

1948

Roy D. Thatcher, LeRoy B. Young and Paul
Thatcher, Thatcher & Young v. Industrial
Commission of Utah and Bernice Y. Rosenbaum :
Brief of Plaintiffs

Utah Supreme Court

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Thatcher & Young; Attorneys for Themselves;

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CASE NO. 7178

IN THE
SUPREME COURT
OF THE STATE OF UTAH

ROY D. THATCHER, LEROY B. YOUNG
and PAUL THATCHER, co-partners, doing
business under the firm name and style of
THATCHER & YOUNG,

Plaintiffs,

VS.

**INDUSTRIAL COMMISSION OF THE
STATE OF UTAH, and BERNICE Y.
ROSENBAUM, for herself as a widow, and
also as the mother of JOAN B. ROSEN-
BAUM and ELYNOR K. ROSENBAUM, the
minor daughters of MORRIS DEWAYNE
ROSENBAUM, deceased,**

Defendants.

FILED
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Plaintiffs' Brief
CLERK, SUPREME COURT, UTAH

THATCHER & YOUNG,
Attorneys for Themselves.

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ROY D. THATCHER, LEROY B. YOUNG
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vs.

INDUSTRIAL COMMISSION OF THE
STATE OF UTAH, and BERNICE Y.
ROSENBAUM, for herself as a widow, and
also as the mother of JOAN B. ROSEN-
BAUM and ELYNOR K. ROSENBAUM, the
minor daughters of MORRIS DEWAYNE
ROSENBAUM, deceased,

Defendants.

STATEMENT OF FACTS

The plaintiffs are and at all times herein mentioned were attorneys at law duly licensed by this court to practice their profession throughout the State of Utah.

In February, 1946 one Morris Dewayne Rosenbaum died of injuries resulting from an accident occurring in the course of his employment by one H. Fay Sholty. Shortly thereafter his widow filed with the Industrial Commission an application in her own behalf and in that

of her minor daughters, claiming workmen's compensation as provided by law. At that time the widow was advised by a member of the Industrial Commission that it would not be necessary for her to retain counsel to represent her at the hearing upon her application, but that the Commission would give her a fair hearing and make such order as she was entitled to without the expense of counsel. However, upon the hearing, the Industrial Commission found that the decedent was not the employee of Sholty, and entered an order denying any compensation.

The widow thereupon consulted with the plaintiffs herein. At that time she had no money to pay them a fee. It was recognized that to obtain a reversal of the Industrial Commission's order in view of the record made at the hearing and the presumptions in favor of the correctness of the Commission's order would be a very difficult legal task requiring a high degree of legal skill, and that any fee to be paid plaintiffs for their services would have to be contingent upon the successful performance of this task. Accordingly the widow retained the plaintiffs as her attorneys to obtain a review of the decision of the Commission upon a reasonable fee to be agreed upon and paid them only in the event that plaintiffs' efforts in behalf of the claimants should result in the making of an award of workmen's compensation to the widow and children of the decedent.

The plaintiffs, as attorneys for the dependants of the decedent, filed before the Industrial Commission their application for rehearing, which was denied. Plaintiffs then briefed very carefully all the questions

involved and procured the issuance in due course of a writ of certiorari to the Industrial Commission for the review of its order denying compensation, and after further careful briefing wrote and submitted their brief, read the brief of the respondents and the authorities cited therein, and argued the case before the Supreme Court in Salt Lake City. The Supreme Court, in a divided opinion, set aside the order of the Industrial Commission denying compensation. *Rosenbaum v. Industrial Commission, Utah*, 185 Pac. 2d 511. Thereupon the respondents in that case filed a brief arguing that the matter should be reheard, but failed to file any petition for rehearing.

After briefing the question involved in the respondents' failure to file a petition with their brief, the plaintiffs herein, as counsel for the widow, filed a motion for the issuance of a remittitur. Thereupon the respondents in that case filed a motion to be relieved of their default and sought leave to file the petition for rehearing. Both motions were argued before the court in chambers and submitted, and the motion of the widow was denied and the motion of the respondents therein was granted and an order made allowing them to file their petition for rehearing. The brief on the application for rehearing was then read and studied by the plaintiffs and a reply brief prepared and filed. The petition for rehearing was denied by the court. The various proceedings are outlined in some detail in the petition for the writ in this case.

Thereafter the plaintiffs and their client discussed the matter of a fee and it was agreed between them that One Thousand Dollars (\$1,000.00) was a reasonable con-

tigent fee to be paid them for their successful services and plaintiffs' client agreed to pay that fee. This agreement was reported by letter to the Industrial Commission upon the request of the chairman. In the meantime the remittitur had issued from the Supreme Court, and based upon the Court's ruling and the facts in the case, the Commission vacated its previous order denying compensation and entered an order awarding to the dependents of the decedent compensation totaling Seven Thousand Two Hundred Fifty Dollars (\$7,250.00). At the same time the Commission entered an order fixing the fees of plaintiffs for their services to their clients at Three Hundred Seventy Five Dollars (375.00) and directing that that sum be paid to them directly out of the compensation awarded. (R. 75.)

No notice was given to plaintiffs that their contract with their client was to be set aside and the fee reduced, and no opportunity was given them to be heard upon the issues involved in such order or to present evidence in support of their contract, nor did the Commission hear any competent evidence regarding such fee as a basis for its order in respect thereto. All these things appear from the record certified to this court.

Thereupon the plaintiffs herein filed with the Industrial Commission their application for a rehearing and the application was denied, and the application for the writ of review herein followed in due course.

The plaintiffs' client still remains ready, willing and anxious to pay to plaintiffs the One Thousand Dollar (\$1,000.00) fee agreed upon.

In this connection and before proceeding further, we desire to advise the court that at the time the application for a rehearing was filed herein and again at the time the writ was issued by this court, the plaintiffs advised their client Mrs. Rosenbaum that insofar as the matter of the fee was concerned, she was an adverse party to the plaintiffs herein and that we could not advise her but that she was entitled to and should seek other counsel and that she was perfectly free to oppose any attempt to set aside or revise the order of the Commission respecting the fees of the plaintiffs for legal services rendered to her. She, however, felt that she had made a reasonable bargain and she wanted to perform it, and joined in the application to the Industrial Commission for a rehearing. We have not been advised whether she has in fact consulted other counsel since the writ was issued in this case.

STATEMENT OF ERRORS

The plaintiffs assign and rely upon the following errors committed by the Industrial Commission for a reversal of the order of the Commission fixing plaintiffs' fees for legal services rendered their client at Three Hundred Seventy Five Dollars (375.00):

1. The Industrial Commission erred and acted in excess of its jurisdiction in entering its order of January 29, 1948 fixing the attorneys' fees of plaintiffs herein.

2. The Industrial Commission erred and acted arbitrarily and capriciously and in excess of its jurisdiction in fixing the attorneys' fees of plaintiffs herein at a sum less than the amount plaintiffs' client had agreed to pay without first giving plaintiffs notice, and

an opportunity to be heard and to present evidence upon issues fairly drawn, and without hearing or taking any evidence upon which to base its order fixing such fees.

3. The Industrial Commission erred and acted arbitrarily and capriciously in fixing plaintiffs' fees at Three Hundred Seventy Five Dollars (\$375.00) and in failing to approve plaintiffs' contract for fees to be paid in the sum of One Thousand Dollars (1,000.00).

4. The Industrial Commission erred and acted arbitrarily and capriciously in denying plaintiffs' application for rehearing of the matter of the Commission's order respecting attorneys' fees.

ARGUMENT

Our first three assignments of error address themselves, in order, to the following three propositions:

1. Section 42-1-81 U.C.A., 1943, purporting to authorize the Commission to regulate and fix attorneys' fees is unconstitutional and void as an unwarranted legislative and executive interference with the judicial branch of the government in violation of Article V, Section 1 of the Constitution of Utah.

2. Said Section and the orders of the Commission thereunder are also unconstitutional and void because the statute authorizes the Commission to regulate and fix, and the Commission has in fact reduced and fixed the fees of attorneys, and particularly the plaintiffs, for their services without notice or opportunity to be heard or to present evidence in an orderly proceeding, thus depriving plaintiffs of property without due process of law and denying equal protection of the law in violation

of Section 1, Amendment XIV of the Constitution of the United States and Article I, Section 7 of the Constitution of Utah.

3. Even if the statute is valid, still the Commission, under the facts, acted so arbitrarily, capriciously and unreasonably in refusing to approve the agreed fee of \$1,000, and in fixing such fees at the unreasonably low sum of \$375 that it has abused its discretion, and this court will correct that abuse.

Our fourth assignment of course embraces the first three, for if the commission erred in any one of the three points first assigned, it erred in failing to grant a rehearing to correct those errors. These matters will be discussed in order.

Point 1. The Commission is without jurisdiction to fix plaintiffs' fees because the statute purporting to grant that jurisdiction is a void attempt of the legislature to authorize an executive commission to invade the judicial prerogative by regulating the conduct of attorneys as officers of the court.

So far as we have been able to ascertain this is the first time this question has been raised here or in any other state having a statute similar to our section 42-1-81, U.C.A., 1943. Apparently no constitutional question was submitted to or considered by this court in *Ellis vs. Industrial Commission*, 91 Utah 432, 64 Pac. 2d 363 or *In re Hatch*, 108 Utah 446, 160 Pac. 2d 961, the two previous cases in which the statute has been involved.

Article V, Section 1 of the Constitution of Utah provides that

“The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.”

The Industrial Commission, of course, is a creature of the legislature, an executive or administrative body without power to perform judicial acts or to exercise judicial functions.

Logan City vs. Industrial Commission,
85 U. 131, 38 Pac. 2d 769

Attorneys, including the plaintiffs herein, are officers of the court—of the judicial branch of the government of Utah.

This Court, in the case of

Ruckenbrod vs. Mullins,
102 Utah 548, 133 Pac. 2d 325,
144 A.L.R. 839,

in its most illuminating opinion, reviewed the history of the development of the judiciary as an independent branch of government and of the role of the attorney in the judicial system. As the Court there says “Today our judicial procedure is such that the attorney is indispensable.” The right to counsel in litigation is granted by Article I, Section 11, of our State Constitution. Only the most general knowledge of our established procedure is necessary to arrive at the inescapable conclusion that the office of the attorney plays an integral and absolutely essential, an “indispensable”

role in the administration of justice by the judiciary of Utah. Without the attorney the wheels of justice would become clogged and would grind to a stop.

It follows that any action which militates against the free and effective functioning of the attorney in the discharge of the duties of his office strikes at the roots of the judicial system itself. For this reason if for no other, it is the general rule that the admission of attorneys to the bar, the regulation of their professional conduct, and their discipline and disbarment are judicial functions and powers which are inherent in the Court. As this Court said in *Ruckenbrod v. Mullins*, supra, "To properly function it is necessary that courts retain control of their officers."

As the Court recognized in its opinion in the *Ruckenbrod* case, the legislature may make reasonable regulations *in aid* of the power of the courts to control their attorney-officers but the ultimate power must be and is inherently in the courts. This rule has the widest acceptance. Its application is well stated by the *Annotation* in an extensive note dealing with admissions to the bar (144 A.L.R. 150) as follows:

"Under most constitutions the sounder and better supported doctrine seems to be that, in the exercise of its police power, in the interest and for the protection of the general public, a legislature may, with entire validity, *reasonably* regulate admissions to the bar, but that any statutory provision which, *as put into effect, involves interference with, or frustration of the courts in the performance of their duties and functions cannot be regarded as valid.*" (Italics added)

That is the effect of the rule announced by this court for this state in the case of

In re Platz
42 Utah 439, 132 Pac. 390, 392,

which was quoted with approval in the Ruckenbrod case.
See also

In re Unification of Montana Bar Association,
87 Pac. 2d 172.

An excellent headnote by Carter, J., of the Nebraska Supreme Court, in the case

In re Integration of Nebraska State
Bar Association,
133 Neb. 283, 275 N.W. 265, 114 A.L.R. 151,

reads

“The Supreme Court has the inherent power to regulate the conduct and qualifications of attorneys as officers of the court. The proper administration of justice is the main business of a court, and whatever obstructs or embarrasses its chief function must naturally be under its control. The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government.”

In a very well considered case the Nebraska Court has also held that, in absence of express grant by the Constitution to the legislature, the power to regulate the practice of law is vested in the courts, and that consequently a statute providing that any Nebraska

law school should be deemed "approved" so that its graduates are entitled to take the bar examination is unconstitutional and void as an unwarranted encroachment upon the judicial prerogative. See

State ex rel. Ralston v. Turner
4 N.W. 2d 302, 144 A. L. R. 138

See also the case of

In re Fletcher
107 F. 2d 666, 668, cert. den. 309 U.S. 664,

in which the United States Court of Appeals for the District of Columbia says

"It is held by the great weight of authority that it is within the inherent power of courts of general jurisdiction to define and regulate the practice of law and that this power includes the control of practice not only in the court, but also outside. See Opinion of the Justices, 1935, 289 Mass. 607, 194 N.E. 313; Judd v. City Trust & Savings Bank, 1937, 133 Ohio St. 81, 12 N.E. 2d 288; Rhode Island Bar Association v. Automobile Service Association, 1935, 55 R. I. 122, 179 A. 139, 100 A. L. R. 226; In re Morse, 1924, 98 Vt. 85, 126 A. 550, 36 A.L.R. 527."

In this case a disbarred attorney was held guilty of contempt for sending a letter representing that he was authorized to practice law.

The Supreme Court of Louisiana has considered these principles in its very well reasoned opinion in the case of

Meunier v. Bernich
170 So. 567.

That was an action by a "claim adjuster" upon a written contract solicited by the plaintiff whereby he engaged to investigate, adjust and collect defendant's claim for the negligent death of their child for one-third of the proceeds, under a statute specifically authorizing a lay person to perform such services provided he does so without resort to court proceedings. It was held that such services constitute unauthorized practice of law, that regulation of the practice of law is an exclusively judicial function, and that the statute was unconstitutional as an impingement on the exclusive prerogative of the judicial branch under the section of the Constitution dividing the government into three branches. The contract for employment was therefore illegal and void. The Court's reasoning is so well stated we feel constrained to quote at some length from the opinion.

The Court says:

"Due to the fact that courts are not empowered to enact laws, the jurisprudence has approved legislation passed in aid of the courts' inherent powers. But, while such statutes, in aid of the courts' powers will be sanctioned, by the same token, the courts disapprove and render valueless any legislation, which has the effect of divesting or stripping its inherent powers . . .

"It is therefore manifest that the Supreme Court not only possesses the inherent power to prescribe the ultimate qualifications for those who wish to engage in the practice of law, but this prerogative necessarily includes the regulation of the law practice. The legislature may aid, by the passage of statutes, the exertion of judicial power subject to the approval of the court. And, albeit,

while the Legislature may enact laws to aid the courts in the protection of its inherent power, the courts will suppress and disapprove statutes, such as the exception contained in section 2, . . . which frustrate and stultify that implied judicial authority . . .

“Under the Constitution, the Supreme Court is given express power to regulate the conduct of the members of the bar. When the legislature passes a statute which attempts to define the practice of law, it directly impinges upon the constitutional grant of power bestowed upon the courts respecting the regulation of the conduct of the members of the legal profession.

“If a lawyer solicits business, as Meunier has done in this case, he can be brought before the Supreme Court and tried for his misconduct in office. Meunier, however, acting in his capacity as an adjuster, . . . is, by authority of the exception, privileged to do all things that a qualified lawyer might do in the practice of law, save appearance in Court, without being subject to the discipline of or regulation by the court and wholly unrestrained by any consideration of the ethical standards of the profession. This type of statute has the effect of nullifying the power vested in the Supreme Court to punish those persons, who engage in the practice of law without a license . . .

“It is a matter of common knowledge that attorneys customarily handling damage suits do so on a contingent fee basis. The fee of the attorney is fixed on a percentage of the amount recovered in court and in almost all cases, the percentage of the attorney’s interest in the outcome of the litigation is higher than that received by him in

other cases because he is not compensated for his services in the event he fails to obtain a judgment."

"The rendering of legal services before an administrative tribunal, such as the Industrial Commission, is the practice of law, and the power of the courts to discipline and control attorneys extends to the field of such practice. Neither the legislature nor the administrative body which it has created has any power to authorize persons not duly licensed by the courts as attorneys at law to engage in such practice.

People ex rel. Chicago Bar Ass'n
v. Goodman (Ill., 1937)
8 N.E. 2d 941, 111 A.L.R. 1.

It would seem obvious that if attorneys are officers of the judicial branch of the government, and absolutely essential to the discharge of the functions of that branch, and subject to regulation and control by the courts in the performance of their official duties, they must be free from hampering and frustrating control by the other branches of government. If they are not, the effective function of the courts becomes subject to the arbitrary whim of the legislature or the executive. This becomes apparent if we assume an extreme case. Suppose the legislature were to enact a statute forbidding any attorney to charge more than \$10.00 for services before any court in any one case. Although attorneys are public officers serving in the judicial branch of government, they are not paid any compensation out of the public funds. (See the Ruckenbrod case, *supra*!) Neither does the legislature provide for them office space or pay other expenses incident to their office. Attorneys are entirely dependent upon the fees paid them by their clients for

legal services rendered. If they are forbidden to receive fair and adequate fees for legal services rendered they can neither maintain themselves (Attorneys, also, eat.) nor perform their functions before the courts. Moreover, some attorneys, as other human beings, if prevented from receiving a fair return for their services, thus being subjected to economic stress, will be tempted always to amplify their incomes through improper procedures, bringing the entire administration of justice into disrepute and materially impairing the prestige and effectiveness of the courts. An apt illustration may be found in the Utah Bar's unfortunate experience.

In re Hatch,
108 Utah 446, 160 Pac. 2d 961.

Furthermore, as the earning capacity of, and public respect for attorneys is lowered, the bar attracts fewer and fewer men of ability and energy, and the functioning of the judicial branch of government is further hindered and impaired.

And if, as here, a reasonable return for services is prevented only in one field of legal practice, that field tends to be neglected by capable and conscientious attorneys, until as a general rule, only the relatively incompetent practitioner, or the practitioner who refuses "to deliver more than he is paid for" will accept employment in that field. Some very capable young men, newly called to the bar, will occasionally practice in that field during their "starvation period," but ordinarily they withdraw as soon as they are able.

Such is the case with workmen's compensation in Utah. We believe it is common knowledge that few of

the leading firms in Utah will, except under unusual conditions, accept employment from a claimant before the Industrial Commission. Such practice hardly pays its share of office overhead, not to mention a "fair wage."

It seems clear that the legislature's enactment of Section 42-1-81, U.C.A. 1943, and the arbitrary and capricious application thereof by the administrative Industrial Commission materially interferes with and frustrates the courts in the administration of justice and in the control and regulation of their officers pursuant to their exclusive prerogative. It is unconstitutional and void.

Further strong support for this proposition is found in

Ruckenbrod vs. Mullins
102 Utah 548, 144 A.L.R. 839,

hereinbefore referred to. It was there held that "The attorney, because of his position as an officer of the court, can be compelled *by the court* [not the legislature or the executive] to render gratuitous services in the defense of indigents . . ." (Italics added.) The right to compensation for one's labor is a property right.

McGrew vs. Industrial Commission
96 Utah 203, 85 Pac. 2d 608.

Such a right, of course, cannot be taken away without due process of law. The court, in the Ruckenbrod case, points out that the justification for a court order requiring an attorney to defend an indigent without pay lies in the privileges incident to the office, in considera-

tion of which (in effect) the attorney, upon being called to the bar, voluntarily submits himself to the jurisdiction of the court to make such an order. He assumes the burdens with the privileges of the office.

Although commenting that in many states attorneys have saddled upon them most of the common law duties and obligations while many of the common law privileges no longer exist, the court holds that attorneys still enjoy as privileges the exclusive right to set the judicial machinery in motion in behalf of another, the sponsorship of the courts as a person worthy of confidence, the right (in some states) to be free of occupational tax, the right to hold office during good behavior, and freedom from control by the legislature in his official capacity. This court there observed,

“This freedom from control by all except the courts in which they are officers is deemed a privilege.”

We submit that the Ruckenbrod case is controlling here. It is a direct holding that attorneys are exempt from legislative control in their practice of the law. They are subject only to the plenary power of the courts.

Any statute encroaching on that power and infringing the privilege is void.

It is true that courts have, as a matter of inter-departmental comity, sometimes recognized, or adopted and enforced reasonable statutory regulations where they have been in aid of the court's power. This is perhaps analogous to the well known rule that certain aspects of interstate commerce are subject to state regulation

until the Federal government has assumed its exclusive prerogative in the regulated area. It is equally analogous to the equally well known rule that when Congress has taken any action within the regulated field, all previous state regulations immediately determine and have no effect. See

11 Am. Jur. "Commerce" Sections 22 to 24.

Thus the Supreme Court of Massachusetts, in the very recent case of

In re Berkwitz,
80 N.E. 2d 45

held that a statute relating to admission of attorneys to the bar was void because it dealt with subject matter regulated by court rule adopted under the court's exclusive power under the Constitution, even though the statute had, previous to the adoption of the court rule, been accepted by the court as in aid of its jurisdiction.

That is the situation in Utah. Prior to the adoption by this court of the Rules of Professional Conduct of the Utah State Bar, the court, without conceding the legislature any plenary right to regulate the conduct of attorneys (See In re Platz, 42 Utah 439, 132 Pac. 390) nevertheless recognized legislative enactments in that field which were *in aid* of the court's jurisdiction. However, it is noteworthy that when the Court, on March 1, 1937, adopted the Rules of Conduct, *it deemed it necessary to incorporate the existing statutes in the Rules themselves*. ...This was done in Rule II. Evidently the Court and the officers serving it recognized that unless so preserved the statutes would cease to be effective from the moment the Court assumed to exercise its authority by rule.

It is also noteworthy that this Court, in adopting the Rules of Professional Conduct, declared that it did so “under the inherent power of the Court to control and supervise the conduct of members of the Utah State Bar.” We think it is also fair to observe that these Rules of Conduct are well loaded with burdens which the attorney assumes, and which should be regarded as more than ample consideration for the privilege for which we here contend.

The Court, in adopting the statutory rules of conduct, did *not* adopt section 42-1-81, under which the Industrial Commission claims jurisdiction. It is to be doubted that the Court could constitutionally so delegate its power to an administrative body, at least without prescribing policies, standards and rules for its guidance, and a procedure according due process and the right to review by the Court. See

16 C.J.S. p. 507, note 62, et seq.

Instead of delegating the supervision of its attorneys in the matter of fees to the Industrial Commission, the Court itself prescribed the principles to govern the fixing of the fee (Rule III, Section 32, paragraph 12.) and provided for the discipline of attorneys who should violate the provisions of the rule.

Rules of Discipline of the Utah State Bar.

In so doing this Court pre-empted the field in which it has inherent and, under the constitution, exclusive power and jurisdiction. Any authority which the legislature and its creature, the Industrial Commission, may have previously had under rules of inter-departmental

comity thereupon immediately ceased and determined. Attorneys' fees in compensation cases, at least since then, have been the subject of open and free agreement between the parties concerned.

This of course does not mean that claimants are at the mercy of unscrupulous attorneys who may exact unconscionable fees from them. It is, we believe, common knowledge that under the Rules of Discipline the State Bar Commission and its committees, as the authorized agency of the Court, has in fact heard and determined all charges made before them of the charging of unfair fees or of over reaching by attorneys. Moreover, in cases of obvious abuse the courts have and exercise summary power to compel their attorneys to refund moneys exacted from their clients.

Re Long

287 N.Y. 449, 40 N.E. 2d 247, 141 A.L.R. 651

Shima v. Shima

139 Fed. 2d 533, 150 A.L.R. 1179

It is submitted that section 42-1-81, U.C.A., 1943, as put into effect and administered by the Industrial Commission interferes with and frustrates the courts and their officers in the performance of their duties and functions, is an unjustified and unwarranted encroachment on the judicial branch of government, and is therefore unconstitutional and void. The order of the Commission in this case of course falls with the statute.

Point II. The statute in question, and the procedure and order of the Commission thereunder are void for violation of Section 1, Amendment XIV of the Constitution of the United States and Article 1, Section 7 of the Constitution of Utah.

At the outset it is perhaps well briefly to call the court's attention to one phase of this aspect of the case which is closely related to the matters discussed under Point I. It is the rule that administrative proceedings conducted under statutory authority do not constitute due process of law unless the procedure and power of decision committed to the administrative body is within the power of the legislature to confer.

Dukich vs. Blair
3 Fed. 2d 302.

This would seem to be elementary. As we have demonstrated in our previous discussion, the power attempted to be exercised by the Commission in this case, as wielded by it, encroaches upon the judicial prerogative, and is not within the power of the legislature to bestow. Its attempted exercise by the Commission therefore deprives plaintiffs, and attorneys generally, of their property without due process, and is unconstitutional and void.

Again, even if it were to be conceded that the legislature under our system may regulate, or delegate the regulation of the fees to be charged by attorneys for their services as officers of the judicial branch (which we do not), the legislature must still prescribe a policy, standard or rule for the Commission's guidance, and cannot vest it with an arbitrary or uncontrolled power with regard thereto, thus permitting an encroachment on the legislative prerogative.

16 C.J.S., p. 349, note 12,
and cases cited.

Statutes purporting to confer such power are invalid for the additional reason that they deny due process of law.

Douglas vs. Noble,
261 U. S. 165.

Yet that is just what the legislature has attempted to do here. It has said that "the Commission is vested with full power to regulate and fix the fees of such attorneys." No policy, no standard, no rule for guidance, or fixing reasonable limits, or even requiring the Commission to investigate and fix its own standards after reasonable notice and hearing. Nothing to suggest even that either the client or the attorney are entitled to notice and an opportunity to be heard before their rights and duties are fixed by the Commission. Just unlimited, arbitrary power, which this record shows the Commission has exploited to the fullest extent. Clearly this infringes the state and federal constitutions.

We think that the arbitrary application of this asserted power by the Commission also deprives attorneys for claimants and their clients before the Commission of the equal protection of the law, in violation of the Fourteenth Amendment of the U.S. Constitution. In this case and other cases the Commission has fixed the fees of the attorneys for the claimant at notoriously low figures. Neither here, nor in any other case, so far as we know, has the Commission even attempted to fix the fees of counsel for the private insurance carrier. The latter is free to charge and collect a reasonable fee under the principles set out in the Court's Rules of Conduct. This certainly is an unfair and unreasonable discrimination between the attorneys (who are surely in

the same class) and we believe it is equally unfair and unreasonable as between the parties. As we have pointed out, as a practical matter it prevents the claimant from obtaining competent counsel of his own choice. At the very least it drastically limits his choice, and in many cases must result in the claimant relying upon counsel of relatively inferior ability in the presentation of difficult facts and extremely nice points of law. While we realize that we are not here entitled to urge the discrimination against the claimant, it is still proper to mention the matter so that the Court may be cognizant of all of the background of the problem. And we do submit that the action of the Commission in this regard infringes the "equal protection" clause. See 12 Am. Jur. "Consti. Law" section 566.

Even more serious, however, is the legislature's failure to require, and the Commission's failure to accord to plaintiffs herein the notice and opportunity to be heard before a competent tribunal in an orderly proceeding, which is the very essence of procedural "due process."

12 Am. Jur. "Consti-Law," section 573, p. 267.

As the record shows, when plaintiffs reported their agreement as to fees at the request of the Commission, the Commission, without notice to plaintiffs or their client, without granting any opportunity to be heard, without tendering any issues, or taking any evidence, and without making any findings of fact, fixed plaintiffs fees for their services before the Court at a mere 3/8 of the reasonable fee upon which the parties concerned had

agreed. Then, further to demonstrate the arbitrary bias of the Commission, when this omission was called to its attention in the petition for rehearing (R. 78), it denied the petition and again refused to accord plaintiffs the essentials of due process.

The right to receive compensation is, as before observed, a property right.

McGrew vs. Industrial Commission,
supra.

It is obviously immaterial, from a legal viewpoint, whether one is deprived of all or part of his property—whether compensation is entirely denied or only reduced below an agreed fair return. A deprivation of property within the meaning of the constitution is involved in either case, and cannot be legally accomplished without compliance with the constitutional requirements.

This court has held that notice and an opportunity to be heard are elementary requirements of due process which cannot be refused in a proceeding before the Industrial Commission, and an order made without observance of those fundamental rights is void.

Denver & R.G.W.R. Co. vs. Industrial Commission
74 Utah 316, 279 Pac. 612.

The legislature specifically required (section 42-1-10, U. C.A. 1943) that the rules of the Commission provide for service of notice “in all claims for compensation,” but the requirement of notice before depriving an attorney of a fair compensation is conspicuous only by its absence from the act. Nor has the Commission attempted by rule or practice to supply the deficiency, either because of a settled policy to discourage the appearance of

attorneys before it, or, perhaps, because it recognized the futility of an administrative attempt to supply a legislative deficiency.

For where a statute does not provide for notice and an opportunity to be heard it is unconstitutional and void, and it is immaterial that the agency in charge of its administration may in fact have accorded notice and such opportunity to one affected.

People vs. Broad (Gen'l. Motors Acc. Corp., Intervenor) 12 Pac. 2d 941. (California); cert. den. People v. General Motors Acc. Corp., 287 U.S. 661.

There are a number of interesting cases in which orders of Industrial Commissions fixing attorneys fees have been vacated for failure to follow the requirements of due process. In none of them has the enabling statute been attacked, as here, but they are nevertheless very instructive, and are exactly in point as regards the procedure here followed by the Commission. In

Bentley vs. Industrial Acc. Commission,
171 Pac. 2d 532 (Calif D. Ct. of App., 1946),

certiorari was granted to review an order of the Commission fixing attorneys fees in a compensation case. Because the attorney was not given a hearing the order was vacated, with instructions to grant a hearing and fix the fees on the basis of the evidence to be adduced. The court sets out some of the factors for consideration in fixing the fees and says:

“If an award of attorney’s fees was not to be based upon the facts which were known to the referee and the Commission, the attorney should

have been so advised, and should have been allowed an opportunity to offer evidence as to all matters property to be considered in fixing his fee. His petition for rehearing should have been granted for that purpose."

"We deem it important, however, that attorney's fees in such matters should not be fixed with the sole purpose in view of saving the applicant from expense. The basis upon which fees are fixed should not be so low as to discourage competent attorneys from accepting employment in industrial accident matters. Schilling vs Industrial Accident Commission, 47 Cal. App.

190, 190 P. 373."

From

Conrad vs. State Industrial Commission,
73 Pac. 2d 858 (Okl. 1937),

We wish to quote the 2nd and 5th syllabi prepared by the court, and one short statement from the Court's opinion:

"2. The claim for an attorney fee in a proceeding before the State Industrial Commission must be submitted to and heard by the Commission upon due notice to the parties affected thereby pursuant to the requirements of due process of law."

"5. In considering a claim for attorney's fees in a proceeding before it, the State Industrial Commission should be guided by the evidence concerning the services rendered and should approve such fee as may be just under all the circumstances and in consonance with right and justice between both the workman and the attorney."

In its opinion the Court says:

“The right of an attorney to be paid for his services is a valuable one, and he cannot be made to accept an ex parte award made therefor . . . On the contrary the claim for such services must be submitted to the Commission by the party entitled thereto and if not so submitted it cannot be heard by the Commission but when it has been so submitted, then the Commission must hear evidence in support thereof and in opposition thereto, *and the Commission should show the attorney the same consideration it accords to the injured workman . . .* In the award now under review this was not done but the petitioner was given neither an opportunity to be present nor to offer any evidence in support of his claim, but the action of the Commission was apparently wholly ex parte. This constitutes a denial of due process of law guaranteed by section 7, Article 2, of the Constitution, and cannot be countenanced by this Court . . .” (Italics added.)

The companion cases of

Warrenberg vs Cline,
114 Pac. 2d 302 (Colo. 1941), and

Cline vs Warrenberg,
126 Pac. 2d 1030,

are very helpful. Both cases were appeals from judgments in a lower court in actions brought to review an order of the Industrial Commission fixing the fees of claimant's attorney in a compensation case. In the first case the Colorado Court held that the Industrial Commission had acted arbitrarily in refusing the attorney a hearing on the question of the amount of the fees to be allowed the attorney for his services, and further,

that the trial court, on review, had no authority to fix such fees in the absence of evidence and findings supporting its order. The case was remanded with instructions to refer the matter to the Commission to hold hearings and to fix the fees in accordance with the principles outlined by the court as the proper basis for fees.

After holding hearings as directed the Commission again fixed the fees of the Attorney, who again sought review by the Court. This was the second case above cited. The Court held that the legislative intent in the enactment of the statute authorizing the Commission to fix the fees of the attorney was to prevent attorneys from exacting excessive or unreasonable fees (a duty the Courts have assumed in Utah), and that the intent was *not* "to place the amount to be allowed as attorney's fees on such a low and unreasonable level as would foreclose a claimant from obtaining the legal services of competent counsel." The court continues, "to arbitrarily deny a claimant the right of competent legal representation, by fixing unreasonably low remuneration for services rendered by attorneys, is a serious matter, and may amount to a denial of due process. Preconceived ideas of the commissioners as to the value of legal services rendered in workmen's compensation cases should not be permitted to override the sworn testimony of competent witnesses as to the value of those services in a given case." The court found that the Commission's allowance was unreasonably low, expressed its opinion as to a proper fee, and remanded the case for further proceedings consistent with its opinion.

And in the case of

Employers Liability Assurance Corp.
v. Sims, 67 S.W. 2d 445,

the Texas Court had before it a case involving the fixing of attorney's fees in a workmen's compensation case. Apparently no issues had been made on the fee question. The court observes:

"It is elementary that, in any case, no judgment can be rendered, unless it be in response to proper pleadings by one seeking the judgement; hence a proper pleading was necessary in respect to the allowance of an attorney fee, to warrant the court to fix a fee, and to enter judgement therefor."

It is interesting to note that there the Texas Court allowed a fee of one-third of an award of \$4,389.14. Apparently in Texas the legal servant is deemed worthy of his hire.

We submit that the order of the Commission in the case at bar is void because it was entered without due process and because it denies the plaintiffs the equal protection of the law, and that the statute under which the Commission purported to act is unconstitutional and void for denial of due process.

Point III. Even if the Commission had authority to fix plaintiffs fees, in rejecting plaintiffs' contract for a fee of \$1,000.00, and fixing a fee of only \$375.00 it acted arbitrarily and capriciously, and abused its discretion, and the abuse will be corrected.

It is difficult to argue this point, as a full argument would require full consideration of the facts, and the arbitrary action of the commission in refusing a hearing

has prevented the proper developmnet of the record to disclose all the facts and circumstances which make the fee allowed by the commission so unreasonably low. Quite frankly, we hesitated to make the statement of facts in this brief as full as we have, but on reflection, we concluded that the Commission's inclusion in the Record (pp. 67 to 73) of our letter of January 28, 1948, outlining the facts, justified us in so doing even though we believe it is not competent evidence except as an admission by us that *no more* than \$1000.00 was due for fees. Moreover, we think that inasmuch as this case is in effect a continuation of the case of *Rosenbaum v. Industrial Commission, No. 7021,Utah.....*, 185 Pac. 2d 511, in this court, the court may here take judicial notice of the proceedings before this court which form the basis for the agreement for a \$1000.00 fee.

Moreover, the presiding officers of this court are attorneys, and although perhaps somewhat cloistered as regards active practice and the matter of fees during the term of their judicial service they have and are entitled to have judicial opionions on the reasonableness of legal fees, as they did in *Ellis vs Industrial Commission*, 91 Utah 432.

And see

In re Associated Towel & Linen Supply Co.
7 F. S. 699.

The members of this court of course have (perhaps because of the human failings of counsel who write briefs) a very complete knowledge of the labor involved in briefing cases as close and difficult as the *Rosenbaum* case, *supra*, here involved. We submit they are entitled

to have and to act upon an opinion as to the unreasonableness of the fee fixed by the Commission in this case.

In considering this point we are of course immediately confronted with the divided opinion in the Ellis case. In this connection we must confess we think that Mr. Chief Justice Elias Hansen and Mr. Justice Wolfe had the better of it in their dissenting opinions, and that, at least on this point, the Ellis case should be over-ruled.

However, there are some very material distinguishing factors in the case at bar which, we submit, make the Ellis case inapplicable. We shall refer to them only briefly.

First, the \$300 fee allowed to stand in the Ellis case was 7.9+ % of the total compensation (\$3781.41) obtained through counsel's efforts, while in the case at bar the allowed fee is only 5.2- % of the \$7,250.00 award obtained through counsel's efforts. (The figures in the Ellis case are based on Chief Justice Hansen's statement: \$12.12 a week x 52 weeks x 6 years.)

The agreed fee of \$1000.00 in this case is only 13.4- % of the \$7250.00 benefit obtained, while in the Ellis case all members of the Court thought a fee of at least \$600.00, or nearly 16% should have been allowed.

Thus, on a percentage basis, the Commission's allowed fee *is a full third lower in our case than in the Ellis case.* The court of course knows that in the case of contracts for contingent fees the uncertainty of any remuneration is customarily the most heavily weighted factor considered in arriving at a fair and reasonable fee. That is only practical and just. As we have ob-

served, attorneys must maintain their offices and eat if they are to serve their clients and the courts. An attorney must expect to lose half or more of his contingent fee cases. So, if clients with colorable claims but no money for a retainer are to have access to the courts in accord with the constitutional guarantee, the fees in contingent cases must be large enough to carry the combined load of cases won and lost. So it is that 20% to 40% or even 50% is very generally regarded as a fair and reasonable contingent fee, depending on the amount involved, the estimate of the chance of recovery, the estimated work involved, and other minor factors.

When plaintiffs accepted employment in the Rosenbaum case the chances definitely were not good. The case already had been lost, with strong statutory presumptions in favor of the commission's stand. Plaintiffs did not know the facts, which had been inadequately developed in the Record made without the assistance of counsel for the claimant, but with the very able assistance of opposing counsel. It was a very long shot, as the divided opinion of this court has since conclusively demonstrated. In such a case it is obvious that the highest skill and a great deal of work are, and in fact were involved. A large sum was at stake. And yet, because of the widow's lot, and because the general policy is in favor of relatively small fees in workmen's compensation cases (though why it should be less than in a negligence case against an insured defendant for the death of a breadwinner we can't see) the plaintiffs agreed to accept only 13.4% of the benefit achieved, and were "cut down" to 5.2%!

Moreover, as the result of the inflation (of which the court will take judicial notice) which has had its inception since the Ellis decision, the cost of living and of maintaining a law-office has increased enormously. A recent headline reported the estimate of the federal government that living costs are up to 171% of the 1941 cost. Naturally fees for legal services have likewise increased. (We even recall that the Bar supported a measure for the increase of judicial salaries upon earnest representations from most reliable sources that such increases were absolutely necessary and eminently fair.) Law office earnings, although higher, are not keeping pace, and the situation is becoming so bad that the Editorial Board of the American Bar Association Journal is with reason concerned over the future quality and independence of the Bar. See "In Behalf of Young Lawyers," 34 A.B.A.J. 588 (July, 1948). Now is not the time to cut attorneys fees.

It may be that the work and time involved in the Ellis case was greater than that spent in the Rosenbaum case. The court's opinion seems to lend credence to such a claim, inasmuch as two appeals were involved. But here the amount of the claim involved was nearly twice that involved in the Ellis case and the work was substantial. And there three attorneys would have testified that 50% was reasonable.

Surely 13.4% is most reasonable—and 5.2% is most unreasonable, *as a matter of law*, in this case. It is so low, in view of the matters within the judicial knowledge of the court, that the court should brand it as arbitrary and unreasonable, vacate the order of the commission and permit plaintiffs and their clients to carry out the agreement they have made.

As to the fourth assignment of error, it is obvious that if the Commission acted in excess of its jurisdiction, and pursuant to an unconstitutional statute, and acted arbitrarily, capriciously and unreasonably in fixing so low a fee, and in denying plaintiffs any hearing, they erred in refusing to correct the order when asked to do so on petition for rehearing.

It is therefore submitted that this court should vacate the order of the Industrial Commission fixing plaintiffs fees as being entirely outside the authority and jurisdiction of the Commission, in view of the unconstitutionality of section 42-1-81, or, if the Court will not do that, it should vacate the order because it was entered without due process and is unreasonable, arbitrary and capricious, and should fix or suggest a reasonable fee in accordance with its plenary power over its attorneys, and remand the case for proceedings in accord with its judgment.

We do not want to close this brief without saying that this proceeding for review of the Commission's order was undertaken only as a public service, and at the urging of many of our brothers at the bar who are genuinely concerned that the meagerness of the fees allowed by the Commission and its arbitrary and capricious policy and procedure in respect thereto hampers and frustrates the administration of justice, to the ultimate great damage of the public and of the institutions of democracy. We believe it will be obvious to the court that even if this proceeding results in payment of the total amount of the agreed fee, it will not be profitable in a monetary way, for the time and effort involved in preparing and presenting our position on

these novel questions during a very busy time far outweigh the possible financial gain. (This is not intended to intimate that we would spurn an increased compensation.) We are convinced however, that these questions are of considerable public moment in Utah, and we are happy to serve in an effort to resolve them properly.

We only hope our efforts will prove helpful to the court in its study and deliberations.

Respectfully submitted,
THATCHER & YOUNG