

1972

## **In Re: George H. Badger : Respondent's Brief**

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Glenn C. Hanni; Attorney for Respondent

---

### **Recommended Citation**

Petition for Rehearing, *Bigler v. Badger*, No. 12052 (1972).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/5248](https://digitalcommons.law.byu.edu/uofu_sc2/5248)

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

---

IN RE:

GEORGE H. BADGER,  
*Disciplinary Proceeding*

---

APPELLANT'S PETITION FOR REHEAR  
AND BRIEF IN SUPPORT THEREOF

---

GLENN C. HARRIS  
STRONG & HARRIS  
604 Boston Building  
Salt Lake City, Utah  
*Attorneys for*  
*George H. Badger*

WAYNE H. WADSWORTH  
Kearns Building  
Salt Lake City, Utah

FRANK GUSTIN  
Walker Bank Building  
Salt Lake City, Utah  
*Prosecuting Committee*

FILED

AUG 24 1972

\_\_\_\_\_  
Clerk, Supreme Court, Utah

---

---

## TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF THE CASE .....	1
ARGUMENT .....	1
POINT I.	
IN REVIEWING THE FINDINGS AND RECOMMENDATION OF THE BAR COMMISSION THIS COURT APPLIED AN ERRONEOUS STANDARD .....	1
POINT II.	
DISBARMENT OF GEORGE H. BADGER IS MUCH TOO HARSH WHEN COMPAR- ED WITH THE DISCIPLINARY ACTION TAKEN BY THIS COURT IN OTHER CASES .....	4
CONCLUSION .....	22

### CASES CITED

<i>Egan v. State Bar of California</i> , 294 P.2d 949 .....	21
<i>Ex-Parte Bennett</i> , 269 P.2d 490 .....	21
<i>Ex-Parte Powell</i> , 269 P.2d 512 (Ore.) .....	21
<i>In re Badger</i> , 27 Utah 2d 174, 493 P.2d 1273 .....	2
<i>In re Baldwin</i> , 303 P.2d 943 (Ore.) .....	21
<i>In re Barclay</i> , 82 Utah 288, 24 P.2d 302 (1933) .....	13
<i>In re Bridwell</i> , 25 Utah 2d 1, 474 P.2d 116 (1970) .....	3, 10, 23
<i>In re Burton</i> , 67 Utah 118, 246 P. 188 (1926) .....	9
<i>In re Carroll</i> , 343 P.2d 1023 (Wash.) .....	21
<i>In re Dennett</i> , 18 Utah 2d 127, 417 P.2d 245 .....	6
<i>In re Evans</i> , 22 Utah 366, 62 P. 913 (1900), reversed, 42 Utah 282, 130 P.217 (1913) .....	8, 11
<i>In re Foxley</i> , 61 Utah 575, 217 P.248 (1923) .....	5
<i>In re Fritts</i> , 341 P.2d 555 (Ore.) .....	21

## TABLE OF CONTENTS Continued

	<i>Page</i>
<i>In re Fullmer</i> , 17 Utah 2d 121, 405 P.2d 343 (1965) .....	16
<i>In re Graham</i> , 118 P.2d 1093 (Ariz.) .....	21
<i>In re Hanson</i> , 48 Utah 163, 158 P. 778 (1916) .....	9, 11
<i>In re Hannon</i> , 324 P.2d 753 (Ore.) .....	21
<i>In re Hatch</i> , 108 Utah 446 ,160 P.2d 961 (1945) .....	17
<i>In re Hilton</i> , 48 Utah 172, 158 P. 691 (1916) .....	5, 21
<i>In re Jones</i> , 68 Utah 213, 249 P. 803 (1926) .....	10
<i>In re King</i> , 7 Utah 2d 258, 322 P.2d 1095 (1958) .....	16
<i>In re King</i> , 257 P.2d 219 (Wash.) .....	21
<i>In re Marsh</i> , 42 Utah 186, 129 P. 411 (1913) .....	4
<i>In re Matthews</i> , 61 Utah 581, 217 P. 250 (1923) .....	6
<i>In re Mac Farlane</i> , 10 Utah 2d 217, 350 P.2d 631 (1960) .....	16
<i>In re McCullough</i> , 97 Utah 533, 95 P.2d 13 (1939) .....	14
<i>In re Norton</i> , 106 Utah 179, 146 P.2d 899 (1944) .....	15
<i>In re Park</i> , 274 P.2d 1006 (Wash.) .....	21
<i>In re Pearce</i> , 103 Utah 522, 136 P.2d 969 (1943) .....	6
<i>In re Platz</i> , 42 Utah 439, 132 P. 390 (1913) .....	4
<i>In re Richeson</i> , 166 P.2d 583 (Ariz.) .....	21
<i>In re Snow</i> , 27 Utah 265, 75 P. 741 (1904) .....	8, 13
<i>In re Steffensen</i> , 85 Utah 380, 39 P.2d 722 (1935) .....	14, 15
<i>In re Steffensen</i> , 94 Utah 436, 78 P.2d 531 (1938) .....	15
<i>In re Wade</i> , ..... Utah 2d ....., ..... P.2d ....., No. 12780 (1972) .....	18
<i>Narhian v. State Bar of California</i> , 136 P.2d 553 .....	21
<i>People v. Kistler</i> , 354 P.2d 1022 (Colo.) .....	21
<i>Sturr v. State Bar of California</i> , 338 P.2d 897 .....	21

### TEXTS CITED

Utah Constitution, Article VIII, Sec. 2 .....	22
---	----

IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

---

IN RE:

GEORGE H. BADGER,  
*Disciplinary Proceeding*

---

} Case No.  
12052

APPELLANT'S PETITION FOR REHEARING  
AND BRIEF IN SUPPORT THEREOF

---

STATEMENT OF THE CASE

George H. Badger, appellant, respectfully petitions the court for a rehearing in the above-entitled matter, or in the alternative that the court modify its decision by vacating the disbarment judgment and imposing in lieu thereof a suspension for a reasonable period of time. Considering the violations involved, disbarment is much too harsh. The interests of the public and of the bar will be best served by a period of suspension.

ARGUMENT

POINT I

IN REVIEWING THE FINDINGS AND RECOMMENDATION OF THE BAR COMMISSION THIS COURT APPLIED AN ERRONEOUS STANDARD.

Although a reading of the record, examination

of the exhibits and of the testimony, would justify a conclusion contrary to that reached by the Disciplinary Committee, no effort will be made to review the evidence or to argue that the Findings of Fact are not supported by the evidence. The sole purpose of this petition is to request that the court (1) apply the correct standard of review, and (2) re-examine the harsh and final judgment of disbarment in light of the prior decisions of this court and the facts and circumstances of this case.

This court in *In re Badger*, 27 Utah 2d 174, 493 P.2d 1273, in reviewing the Bar Commission's recommendations stated:

"The Bar Commission has recommended that Mr. Badger's conduct justifies disbarment; such a recommendation, in the final analysis constitutes a value judgment, which may be accepted, modified or rejected by this court. *However, this court has established a standard that it will sustain the recommendation of the Bar Commission unless it has acted arbitrarily, capriciously or unreasonably. If the alleged severity of the recommendation be evaluated by this standard, there is no ground upon which this court can predicate a departure from it.*" (emphasis added)

We have no quarrel with the court applying the standard referred to when reviewing the findings of the Bar Commission. In view of this court's pronouncements in prior decisions, we do not believe this standard should be followed when reviewing the Bar Commission's recommendations of punishment as dis-

tinguished from its findings. Findngs of Fact on the one hand and recommendations for punishment on the other are not in the same category and different standards of review have always, prior to the instant case, been applied by the Supreme Court.

This court in the case of *In re Bridwell*, 25 Utah 2d 1, 474 P.2d 116 (1970) stated the standards of review as follows:

“It has been the policy of this court to look upon the findings and recommendations of the Utah State Bar with indulgence; and while we are still of the opinion that the findings of the Utah State Bar should be adopted by this court unless they appear to be arbitrary or not in accord with the preponderance of the evidence, yet *we do not consider the recommendations of punishment made by the bar to be in the same category as we do their findings of fact, because it is our responsibility to discipline an erring attorney, and we cannot delegate that duty to others.* The Utah State Bar makes its recommendations upon a reading of the printed record of proceedings had before committees and not before the individual commissioners of the State Bar. We are, therefore, in an equally good position to evaluate the situation as are the commissioners.” *Id.* at 116.

Had the court applied the review standard it employed in *Bridwell* and all of its prior disciplinary decisions, we do not believe it would have agreed with the harsh and unyielding recommendation of the Bar Commission. Fairness would seem to dictate that a lawyer when being proceeded against in a disciplin-

ary matter, has a right to have the recommendations of the Bar Commission reviewed by the correct standard as enunciated in *Bridwell*. A rehearing would accomplish this.

## POINT II

### DISBARMENT OF GEORGE H. BADGER IS MUCH TOO HARSH WHEN COMPARED WITH THE DISCIPLINARY ACTION TAKEN BY THIS COURT IN OTHER CASES.

We have made a diligent effort to find all of the reported disciplinary cases decided by this court in its entire history. In only seven reported cases so far as we have been able to determine has the harsh, final and unyielding penalty of disbarment been imposed. A short resume of those cases follows:

*IN RE MARSH*, 42 Utah 186, 129 P. 411 (1913).

1. *Wrongs Committed*: Kept a house of prostitution "at which white girls consorted with negroes and smoked opium with his knowledge, and to which he took beer and served to inmates and patrons."
2. *Grievance Committee's Recommendation*: Complete disbarment.
3. *Penalty Imposed by Supreme Court*: Found morally unfit to be a member of the bar and permanently disbarred.

*IN RE PLATZ*, 42 Utah 439, 132 P. 390 (1913).

1. *Wrongs Committed*: No facts are stated in the court's opinion. A check was made in the Clerk's office and in the archives to see

if a detailed statement of facts could be obtained but these efforts were without success. From the opinion of the court it would appear that there were several very serious violations in terms of moral conduct, dishonesty, and deception.

2. *Grievance Committee's Recommendation*: Permanent disbarment.
3. *Penalty Imposed by Supreme Court*: Found unfit to be a member of the bar and permanently disbarred.

*IN RE HILTON*, 48 Utah 172, 158 P. 691 (1916).

1. *Wrongs Committed*: Attacked the Utah Supreme Court for a decision regarding an executed murderer. Attacked the court "wilfully and maliciously in the press, public addresses, and otherwise," to the effect that the the court was improperly influenced, prejudiced, and unfair.
2. *Grievance Committee's Recommendation*: Permanent disbarment.
3. *Penalty Imposed by Supreme Court*: Permanently disbarred on the grounds that an attorney who intentionally misrepresents matters with respect to the court and who deliberately attempts to bring it into disrespect is guilty of moral turpitude.

*IN RE FOXLEY*, 61 Utah 575, 217 P. 248 (1923).

1. *Wrong Committed*: Convicted of embezzlement.
2. *Penalty Imposed by Supreme Court*: Dis-

barred and name stricken from the record as provided by statute, (Sec. 331 Compiled Laws of Utah 1917).

*IN RE MATTHEWS*, 61 Utah 581, 217 P. 250 (1923).

1. *Wrongs Committed*: Took \$3,500.00 from client to pay alimony in divorce proceeding with agreement that unused money would be repaid. Divorce proceeding was dropped, Matthews returned only \$1,000.00 and kept the balance converting it to his own use. Matthews fled the state to escape prosecution and punishment.
2. *Grievance Committee's Recommendation*: Disbarment.
3. *Penalty Imposed by Supreme Court*: Disbarred and name stricken from the record.

*IN RE PEARCE*, 103 Utah 522, 136 P. 2d 969 (1943).

1. *Wrongs Committed*: Convicted of criminal conspiracy to "permit, allow, assist and enable houses of ill fame and gambling houses to be kept, maintained and operated in Salt Lake City, knowing such operation to be in violation of the law." Did so and collected money from the operators of such places.
2. *Board of Commissioners Recommendation*: Disbarment.
3. *Penalty Imposed by Supreme Court*: Permanently disbarred as required by statute, (Sec. 6-0-36 U.C.A. 1943)

*IN RE DENNETT*, 18 Utah 2d, 127, 417 P.2d 245.

This is a reported case where the attorney was disbarred. None of the facts involving the wrongful conduct of the lawyer are stated in the opinion. Because of this in our discussion, we are not taking this case into consideration.

It should be noted that of the seven cases, two of them involved criminal convictions where disbarment is provided for by statute and in one case, *Pearce*, was mandatory.

*Hilton* involved an aggravated, wilful and repeated assault on the Supreme Court and a deliberate attempt to bring it into disrepute. *Matthews* involved conduct that would amount to embezzlement. It should be noted that inasmuch as two of the instances of disbarment were after conviction of a criminal offense this court in its entire history, so far as we are able to determine, has disbarred a lawyer in regular disciplinary proceedings on four occasions only. One of those occasions amounted to an embezzlement, another a deliberate and wilful disrespectful attack on the Supreme Court amounting to moral turpitude. The other two, *Marsh* and *Platz*, involved serious violations in terms of moral conduct, dishonesty and deception.

The case now before this court involves (1) a finding of solicitation, and (2) a finding of common law fraud in a civil action, not involving a client however, and which finding of fraud was expunged from the court record by the judge who made the original finding. A reading of the cases where disbarment has

been ordered readily demonstrates the conduct involved in those cases was much more aggravated and serious than the violations of which George H. Badger has been found guilty.

We have made an exhaustive review of the Utah Supreme Court's decisions where disbarment was recommended by the Bar Commission but where this court independently re-evaluated the conduct of the attorney and determined that the Bar Commission's recommendation was simply too severe. The following cases fall in this category:

**DISBARMENT RECOMMENDED. SUPREME COURT REFUSED.**

*IN RE EVANS*, 22 Utah 366, 62 P. 913 (1900), reversed 42 Utah 282, 130 P. 217 (1913).

1. *Wrongs Committed*: Stipulated in a contract with a client that the attorney would pay the cost of litigation. Furthermore, acted against the interest of his clients and disregarded the confidential nature of the attorney-client relationship.
2. *Grievance Committee's Recommendation*: Permanent disbarment.
3. *Penalty Imposed by Supreme Court*: Required repayment of the clients. No other punishment upon satisfaction of this requirement.

*IN RE SNOW*, 27 Utah 265, 75 P. 741 (1904).

1. *Wrongs Committed*: In an answer filed in an action, made "scandalous and malicious

false allegations against judge on the Utah Supreme Court charging that he bartered his judicial influence for a portion of the fruits of litigation in a conspiracy to falsely maintain an action.”

2. *Grievance Committee's Recommendation:* Disbarment.
3. *Penalty Imposed by Supreme Court:* Suspended for sixty days.

*IN RE HANSON*, 48 Utah 163, 158 P. 778 (1916).

1. *Wrongs Committed:* Went into policie station where Chief of Police was holding client's clothes to be used as evidence and took the clothes away to avoid detection by police.
2. *Grievance Committee's Recommendation:* Permanent disbarment.
3. *Penalty Imposed by Supreme Court:* Suspended for sixty days.

*IN RE BURTON*, 67 Utah 118, 246 P. 188 (1926).

1. *Wrongs Committed:* (Involved a judge not an attorney) Wrote a letter to himself purporting to have been written by a party in litigation in his court, then attempted to get party to sign it. Also, arbitrarily suspended attorneys from practicing in his court.
2. *Grievance Committee's Recommendation:* Disbarment.
3. *Penalty Imposed by Supreme Court:* Court

decided that he could not practice while he was a judge anyway, so disbarment or suspension may be useless. Received only a formal reprimand.

*IN RE JONES*, 68 Utah 213, 249 P. 803 (1926).

1. *Wrongs Committed*: Appeared without authority as attorney for several parties in a proceeding. Also changed name of grantee after execution of a deed in order to defraud his own creditors (and succeeded).
2. *Grievance Committee's Recommendation*: Disbarment.
3. *Penalty Imposed by Supreme Court*: None. Held not sufficiently serious to justify disbarment or suspension.

*IN RE BRIDWELL*, 25 Utah 2d 1, 474 P.2d 116 (1970).

1. *Wrongs Committed*: Represented clients with conflicting interests resulting in one client getting a \$10,000.00 profit at the expense of the other client. There were several other "wrongs" which were subject to disagreement.
2. *Board of Commissioner's Recommendation*: Total disbarment.
3. *Penalty Imposed by the Supreme Court*: Suspension for one year.

Just as most courts are loathe even in cases involving the most heinous of crime to impose the death penalty, so the Utah Supreme Court has been most reluctant, except in highly aggravated cases, to impose the Supreme Penalty in a disciplinary matter —

DISBARMENT. A reading of the opinion in *Bridwell* demonstrates that the conduct there involved was more aggravated than in the case at bar, yet this court refused to follow the recommended disbarment and in lieu of that suspended the lawyer for one year.

In voicing its reluctance and refusal to follow the Bar Committee's recommendation of permanent disbarment, the court in *In re Evans*, 22 Utah 366, 62 P. 913 (1900), said:

“Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of the office of this character would often be to decree poverty to himself and destitution to his family. *A removal from the bar should, therefore, never be decreed where any punishment less severe, such as reprimand, temporary suspension, or fine, would accomplish the end desired.*”

The mere fact that George Badger had left the practice temporarily to engage in business undertakings should not alter the application of the principle enunciated in *Evans* in this case.

This court in *In re Hanson*, 48 Utah 163, 158 P. 778 (1916), again voiced its opposition and refusal to follow the Bar Committee's recommendation that the drastic punishment of disbarment be imposed when it said:

“The conduct on his part was wholly unnecessary, and it cannot be overlooked nor minimized by this court. To do that would be a reproach to the law, as well as to this court, and be a reflection upon the character and high standing of the bar in this state. *The defendant’s conduct, though reprehensible, yet hardly calls for the drastic remedy of disbarment.* To disbar him would, in our judgment be quite as unjust to him as to entirely absolve him from all blame, as he asks to be, would be unfair and unjust to all the other members of the bar of this court, as well as to the court itself. We are convinced that the defendant deserves to be, and should be, admonished that conduct such as he was guilty of is reprehensible to the last degree, and cannot be indulged by any attorney with impunity, and will not be tolerated by this court.

“In view, therefore, that these proceedings are not intended as punishment in the sense that a sentence or judgment in a criminal proceeding is deemed to be so, but are intended more in the nature of an admonition to the accused and to protect the public against future transgressions upon the part of the attorney, the only question is what, in justice and fairness to all, should our judgment be.” *Id.* at 780.

As noted by the court, disciplinary proceedings are not intended as punishment but are intended more in the nature of an admonition to the accused and to protect the public against future transgressions upon the part of the attorney. We submit that to disbar Badger in this case is akin to imposing the death sentence, is penal in nature, and is much more severe

than is necessary "to protect the public against future transgressions upon the part of the attorney." A suspension for a reasonable period of time will more than adequately accomplish the purpose of these proceedings.

This court again in the case of *In re Snow*, 27 Utah 265, 75 P. 741 (1904), reaffirmed its position against decreeing disbarment notwithstanding the recommendation of the Bar Committee. In so doing, the court said:

"The offense of Snow is indeed of such gravity that we would be entirely within the law if we should proceed to inflict the severest penalty and permanently disbar him. *The power of inflicting such punishment should never be exercised unless absolutely necessary to protect the court and the public from one shown to be unfit to be a member of an honorable profession.*" *Id.* at 746. (emphasis added)

#### SUSPENSION RECOMMENDED. S U P R E M E COURT REDUCED TIME OF SUSPENSION.

In other cases the Bar Commission has recommended suspension of an attorney for a certain period of time and the Supreme Court in reviewing this recommendation has disagreed with the Bar Commission and has suspended the attorney for a lesser period than that recommended. The following are cases in this category:

*IN RE BARCLAY*, 82 Utah 288, 24 P.2d 302 (1933).

1. *Wrongs Committed*: "Wilful disobedience in violation of an order of the court" and

appropriating a client's money to his own use.

2. *Board of Commissioner's Recommendation*: Suspension for six months.
3. *Penalty Imposed by Supreme Court*: Suspended for three months.

*IN RE McCULLOUGH*, 97 Utah 533, 95 P.2d 13 (1939).

1. *Wrongs Committed*: (a) Solicitation of employment in personal injury cases (both directly and through others); (b) Refused to disclose to the court the whereabouts of an accused person released to his custody; (c) Gave false testimony under oath in contempt proceedings.
2. *Board of Commissioner's Recommendations*: Two years suspension and until he could satisfy the Bar "that he is a fit and proper person, both morally and in the knowledge of the law, to be reinstated."
3. *Penalty Imposed by Supreme Court*: Suspended for nine months, (and specifically held that the additional conditions set out in quotes above were "not justified.")

*IN RE STEFFENSEN*, 85 Utah 380, 39 P.2d 722 (1935).

1. *Wrongs Committed*: Failed to pay over to a client money collected on behalf of the client.
2. *Board of Commissioner's Recommendations*: Three months suspension.
3. *Penalty Imposed by Supreme Court*: Suspended for three months.

*IN RE STEFFENSEN*, 94 Utah 436, 78 P.2d 531 (1938).

1. *Wrongs Committed*: Again failed to pay over money to a client collected in settlement of an action.
2. *Board of Commissioner's Recommendations*: (The specific recommendation of the Board of Commissioners was not explicitly set out by the court. However, the court did note that the punishment it imposed was less than that recommended by the Board of Commissioners.)
3. *Penalty Imposed by Supreme Court*: Suspended for six months.

This court on other occasions has dealt with breaches of professional conduct much more serious or at least as serious as the conduct involved in this case and in each occasion has not imposed the Supreme Penalty — DISBARMENT, but on the other hand has felt that a suspension or other mode of punishment would best serve as an admonition to the offender and as protection to the public against further transgressions.

*IN RE NORTON*, 106 Utah 179, 146 P.2d 899 (1944).

1. *Wrongs Committed*: Intentionally represented to the Utah Supreme Court that an exhibit which had been offered as evidence and was refused had been admitted into evidence, knowing it had not been received into evidence.
2. *Bar Commission's Recommendation*: One year suspension.

3. *Penalty Imposed by Supreme Court*: One year suspension.

*IN RE KING*, 7 Utah 2d 258, 322 P.2d 1095 (1958).

1. *Wrongs Committed*: Failed to disclose known perjury of a witness until its falsity was shown by opposing counsel.
2. *Bar Commission's Recommendation*:
3. *Penalty Imposed by Supreme Court*: Suspension for six months and until recommended for reinstatement.

*IN RE MAC FARLANE*, 10 Utah 2d 217, 350 P.2d 631 (1960).

1. *Wrongs Committed*: Exercised fraud and undue influence upon client, particularly in drafting will to become beneficiary of one-third of a \$285,000.00 estate.
2. *Bar Commission's Recommendation*: One year suspension.
3. *Penalty Imposed by Supreme Court*: Suspended for one year and until application for and recommended for reinstatement.

*IN RE FULLMER*, 17 Utah 2d 121,405 P.2d 343 (1965).

1. *Wrongs Committed*: Received \$2,500.00 for personal injury settlement. Falsely represented to clients that an action had been filed on their claim and that trial had been set for a later date. Meanwhile he received the money, by a deceptive artifice procured client's signatures on a release and draft, and converted the money to his own use. On

a second count Fullmer converted \$780.00 of a client's money.

2. *Bar Commission's Recommendation*: Three years suspension.
3. *Penalty Imposed by Supreme Court*: Three years suspension. The court noted that the conduct of the lawyer was such that charges of "embezzlement" might very well lie.

*IN RE HATCH*, 108 Utah 446, 160 P.2d 961 (1945).

1. *Wrongs Committed*: Collected fee in excess of that set by Industrial Commission and kept money for nearly four years which was collected from client to be paid to client's former wife in satisfaction of former judgment and stipulation.
2. *Board of Commissioner's Recommendation*: Suspension for one year.
3. *Penalty Imposed by Supreme Court*: Suspension for one year.

It seems grossly unfair that Badger should be disbarred for solicitation and a finding of fraud in a civil action which was later expunged from the court record by the judge, when:

(1) As in *Norton*, a lawyer intentionally misled the Supreme Court and received a one year suspension.

(2) A lawyer, as in *King*, knowingly used perjured testimony of a witness and was given a six month suspension.

(3) The attorney, as in *MacFarlane*, was guilty of fraud and undue influence in dealing

with an elderly client and by virtue of which succeeds in being named as a beneficiary of a large estate and receives a suspension of one year.

(4) The attorney, as in *Barclay*, wilfully violates a court order, converts his client's money to his own use and gets a three month suspension.

(5) As in *McCullough*, the attorney is guilty of soliciation, refusal to disclose to the court the whereabouts of an accused person released to his custody, gives perjured testimony under oath in contempt proceedings and is given a nine month suspension.

(6) The lawyer, as in *Bridwell*, was guilty of the many wrongs spelled out in the opinion, all of which conduct was more grave than the charges of which *Badger* was found guilty, and receives a one year suspension.

(7) The lawyer, as in *Fullmer*, is guilty of fraud and deception practiced on his client and embezzlement of his client's money and receives a three year suspension.

Since the decision in *Badger*, this court dealt with another disciplinary problem in the case of *In re Wade*, ..... Utah 2d ....., ..... P.2d ..... No. 12780 (1972). In that case the lawyer neglected to attend to his client's affairs which were entrusted to his care and attention and failed to maintain complete records of client's funds, securities and properties which were entrusted to him, and he failed to account to his client for these. The penalty imposed by the Supreme Court was two years suspension. The conduct of the

lawyer in *Wade* is manifestly as bad or worse than that of the attorney in *Badger*, yet *Wade* gets a two year suspension and *Badger* gets disbarred. This seems grossly unfair. Had the court reviewed the punishment for itself and made its own determination as to what would be proper and fair, rather than simply looking at it from the standpoint of whether the Bar Commission had acted arbitrarily and capriciously, we submit the result in *Badger* would have been about the same as in *Wade*.

The cases cited in this brief thus far, we believe are substantially all of the reported disciplinary cases that have been before the Utah Supreme Court to the present time. The cases fall into four categories:

- (1) Where the Bar Committee's recommendation was disbarment and the Supreme Court adopted this recommendation. As discussed above, it should be noted there are only seven cases in this category, two of which involve conviction of crime and disbarment under the statute. The other four cases considered involve intentional and aggravated conduct on the part of the attorney.
- (2) Where the Bar Commission recommended disbarment and the Supreme Court refused to follow this recommendation but on the contrary decreed the less harsh but equally effective penalty of suspension or reprimand. An examination of these cases demonstrates clearly that in many of them the conduct on the part of the lawyer was much more aggravated than the conduct involved in this case and in spite of

this the court was of the opinion that the interest of the public and of the bar would be best served by a suspension or reprimand rather than the drastic remedy of disbarment.

- (3) Where the Bar Commission recommended a suspension and the Supreme Court in making its own determination as to what would be fair, imposes suspension but for a lesser period than recommended.
- (4) Where the Bar Commission recommended a one to three year suspension and the Supreme Court adopted the recommendation.

In this category of cases we have *Norton* (attorney intentionally misleading the Supreme Court) one year suspension; *King* (attorney knowingly using perjured testimony) six months suspension and until recommended for reinstatement; *MacFarlane* (attorney guilty of fraud and undue influence which resulted in elderly client naming attorney as beneficiary under her will) one year suspension and until recommended for reinstatement; *Fullmer* (attorney converts proceeds of personal injury settlement to his own use and deceives client who cannot speak or understand English language very well into signing release and endorsing settlement draft) three years suspension.

We submit the conduct of the lawyers involved in this fourth category was of a more serious nature or at least equally as serious as the conduct with which George

Badger was adjudged guilty, and yet in each instance this court felt justice was best served by resorting to the less harsh remedy of suspension rather than decreeing the ultimate penalty — DISBARMENT.

Generally speaking, this court as well as courts of other states has resorted to the extreme remedy of disbarment only on rare occasions and only then when the conduct of the lawyer involved (1) conviction of a felony or other crime involving "moral turpitude" (See: *In re Fritts*, 341 P.2d 555 (Ore.); *Ex-Parte Powell*, 269 P.2d 512 (Ore.); *In re Baldwin*, 303 P.2d 943 (Ore.); *In re King*, 257 P.2d 219 (Wash.); *Ex-Parte Bennett*, 269 P.2d 490, and (2) habitual misuse of or conversion of client's funds to attorney's own use (See: *Narlian v. State Bar of California*, 136 P.2d 553; *Egan v. State Bar of California*, 294 P.2d 949; *Sturr v. State Bar of California*, 338 P.2d 897; *People v. Kistler*, 354 P.2d 1022 (Col.); *In re Graham*, 118 P.2d 1093 (Ariz.); *In re Hannon*, 324 P.2d 753 (Ore.); *In re Park*, 274 P.2d 1006 (Wash.); *In re Carroll*, 343 P.2d 1023 (Wash.), and (3) where the conduct of the attorney has been intentionally malicious and groundless and calculated to bring the judge or court into disrepute (See: *In re Richeson*, 166 P.2d 583 (Ariz.), *In re Hilton*, 48 Utah 172, 158 P. 691).

It will serve little purpose to cite additional cases from other jurisdictions. We believe that a comparison of the action of this court in prior disciplinary matters and subsequent (*In re Wade*, supra) with the

punishment imposed in this case should be persuasive that the court ought to reconsider its actions in this case.

## CONCLUSION

A rehearing should be granted or in the alternative the judgment of disbarment should be vacated and a judgment of suspension (in this event considering prior cases, six months to two years) entered for the following reasons:

1. In this case only four of the justices participated in the decision. The dissenting opinion expressed doubt as to the sufficiency of the evidence to support the Bar Commission's findings of fact but conceding there was a basis for supporting them, that the penalty of disbarment was much too severe and recommended one year suspension. Article VIII, Section 2, Utah Constitution provides as follows:

“The Supreme Court shall consist of five judges, which number may be increased or decreased by the Legislature, but no alteration or increase shall have the effect of removing a judge from office. A majority of the judges constituting the court shall be necessary to form a quorum or render a decision. If a Justice of the Supreme Court shall be disqualified from sitting in a cause before said court, the remaining judges shall call a district judge to sit with them on the hearing of such cause. \*\*\*”

While we appreciate that none of the Justices were “disqualified,” nevertheless Mr. Justice Henroid, for reasons of his own did not “participate” in the de-

cision. In a case involving capital punishment, which disbarment to a lawyer approaches, if such an extreme remedy is to be resorted to, it should be only after full consideration by the full court participating.

2. A different standard of review of the Bar Commission's recommendation as to remedy was applied in this case than has been applied by this court in all prior disciplinary proceedings that have come before it. The question to be determined is not whether "the Bar Commission acted arbitrarily, capriciously or unreasonably" in recommending disbarment as stated by the court in *Badger*, but what this court, reviewing the findings of fact of the Bar Commission, the evidence in the record and evaluating the situation itself independent of the Bar Commission's recommendations (though taking it into consideration) believes the discipline of the attorney should be. The standard of review applied by this court in *Bridwell* and in all of its prior decisions is substantially different than the standard applied by this court in the instant case. In *Bridwell* this court said:

"\*\*\* While we are still of the opinion that the findings of the Utah State Bar should be adopted by this court unless they appear to be arbitrary or not in accord with the preponderance of the evidence, yet we do not consider the recommendations of punishment made by the bar to be in the same category as we do their findings of fact, because it is our responsibility to discipline an erring attorney, and we cannot delegate that duty to others. The Utah

State Bar makes its recommendations upon a reading of the printed record of proceedings had before committees and not before the individual commissioners of the State Bar. We are, therefore, in an equally good position to evaluate the situation as are the commissioners."

This standard is significantly different than the standard applied in *Badger* where the court stated:

"The Bar Commission has recommended that Mr. *Badger's* conduct justifies disbarment; such a recommendation, in the final analysis constitutes a value judgment, which may be accepted, modified, or rejected by this court. *However, this court has established a standard that it will sustain the recommendation of the Bar Commission unless it has acted arbitrarily, capriciously or unreasonably.* (emphasis added) If the alleged severity of the recommendation be evaluated by this standard, there is no ground upon which this court can predicate a departure from it."

We sincerely believe that if the court had been independently evaluating the disciplinary action that should be taken and determining for itself what it thought it should be under all of the circumstances, rather than determining whether the Bar Commission had acted "*arbitrarily, capriciously or unreasonably,*" that very likely a different result would have been reached.

3. A comparison of the drastic disciplinary action taken in this case with the action taken in all of the prior disciplinary proceedings to come before this court demonstrates, we think rather clearly, that

Badger has been much more severely dealt with than has any other erring member of the legal profession. This of itself should justify this court in granting a rehearing where the fairness of the disciplinary action to be taken can be fully argued before a full court, or should prompt this court to vacate its judgment of disbarment and the entry of a decree less harsh and more in line with the disciplinary punishment meted in the past.

Respectfully submitted,

GLENN C. HANNI  
STRONG & HANNI  
604 Boston Building  
Salt Lake City, Utah  
*Attorneys for*  
*George H. Badger*