supreme Court of California

In Bank

March 14 1991

Disciplinary action was brought against attorney. The review department of the State Bar Court recommended that the respondent be disbarred. The Supreme Court held that misappropriation of client funds warrants disbarment.

Disbarred.

Mosk, J. filed a dissenting opinion.

1 Attorney and Client ⇐57

The rule that culpability in state bar proceedings must be established by convincing proof to reasonable certainty and that reasonable doubts must be resolved in favor of the attorney is inapplicable to the issue of appropriate discipline. Attorney bears burden of demonstrating that recommended discipline is erroneous or lawful. *West's Ann Cal Bus & Prof Code* § 6083(c).

2 Attorney and Client ⇐58

Although financial problems can be a mitigating factor in appropriate state bar disciplinary cases, they are given significant weight as a mitigating factor in client fund misappropriation cases only if the financial problems are extreme and result from circumstances that are not reasonably foreseeable or are beyond the attorney's control.

3 Attorney and Client ⇐58

Restitution of client funds paid after commencement of disciplinary proceedings was not a proper mitigating circumstance.

4 Attorney and Client ⇐53(2)

Fact that character witnesses in attorney disciplinary proceeding do not know full extent of misconduct diminishes weight to be accorded to witnesses' testimony.

5 Attorney and Client ⇐58

Willful misappropriation of client funds, particularly considered with prior disciplinary sanction for commingling client funds, warrants disbarment.

Douglas Paul Grim, in pro per.

Arthur L. Margolis, Margolis & Margolis, Los Angeles, for petitioner.

Diane C. Yu, Richard J. Zanassi, Sandra T. Larson and Gael T. Infante-Weiss, Office of General Counsel, State Bar of California, San Francisco, for respondent.

THE COURT

We review the recommendation of the Review Department of the State Bar Court (review department) that petitioner Douglas Paul Grim be disbarred from the practice of law for having willfully misappropriated \$5,500 of client funds.

Petitioner contends that disbarment is excessive. He argues that the review department's conclusions of law are unsupported by the evidence, that it failed to properly weigh the evidence and that it failed to appropriately weigh mitigating and aggravating circumstances. He maintains that the interests of the public and the profession can be adequately safeguarded by the imposition of a suspension with probationary monitoring.

We conclude that the review department's recommendation is supported by the record, that compelling mitigating circumstances do not clearly predominate and that disbarment is warranted.

I. FACTS

Petitioner was admitted to the practice of law in California in January 1966. In a prior disciplinary proceeding in 1980, he was privately reprimanded for depositing

\$960.30 of a client's funds in his general account instead of in his client trust account, and for failing to perform services for the client. Petitioner did not return the funds to the client until after the initiation of State Bar disciplinary proceedings.

A Evidence of Misconduct

Before 1984, petitioner represented Dr. Cabrera and his wife in various legal matters. In 1984, following the death of Dr. Cabrera, his widow retained petitioner to represent the estate of her husband in an action for breach of contract. While the action was pending, Mrs. Cabrera moved to Tennessee.

In March 1986, a judgment for \$7,021 was entered in favor of the estate. Petitioner received payment of the judgment in April, deposited the funds in his client trust account, and notified Mrs. Cabrera of the receipt of the funds. Of the \$7,021 received, petitioner was entitled to \$1,432.57 for fees and costs, but he used all of the funds for his own purposes.

Beginning in 1986, petitioner was contacted on various occasions by Mrs. Cabrera's Tennessee attorneys, who were at tempting to obtain her funds from petitioner. Petitioner did not pay Mrs. Cabrera until April 1989, after the State Bar had initiated disciplinary proceedings and held an evidentiary hearing. Petitioner paid Mrs. Cabrera a total of \$6,546 (\$5,546 as principal and \$1,000 as interest).

In addition to the evidence relating to Mrs. Cabrera, the State Bar introduced into evidence the bank records of petitioner's trust account for the period February 1986 to February 1988. The records showed that the account was overdrawn on several occasions. Petitioner testified that he did not reconcile the bank statements, that individuals whom he had hired to reconcile his bank statements were unable to do so and that he relied on his banker to reconcile his eight to fifteen bank accounts.

¹ As we have previously noted (*Aronin v State Bar* (1990) 52 Cal 3d 276, 290 fn. 4, 276 Cal Rptr 160, 801 P 2d 403), canon 2B of the California Code of Judicial Conduct states that

B Evidence in Mitigation

Petitioner's mitigating evidence centers on his assertion that he was under extreme stress because of financial problems at the time of his misconduct. He also cites as mitigating circumstances his cooperation with the State Bar and the favorable character evidence presented at the hearing.

Petitioner's financial distress arose out of a troubled business venture. Petitioner became involved in a business enterprise, Agri-Feeds Inc., to produce animal food from waste agricultural cellulose. He was and still is the president, the chairman of the board of directors, and a 98 percent shareholder of Agri-Feeds. In February 1981, petitioner borrowed \$731,000, secured by his personal real estate holdings, to construct an Agri-Feeds factory near Stockton. In 1982, he borrowed another \$50,000 to complete construction of the factory. That same year, however, the factory was ordered closed because of air pollution problems.

In 1983, after petitioner had raised an additional \$150,000, Agri-Feeds resumed operations. In 1984, petitioner raised another \$300,000. Agri-Feeds remained in business until 1985, when it was closed for lack of operating capital. In 1986, when the misconduct occurred, petitioner was attempting to refinance Agri-Feeds while also practicing law. His efforts to obtain \$6 million in additional financing were unsuccessful. During this same period, petitioner was representing clients in 10 "major pieces of litigation," was running a car pool for his 2 young children (who lived with his ex-wife), and was making child support and other payments to benefit his children.

Ten character witnesses, including two superior court judges,¹ testified to petitioner's good moral character. All of them had known petitioner for a significant period of time. They described petitioner as a hard working, competent attorney who had been under significant financial stress as a result of the problems with Agri-Feeds. A number of the witnesses described petition-

Judges should not testify voluntarily as character witnesses. (Cal Code Jud Conduct canon 2B. *In re Rivas* (1989) 49 Cal 3d 794, 798 fn. 6, 263 Cal Rptr 654, 781 P 2d 946.)

er's misappropriation as aberrational. Seven of the witnesses testified that they were not aware of petitioner's prior discipline until shortly before the hearing. Four of these seven witnesses did not learn of petitioner's failure to make restitution until they were questioned at the hearing. All of these witnesses, however, maintained that in their opinion petitioner was of good moral character.

Petitioner also presented three letters from former clients attesting to his good character.

C State Bar Proceedings and Recommendations

The hearing panel, consisting of a single referee, cited petitioner's prior discipline as an aggravating factor. In mitigation the referee listed these eight circumstances: (1) petitioner's candor with the State Bar, (2) petitioner's stipulation to having violated former Rules of Professional Conduct, rule 8-101(B)(4) (duty to promptly pay or deliver client funds), and Business and Professions Code sections 6068 (duties of attorneys) and 6103 (violation of oath), (3) petitioner's restitution to Mrs. Cabrera, (4) the aberrational nature of petitioner's conduct, (5) the absence of other complaints against petitioner, (6) the severe financial stress to which petitioner was subjected as a result of the near failure of Agri-Feeds, (7) the testimony of the ten character witnesses, and (8) the three client letters. The referee recommended that petitioner be suspended from the practice of law for three years, that the suspension be stayed and that petitioner be placed on probation for five years subject to conditions that included actual suspension for six months.

The review department, by a vote of 12 to 2, adopted the referee's findings with certain modifications. It deleted the referee's conclusions with respect to aggravation, and substituted a brief recitation of the facts relating to petitioner's prior discipline. The review department also determined that "[i]n misappropriating the funds of Ms. Cabrera, [petitioner] took advantage of a family friend who was residing in Tennessee and who accordingly was at a disadvantage with respect to protecting her interests." The review department

deleted the referee's second, third, fourth, fifth, sixth, and eighth factors in mitigation, and stated that most of petitioner's character witnesses were surprised to learn at the hearing that the funds had not been repaid. It added a finding that petitioner had candidly admitted the misappropriation to his client and a finding that petitioner was guilty of gross neglect in the management of his client trust funds.

In recommending disbarment, the review department relied on the Standards for Attorney Sanctions for Professional Misconduct (Transitional Rules Proc. of State Bar div. V, all further references to standards are to these provisions). The review department concluded that compelling mitigating circumstances did not clearly predominate and it disregarded petitioner's restitution as a mitigating factor because the restitution was not made until after the hearing in this case. It gave little weight to petitioner's character witnesses because of their "mistaken belief that [petitioner] had promptly returned Ms. Cabrera's funds." It rejected petitioner's defense of financial stress because the defense did not meet the criteria of standard 12(e)(iv) for extreme emotional difficulty and because the defense was "very questionable as an acceptable factor in mitigation." It did, however, consider petitioner's candor as a mitigating consideration.

II DISCUSSION

Petitioner wilfully misappropriated his client's funds. Misappropriation is more than a grievous breach of professional ethics. It violates basic notions of honesty and endangers public confidence in the legal profession. (*Chang v State Bar* (1989) 49 Cal 3d 114, 128, 260 Cal Rptr 280, 775 P 2d 1049, *Kelly v State Bar* (1988) 45 Cal 3d 649, 656, 247 Cal Rptr 608, 754 P 2d 1104.) In all but the most exceptional of cases, it requires the imposition of the harshest discipline. (*Chang v State Bar supra*, 49 Cal 3d at p. 128, 260 Cal Rptr 280, 775 P 2d 1049, *Gordon v State Bar* (1982) 31 Cal 3d 748, 757, 183 Cal Rptr 861, 647 P 2d 137.) The seriousness of the offense and the propriety of disbarment as

the appropriate discipline have long been recognized by this court (*In re Ford* (1988) 44 Cal 3d 810, 816, 244 Cal Rptr 476, 749 P 2d 1331, and cases cited) and are reflected in the standards. Standard 2.2(a) provides that wilful misappropriation of entrusted funds shall result in disbarment unless the amounts are insignificant or the most compelling mitigating circumstances clearly predominate.

We recently observed that the term 'wilful misappropriation' as used in attorney discipline cases, "covers a broad range of conduct varying significantly in the degree of culpability" and that "[d]isbarment would rarely, if ever be an appropriate discipline for an attorney whose only misconduct was a single act of negligent misappropriation, unaccompanied by acts of deceit or other aggravating factors" (*Edwards v State Bar* (1990) 52 Cal 3d 28, 38, 276 Cal Rptr 153, 801 P 2d 396). The misappropriation in this case, however, was not the result of carelessness or mistake, petitioner acted deliberately and with full knowledge that the funds belonged to his client. Moreover, the evidence supports an inference that petitioner intended to permanently deprive his client of her funds; petitioner repaid the funds only after the passage of almost three years and then only under the pressure of these disciplinary proceedings. Standard 2.2(a) is properly applied to such grave misconduct.

[1] The standards and the recommendation of the review department are entitled to great weight (*In re Naney* (1990) 51 Cal 3d 186, 190, 270 Cal Rptr 848, 793 P 2d 54). When, as here, the review department's recommendation is consistent with the standards, we generally will not reject the recommendation unless we entertain grave doubts about its propriety (See e.g., *Hawes v State Bar* (1990) 51 Cal 3d

587, 595, 274 Cal Rptr 2, 797 P 2d 1180, *In re Rivas, supra*, 49 Cal 3d 794, 800, 263 Cal Rptr 654, 781 P 2d 946). The attorney bears the burden of demonstrating that the recommendation is erroneous or unlawful (Bus. & Prof. Code § 6083, subd. (c)).²

Petitioner does not contend that the amount he misappropriated (\$5,546) was significant (See *Lawhorn v State Bar* (1987) 43 Cal 3d 1357, 1361, 1368, 240 Cal Rptr 848, 743 P 2d 908 [\$1,355.75 held to be a significant amount]). Yet he asserts that the recommended discipline of disbarment is excessive. Thus the issue before us is whether petitioner has shown that "the most compelling mitigating circumstances clearly predominate" (Std. 2.2(a)).

In challenging the review department's recommendation of disbarment, petitioner argues that it deleted from the referee's decision certain findings in mitigation that were supported by sufficient evidence, and that it made conclusions regarding aggravating circumstances that were not supported by the evidence. A discussion of petitioner's contentions follows.

A Mitigating Circumstances

Petitioner contends the review department failed to accord appropriate weight in mitigation to his severe financial stress, the absence of complaints or misconduct reported to the State Bar other than his prior discipline, the aberrational nature of his misconduct, his restitution to Mrs. Cabrera, his cooperation in the State Bar proceedings, and the testimony of his character witnesses.

In rejecting petitioner's financial stress as a mitigating factor, the review department cited standard 1.2(e)(iv)³ and, independent of the reference to this standard,

cable to the issue of appropriate discipline. Culpability is not in issue in this case.

[3] Standard 1.2(e)(iv) says that severe emotional difficulties may be a mitigating circumstance if it is established by expert testimony and the attorney demonstrates by clear and convincing evidence that he no longer suffers from the difficulties.

questioned the propriety of financial stress as a factor in mitigation. Petitioner cites certain decisions by this court for the proposition that financial stress may be considered in mitigation, and he argues that standard 1.2(e)(iv) is inapplicable here.

[2] Financial problems can be a mitigating factor in appropriate State Bar disciplinary cases (See e.g., *Amante v State Bar* (1990) 50 Cal 3d 247, 254, 266 Cal Rptr 648, 786 P 2d 375, *Bradpiece v State Bar* (1974) 10 Cal 3d 742, 747, 111 Cal Rptr 905, 518 P 2d 337). In misappropriation cases, financial problems are given significant weight in mitigation only if they are extreme and result from circumstances that are not reasonably foreseeable or that are beyond the attorney's control (*In re Naney supra*, 51 Cal 3d at p. 196, 270 Cal Rptr 848, 793 P 2d 54). Financial difficulties exist in virtually all misappropriation cases for the simple reason that it is usually the attorney's need or desire for money that is the motivation for stealing client funds. Unless our consideration of an attorney's financial pressures as a mitigating factor is confined to circumstances not reasonably foreseeable or beyond the attorney's control, the rule prohibiting misappropriation and the substantial protection it affords the public, will be largely nullified. It is precisely when the attorney's need or desire for funds is greatest that the need for the public protection afforded by the rule prohibiting misappropriation is greatest (See e.g., *Amante v State Bar supra*, 50 Cal 3d at p. 255, 266 Cal Rptr 648, 786 P 2d 375, *Smith v State Bar* (1985) 38 Cal 3d 525, 540-541, 213 Cal Rptr 236, 698 P 2d 139).

Petitioner's reliance on financial stress as a mitigating factor is misplaced. His financial difficulties were neither unforeseeable nor beyond his control. It was the near failure of Agri-Feeds, petitioner's business venture that was primarily responsible for petitioner's stress. As mentioned earlier, the purpose of Agri-Feeds of which petitioner owns 98 percent of the

stock, is to convert waste agricultural cellulose into animal food. It is a novel enterprise using untested technology. The risk of financial failure was reasonably foreseeable by petitioner. Indeed, Agri-Feeds had closed twice, once in 1983 and once in 1985, before petitioner misappropriated Mrs. Cabrera's money. Petitioner controlled his business venture. Petitioner financed Agri-Feeds through loans secured by his real estate holdings and personal guarantees. Under these circumstances, petitioner's financial problems are not entitled to significant weight in mitigation.⁴

Petitioner argues that except for the 1980 prior discipline and the present disciplinary matter, he has committed no misconduct since his admission to the State Bar in 1966 and that this should be considered a mitigating circumstance. He also points out that a number of his character witnesses testified that his misappropriation in this case was aberrational behavior.

Petitioner's private reproval in 1980 was based on a stipulation as to facts and discipline. The stipulation cited as a mitigating circumstance the fact that petitioner had practiced law since 1966 without prior discipline. Thus, before these proceedings, the length of petitioner's practice and the absence of complaints from clients are circumstances that have already been relied on to justify the imposition of a lesser degree of discipline. The prior discipline was imposed for petitioner's commingling of client funds and his failure to perform services. Commingling like misappropriation (the misconduct involved here) is a serious offense involving funds entrusted to an attorney (Std. 2.2(a) & (b)). Although petitioner minimizes the significance of his prior discipline, it is an aggravating factor (Stds. 1.2(b)(1), 1.7). Because of the similarity between and the seriousness of petitioner's 1980 misconduct and the present misconduct, we reject petitioner's contention.

[3] Petitioner also contends his restitution of Mrs. Cabrera's funds should be

department's conclusion that petitioner's evidence did not satisfy the requirements of standard 1.2(e)(iv) is unnecessary.

Because petitioner has not shown that financial stress should be considered as a mitigating factor in this case, a discussion of the review

² Petitioner's argument that in determining discipline we must resolve all reasonable doubts in his favor is incorrect. The rule that culpability in State Bar proceedings must be established by convincing proof to a reasonable certainty and that reasonable doubts must be resolved in favor of the attorney (*Price v State Bar* (1982) 30 Cal 3d 537, 547, 179 Cal Rptr 914, 638 P 2d 1311, *Emslie v State Bar* (1974) 11 Cal 3d 210, 226, 113 Cal Rptr 175, 520 P 2d 991) is inapplicable to the issue of appropriate discipline. Culpability is not in issue in this case.

³ Standard 1.2(e)(iv) says that severe emotional difficulties may be a mitigating circumstance if it is established by expert testimony and the attorney demonstrates by clear and convincing evidence that he no longer suffers from the difficulties.

⁴ Because petitioner has not shown that financial stress should be considered as a mitigating factor in this case, a discussion of the review

considered as mitigating. Petitioner, however, did not make the payment until after he had been contacted by Mrs. Cabrera's Tennessee attorneys and after the State Bar had commenced disciplinary proceedings. Restitution paid under the force or threat of disciplinary proceedings is not a proper mitigating circumstance. (*Hitchcock v. State Bar* (1989) 48 Cal 3d 690, 709, 257 Cal Rptr 696, 771 P 2d 394.)

Petitioner correctly argues that the review department erred in deleting the referee's finding that petitioner's admission of violation of the former Rules of Professional Conduct and Business and Professions Code sections constituted a mitigating circumstance. It is true that cooperation with the State Bar during its investigation and proceedings is a mitigating factor. (Std 1 2(e)(v).)

As noted earlier, 10 character witnesses testified on behalf of petitioner at the hearing. Among them were two superior court judges and one lawyer. The remaining seven witnesses were business associates or business people who had known petitioner for some time. Several of the witnesses testified that petitioner had performed legal work for them. The referee cited the testimony of the character witnesses in mitigation. The review department, however, gave little weight to the testimony in light of the witnesses' "mistaken belief" that petitioner had promptly returned Mrs. Cabrera's funds.

Petitioner contends the review department failed to give sufficient weight to the testimony of his character witnesses. We agree that the review department appears to have discounted this testimony too much. But we do not agree that the testimony established mitigation of a most compelling nature.

[4] The record shows that four of the ten character witnesses, including one of the two judges, were unaware that petitioner had failed to make restitution to Mrs. Cabrera by the time of the hearing. Thus, an appreciable number of petitioner's witnesses did not know the full extent of petitioner's misconduct. (Std 1 2(e)(vi).) Petitioner's failure to make full disclosure

to these witnesses before the hearing diminishes the weight to be accorded the testimony of these witnesses. The testimony is, nevertheless, entitled to considerable weight because even after learning of petitioner's failure to restore the misappropriated funds, the character witnesses maintained that petitioner possessed good moral character.

B Aggravating Circumstances

Petitioner challenges the review department's finding, in aggravation, that he took advantage of a family friend who was residing in another state and thus was at a disadvantage with respect to protecting her interests. Petitioner also challenges the review department's finding that he was guilty of gross neglect in the management of his trust funds and office accounts. Petitioner maintains that the review department's findings are not within the charges set forth in the notice to show cause and are not supported by the findings of the hearing panel.

1 Notice to Show Cause

An attorney cannot be disciplined for a violation not alleged in the notice to show cause. If the evidence shows an ethical violation not charged in the notice, the State Bar must amend the notice to conform to proof. A slight variance in the evidence that relates to the noticed charge, however, does not require an amendment unless the attorney demonstrates that the defense was actually compromised. (*Van Sloten v. State Bar* (1989) 48 Cal 3d 921, 928-929, 258 Cal Rptr 235, 771 P 2d 1323.) Furthermore, although evidence of uncharged misconduct cannot be used as an independent ground of discipline, it may be considered when it is otherwise relevant to an issue in the proceeding. (*Arm v. State Bar* (1990) 50 Cal 3d 763, 775, 268 Cal Rptr 741, 789 P 2d 922.)

The review department's finding that petitioner took advantage of Mrs. Cabrera as a family friend residing in another state and its finding that he mismanaged his trust account were not used as independent grounds of discipline but as circumstances

in aggravation. Factors in aggravation include indifference toward rectifying the consequences of the misconduct (Std 1 2(b)(v)) and lack of cooperation with the victim of the misconduct (Std 1 2(b)(vi)).

The evidence of petitioner's mismanagement of his trust account was also relevant to a factor in aggravation. Standard 1 2(b)(ii) provides that it shall be considered an aggravating factor "that the current misconduct found or acknowledged by the member evidences multiple acts of wrong doing or demonstrates a pattern of misconduct." Petitioner was charged with misappropriating client funds from his trust account. He stipulated that he took Mrs. Cabrera's money for his own use. He also testified at the hearing that his trust account was overdrawn on several occasions. And he testified that neither he nor individuals whom he had hired were able to reconcile his bank statements. The review department properly considered this evidence.

2 Hearing Panel Findings and Sufficiency of Evidence

Petitioner asserts that the review department's findings in aggravation are not supported by the findings of the hearing panel. The argument is without merit. The review department has the authority to "adopt findings, conclusions and a decision or recommendation at variance with the hearing department." (Transitional Rules Proc. of State Bar, rule 453(a).) Because the review department has such authority, we will deem petitioner's assertion to be a challenge to the sufficiency of the evidence to support the review department's findings in aggravation.

We agree with petitioner that the record does not support the review department's finding that Mrs. Cabrera was a family friend of petitioner. The record merely shows that before the misconduct in this case petitioner represented Dr. and Mrs. Cabrera in some legal matters that Mrs. Cabrera would inquire about petitioner's children, and that she invited petitioner to see her in Tennessee if he happened to be in that state for a visit. These instances do

not support the review department's finding that Mrs. Cabrera was a family friend.

The record does, however, support the review department's finding that petitioner took advantage of Mrs. Cabrera's move to Tennessee after her husband's death. The record discloses that attorneys from Tennessee representing Mrs. Cabrera contacted petitioner on various occasions in an effort to obtain her funds from petitioner. Although petitioner told the attorneys he would pay Mrs. Cabrera, he did not do so until after the State Bar hearing in this case. We conclude that the review department properly considered these circumstances as aggravating factors. (Std 1 2(b)(iii).)

Contrary to petitioner's assertion, the review department properly found that petitioner had exhibited gross neglect in the management of his trust funds and office accounts. The record shows that petitioner's trust account was overdrawn on several occasions and that his bank statements could not be reconciled.

C Propriety of Discipline

[5] Petitioner contends that the recommended discipline of disbarment is excessive, unduly harsh and unnecessary. He argues that disbarment exceeds the level of discipline that this court has imposed in comparable cases and that monitored probation will adequately protect the public interest.

The extent of discipline is determined by a balanced consideration of the relevant factors. (*McCray v. State Bar* (1985) 38 Cal 3d 257, 273, 211 Cal Rptr 691, 696 P 2d 83.) The imposition of discipline less than disbarment in other cases involving different facts (see, e.g., *Lawhorn v. State Bar* *supra*, 43 Cal 3d 1357, 1368, 240 Cal Rptr 848, 743 P 2d 908 [compelling mitigating factors in a case falling between wilful misappropriation and simple commingling]), *Chasteen v. State Bar* (1985) 40 Cal 3d 586, 592-593, 220 Cal Rptr 842, 709 P 2d 861 [recommended discipline increased]) does not lead to the conclusion that disbarment in this case is unwarranted. (See, e.g., *Chang v. State Bar* *supra*

49 Cal.3d at pp. 128-129, 260 Cal.Rptr. 280, 775 P.2d 1049 [disbarment based on single misappropriation]; *In re Demergian* (1989) 48 Cal.3d 284, 289, 298, 256 Cal.Rptr. 392, 768 P.2d 1069 [disbarment based on theft of client funds]; *In re Abbott* (1977) 19 Cal.3d 249, 251, 254, 137 Cal.Rptr. 195, 561 P.2d 285 [same].)

Petitioner has not shown that the review department's recommendation of disbarment is erroneous or unlawful. Petitioner's cooperation with the State Bar and evidence of his good character do not constitute compelling mitigation in view of the various circumstances in aggravation. Petitioner misappropriated Mrs. Cabrera's \$5,546. He has a prior disciplinary record. He did not make restitution, despite the efforts of Mrs. Cabrera's Tennessee attorneys to obtain her funds, until after the State Bar's evidentiary hearing. He took advantage of the fact that Mrs. Cabrera resided in another state and placed his interests over those of his client.

Because disbarment is warranted, it is not necessary to address the possibility of prophylactic measures, such as the imposition of a probation monitor, that may be appropriate when lesser forms of discipline are warranted.

DISPOSITION

It is ordered that Douglas Paul Grim be disbarred from the practice of law in California, that his name be stricken from the roll of attorneys, that he comply with rule 955 of the California Rules of Court, and that he perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of this order. Failure to comply with rule 955 may result in imprisonment. (Bus. & Prof.Code, § 6126, subd. (c).) This order is effective upon the finality of this decision in this court. (See Cal.Rules of Court, rule 953(a).)

MOSK, Justice, dissenting.

I dissent.

I would adopt the recommendation of the referee who heard the evidence and had an opportunity to evaluate the witnesses. The

referee recommended five years' probation that included six months' actual suspension and other conditions.

The petitioner was guilty of one act of misappropriation. Unquestionably it was serious and caused inconvenience to the client affected thereby. However this was one isolated incident and in no way indicates a course of conduct. Since a private reproof 11 years ago the petitioner has been free of improper or unprofessional practice.

Under these circumstances disbarment impresses me as excessive punishment unnecessary for the protection of the public.



53 Cal.3d 1

In re Ralph J. LEARDO on
Disbarment.

No. S013350.

Supreme Court of California,
In Bank.

March 14, 1991.

Attorney disciplinary proceeding was brought. The Review Department of the State Bar Court recommended disbarment, but the Supreme Court held that convictions of possessing controlled substances with intent to distribute warrant five-year suspension from practice of law, with order stayed on stringent conditions of probation, in light of mitigating evidence and evidence of rehabilitation.

Suspended, stayed on conditions of probation.

1. Attorney and Client ⇨57

While Supreme Court gives great weight to review department's recommendation of attorney discipline, Court exercises

its independent judgment in determining proper discipline to impose.

2. Attorney and Client ⇨58

Convictions of possession of controlled substances with intent to distribute involve moral turpitude and serious misconduct, warranting disbarment in the absence of compelling mitigating circumstances. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1); West's Ann.Cal.Bus. & Prof.Code § 6101(a).

3. Attorney and Client ⇨58

Compelling mitigating circumstances and evidence of rehabilitation would prevent convictions of possessing controlled substances with intent to distribute from warranting disbarment; initial addiction to opiates resulted from legitimate medical treatment, rehabilitation began promptly upon incarceration, and drug-free and alcohol-free periods following incarceration exceeded four years. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1); West's Ann.Cal.Bus. & Prof.Code § 6101(a).

4. Attorney and Client ⇨58, 60

Conviction of two counts of possessing controlled substances with intent to distribute warrants suspension from practice of law for five years, stayed only on stringent conditions of probation, with no actual suspension required, in light of service of four and one-half years on noncustodial interim suspension and lack of financial profit from drug sales made to undercover agent who proposed and urged transactions. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1); West's Ann.Cal.Bus. & Prof.Code § 6101(a); Cal.Rules of Court, Rule 953(a).

5. Attorney and Client ⇨57, 58

Disciplinary standard providing that, even when there are compelling mitigating circumstances, discipline for conviction of crime of moral turpitude shall not be less than two year actual suspension, prospective

1. Petitioner and the State Bar stipulated that the case would be heard by a single referee sitting

tive to any interim suspension, is simply guideline for use by State Bar, and whether recommended discipline is appropriate is still matter for Supreme Court's independent review. State Bar Procedure Rule 611; West's Ann.Cal.Bus. & Prof.Code § 6002.1.

George V. Denny, III, Sherman Oaks, for petitioner.

Edwin T. Caldwell, San Francisco, Theodore A. Cohen, Beverly Hills, David B. Johnson and Quattrin, Johnson, Campora and England, Sacramento, as amici curiae on behalf of petitioner.

Diane C. Yu, Richard J. Zanassi, Starr Babcock and Mara Mamet, San Francisco, for respondent.

THE COURT:

We review the recommendation of the Review Department of the State Bar Court (hereafter review department) that petitioner be disbarred from the practice of law in California because of his 1985 conviction in the Virgin Islands on two counts of possessing controlled substances with intent to distribute (21 U.S.C. § 841(a)(1)). As will appear, we conclude that a less severe form of discipline will better recognize the compelling evidence of mitigation and rehabilitation in this record, will amply protect the public and the profession, and will promote consistency with a recent decision of this court on very similar facts (*In re Nadrich* (1988) 44 Cal.3d 271, 243 Cal.Rptr. 218, 747 P.2d 1146).

In March 1986 petitioner voluntarily initiated these proceedings by informing the State Bar of his conviction in the Virgin Islands and asking that he be placed on interim suspension. Accordingly, we placed him on such suspension effective May 30, 1986, and referred the matter to the State Bar for a hearing and recommendation as to discipline.¹ During the years 1987 and 1988 petitioner and the State Bar

as a hearing panel (hereafter the referee).

APPENDIX W

Wendell K. Smith, #3019
Assistant Bar Counsel
Office of Bar Counsel
645 South 200 East
Salt Lake City, UT 84111-3834
801-531-9110

IN THE SUPREME COURT
OF THE STATE OF UTAH

In The Matter of the	)	ORDER AFFIRMING
Complaint by	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW AND
DONNA CHURCHEY	)	MODIFIED RECOMMENDATION
	)	OF DISCIPLINE
)	
against	)	F-484
)	
DOUGLAS E. WAHLQUIST)	
DOB: 05-20-46)	
ADM: 04-18-78)	
)	

Pursuant to Rule XII(e) of the Procedures of Discipline of the Utah State Bar, the Board has reviewed the Findings of Fact, Conclusions of Law and Recommendation of Discipline of the Disciplinary Hearing Panel. It hereby affirms the Findings of Fact and Conclusions of Law, adopts them as its own, and incorporates them by reference into this Order.

The Recommendation of the Hearing Panel that Respondent be suspended from the practice of law for two (2) years is disaffirmed. The Board recommends Respondent be disbarred.

The following Recommendations of the Hearing Panel, as modified, are affirmed:

Respondent shall not act or hold himself out as an attorney, paralegal or law clerk following his disbarment.

Respondent shall be permitted to be employed as a secretary and office manager in the law firm of George H. Searle.

George H. Searle shall make annual reports to the Office of Bar Counsel verifying that Respondent is employed in his law firm and that he is not acting or holding himself out as an attorney, paralegal or law clerk. Mr. Searle shall also notify the Office of Bar Counsel when Respondent's employment with his office is terminated. Future employment by Respondent in any office where the practice of law is conducted shall be subject to the same terms and conditions.

Respondent, as a condition precedent to readmission to practice law, shall make full restitution to Lincoln National Corporation in the amount of \$22,500.00, plus interest, at the rate of twelve percent (12%) per annum.

Respondent shall make full restitution to Unigard in Formal Complaint F-268 in an amount satisfactory to Unigard as a condition precedent to readmission to practice law.

Respondent should pay the reasonable costs incurred to the Office of Bar Counsel for prosecuting this action in the amount of \$118.32.

Formal Complaint F-485 is dismissed per agreement of the parties.

The grounds for this modification of the recommendations of the Disciplinary Hearing Panel are set forth in the attached Memorandum of Points and Authorities.

DATED this 8th day of MARCH, 1993.

BOARD OF BAR COMMISSIONERS

By: Randy L. Dryer
Randy L. Dryer
President

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order Affirming Findings of Fact, Conclusions of Law and Modified Recommendation of Discipline was mailed certified mail return receipt requested, postal certificate number P396818109, to George Searle, Attorney for Respondent, at 2805 So. State, S.L.C., UT 84115 on this 12 day of March, 1993.

Cynthia L. Luman

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Attorney at Law
2805 S. State
S.L.C., UT 84115

4a. Article Number

P 396 818 109

4b. Service Type

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DEC 15 1991

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6. Signature (Agent)

Wahlquist

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PS Form 3800, June 1991