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In Re Phil L. Hansen : Brief of the Utah State Bar

Utah Supreme Court

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IN RE
PHIL L. HANSEN
Appellant.

No. 15613

Appeal From an Order Recommending Suspension
By The Board of Commissioners of The Utah State Bar

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FILED

JUN 1 1978

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

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IN RE)	
)	
PHIL L. HANSEN,)	No. 15613
)	
Appellant.)	
)	

BRIEF OF THE UTAH STATE BAR

STATEMENT OF THE CASE

This is a disciplinary action initiated by the Utah State Bar against lawyer-appellant, Phil L. Hansen. The Board of Commissioners of the Utah State Bar has recommended to this Court that appellant be suspended from the practice of law for a period of one year.

DISPOSITION BEFORE THE UTAH STATE BAR

A complaint was lodged with the Utah State Bar on August 25, 1976 by Kay Lou Behunin alleging certain misconduct of her attorney, Phil Hansen. (Exhibit, hereinafter Ex. 20). Appellant was notified of these charges by the Bar and a hearing was held before the Utah State Bar Screening Committee on October 28, 1976. As a result of this hearing a complaint was filed by the Chairman of the Screening Committee and served upon Mr. Hansen on December 29, 1976. The complaint charged Hansen with violation of five specific disciplinary rules.

Hansen requested that the matter be remanded to the Screening Committee on the grounds that he had not been afforded an opportunity to appear and present his defense. This motion was denied by the Trial Committee on January 24, 1977 and an answer was filed by Mr. Hansen on February 15, 1977. The deposition of Hansen was taken on March 22, 1977 and the deposition of Kay Lou Behunin, the complainant, was taken on April 29, 1977.

A hearing was held before three members of the Utah State Bar Commission on September 29, 1977. On January 12, 1978 the Panel issued its Findings of Fact and Conclusions of Law recommending the suspension of appellant from the practice of law in Utah for a period of one year. The Utah State Bar Board of Commissioners, after having reviewed the evidence presented at the Panel hearing, recommended the adoption of the Panel's recommendation and issued an Order recommending suspension for one year.

Appellant was found to have violated Canon 5, DR5-105 and Canon 2, DR2-106 of the Code of Ethics of the Utah State Bar.

Appellant filed his notice of appeal with this Court on February 9, 1978.

RELIEF SOUGHT ON APPEAL

The Utah State Bar seeks affirmance of the Findings and Recommendations made by the Utah State Bar Board of Commis-

sioners that appellant be suspended from the practice of law in Utah for a period of one year. In addition, the State Bar would request that this Court order that Hansen refund the fee paid to him by complainant less the reasonable value of legal services performed and that Hansen be ordered to pay costs of this prosecution to the Utah State Bar.

STATEMENT OF FACTS

The Utah State Bar does not agree with all of the characterizations and editorial comments made in appellant's Statement of Facts. However, because those facts relating specifically to procedure, the claim of conflict, and the excessive fee claim will be dealt with separately in this brief an extensive review of the facts in this case would serve no useful purpose at this point and therefore the following brief synopsis is offered.

This action was initiated on August 25, 1976 when a letter was sent by Kay Lou Jenkins (as president of a car dealership) alleging certain misconduct on the part of her attorney, Phil Hansen. (Ex. 20). (It should be noted that all exhibits in this case are attached either to the original deposition of Phil L. Hansen or to the original transcript of the Disciplinary Hearing).

The letter of Mrs. Jenkins related several incidents and facts which caused her concern. In her letter she mentioned,

among other things, that she had paid Mr. Hansen \$5,000 to represent her in the defense of a lawsuit, that she had difficulty in communicating with him, that she was extremely concerned that Hansen was simultaneously representing her in the civil action while representing the man suing her in a criminal case, that he was not pursuing her case, and that she would like some of her money back if Hansen didn't continue to represent her.

After a hearing before the Disciplinary Screening Committee a complaint was issued by its chairman alleging violation of five specific disciplinary rules of conduct. An answer was filed by Mr. Hansen denying these charges.

The deposition of Phil L. Hansen and Kay Lou Behunin (formerly Kay Lou Jenkins) was taken prior to the Panel Hearing.

On September 29, 1977 a full hearing was held before three members of the Utah State Bar Commission and evidence was presented. At that time the prosecutors voluntarily dismissed two charges against appellant.

The charges remaining against appellant were violation of Disciplinary Rule 2-106 (excessive fee), 5-101 (conflict of interest), and 1-102 (actions prejudicial to the administration of justice). (Transcript of Disciplinary Hearing of September 29, 1977, hereinafter Tr., p. 3).

At the hearing the following testimony was given. Kay Lou Behunin, the complainant, resided in Salina, Utah and was married in 1975 to Randall Johnson. (Tr., pp. 12-13). Johnson at that time owned a Chevrolet dealership jointly with Ted Burr. Johnson subsequently bought up Burr's interest and in November of 1975 Kay Lou divorced Johnson and purchased the entire Chevrolet dealership. (Tr., pp. 13-14).

In December of 1975 Ted Burr sued Kay Lou and Johnson over alleged deficiencies in the accounting of the dealership sale. (Tr., p. 15). Kay Lou had never before been in a civil lawsuit. (Tr., p. 46).

Kay Lou testified at the hearing that in December of 1975 she went to Phil Hansen's office with her bookkeeper and business manager and presented him the complaint and several documents pertaining to the lawsuit. She testified that Hansen said he would take the case presuming she would immediately deposit with him \$5,000. She testified that he informed her that this money would be retained whether or not the case went to trial. (Tr., p. 47).

Hansen agreed with this testimony and added that at the time he reviewed the initial pleadings he intended to file an answer and a counterclaim for defamation. (Tr., p. 53). Hansen testified that the lawsuit was in the nature of breach of contract that required more factual accounting than legal pre-

paration. (Tr., p. 54). Both witnesses agreed that the initial meeting lasted only ten to fifteen minutes. (Tr., pp. 18, 52).

Kay Lou testified that at the time of this meeting Mr. Hansen did not inform her that the legal fee was non-returnable regardless of what events transpired. (Tr., pp. 17-18, 43). No contract of employment was ever signed by Kay Lou reducing the employment terms to writing. (Tr., p. 42). Hansen agreed that no writing existed showing that the fee was nonrefundable (Tr., p. 67) but claimed throughout the proceeding that the nonrefundability was agreed upon by Kay Lou.

Kay Lou testified that she met with Hansen two weeks later in the presence of her bookkeeper and sent Hansen correspondence concerning the lawsuit during 1975 and through September, 1976. (Tr., pp. 18-19). She testified that David Lord, an investigator for Hansen, interviewed her at Salina for about 45 minutes and reviewed documents in her possession. (Tr., p. 20).

The claim of conflict of interest arises from the fact that appellant Hansen represented Ted Burr, the plaintiff in Kay Lou's civil case, in a criminal defense at the same time he continued to represent Kay Lou in the civil action. It was undisputed that Hansen represented both parties simultaneously and that both actions were filed in the 6th District Court of

the Honorable Don Tibbs.

However, there was a sharp conflict in the testimony between Hansen and Kay Lou as to how this dual representation occurred and as to whether Kay Lou had given her informed consent of Hansen's representation of Burr. This conflict of testimony will be discussed infra in that portion of this brief concerning the conflict of interest charge.

It was undisputed that the only documents filed in the civil case on behalf of Kay Lou was an answer and counterclaim. No depositions, interrogatories, or other discovery documents had been prepared by Mr. Hansen during the two-year period of representing Kay Lou. Hansen testified it was his desire and that of the other parties to pursue the criminal case first and to postpone the civil case until after its completion. (Tr., pp. 90, 126).

On August 25, 1976, approximately one month after Hansen began the representation of Burr, Kay Lou wrote the initiating complaint to the Utah State Bar. (Ex. 20). Following this complaint to the Bar, the Disciplinary Screening Committee was convened and after taking further testimony of the complainant issued the formal complaint against Hansen. After discovery by both parties, a Hearing Committee consisting of Richard H. Moffat, O. Wood Moyle, and David W. Sorenson conducted an evidentiary hearing and recommended that Hansen be suspended

from the practice of law in Utah for one year based upon violation of two rules of discipline. The Utah State Bar Commission sitting as a whole reviewed these findings, reviewed the evidence, and adopted the decision of the Hearing Committee.

It is from this recommendation of the Utah State Bar Commission that this appeal is taken.

ARGUMENT

POINT I

APPELLANT HANSEN WAS NOT DENIED DUE PROCESS OF LAW IN THE UTAH STATE BAR DISCIPLINARY PROCEEDINGS.

Before Hansen can prevail on this appeal this Court must be convinced that the Utah State Bar Commission has acted arbitrarily, capriciously, or unreasonably. In Re Badger, 493 P.2d 1273 (Utah 1972). The findings of the Board of Commissioners must be accepted as facts of the case unless it appears that the Board has acted capriciously or arbitrarily or went beyond its powers. In Re Wade, 497 P.2d 22 (Utah 1972).

It is the burden of Hansen upon review of a recommendation of the Utah State Bar Commission to show that the Board's recommendations were erroneous or unlawful. Yokozeki v. State Bar, 521 P.2d 858 (Cal. 1974). A disciplinary proceeding before the State Bar is sui generis. Neither civil nor criminal in character since the purpose of the proceeding is not to punish the individual attorney, or to determine whether the at-

torney is guilty of a crime, but to determine whether the attorney should be allowed to continue the practice of law and the principal objective of the proceeding is to protect the courts, the legal profession, and the public from persons unfit to practice law. The standard of proof in such cases is clear and convincing evidence. McComb v. Commission on Judicial Performance, 564 P.2d 1 (Cal. 1977).

Hansen in his brief argues that he had been denied due process of law during the disciplinary proceedings in four respects: first, that he was not given ample opportunity to be present at the Disciplinary Screening Committee Hearing (Appellant's brief, pp. 12-13); second, that he was not given sufficient notice nor were the pleadings properly framed as to the violation of DR5-105 concerning the conflict of interest charge (Appellant's brief, pp. 18-30); third, that Hansen was not given sufficient notice nor charged properly with violation of DR2-106 concerning excessive fees (Appellant's brief, pp. 30-34); and fourth, that the Board of Commissioners did not base its Order on proper evidence (Appellant's brief, pp. 34-35). A review of the record in this case clearly shows that each of Hansen's contentions is without merit.

A. Hansen was Given Ample Opportunity to be Present at the Disciplinary Screening Committee.

Hansen in his brief argues that he was not given sufficient notice of the Screening Committee Hearing on October 28,

1976 and that, in any case, the charges made by the Committee went beyond the allegations contained in Kay Lou's letter. (Appellant's brief, pp. 12-14). Both arguments are erroneous.

The letter signed by Kay Lou Jenkins and addressed to the Utah State Bar was dated August 25, 1976. (Ex. 20). On September 2, 1976 Dean Sheffield sent a letter to Hansen with a copy of the Kay Lou Jenkins' letter enclosed. He requested that a response be made within ten days. (Ex. 1). On September 24 a second letter was addressed to Hansen stating that no response to the first letter had been received and advising him that an answer must be made within ten days. Again, a copy of the original letter was enclosed. (Ex. 2).

Finally, on October 26, 1976 Sheffield wrote to Hansen informing him that no response had been received as to the September 24 letter and that a hearing was to be held on October 28 before the Disciplinary Screening Committee. (Ex. 3). Hansen in his deposition admitted receiving all of these letters prior to the Disciplinary Screening Committee Hearing. (Deposition of Phil Hansen, March 22, 1977, hereinafter Hansen Depo., p. 6).

Hansen claimed that he sent a letter to Sheffield on September 20, 1976 but the correspondence from Sheffield stating that no response had been received indicates that such letter did not reach the Utah State Bar. Certainly, Mr. Hansen upon

receiving the September 24 letter had adequate notice that his September 20 letter had not been received and should have taken some affirmative action in such an important matter. Thus, Hansen had adequate notice of the Disciplinary Screening Committee Hearing and failed through his own actions to attend such meeting.

Rule I of the Revised Rules of Discipline of the Utah State Bar required that a complaining client give a "full and complete statement of the facts upon which the accusation is based" to the State Bar. It does not require the complaining client to specifically allege violations of ethical canons. Hansen would seem to argue that before a valid charge could be made against a lawyer the client must determine what violations of the ethical rules have occurred. Such an interpretation is unfounded.

The letter of Kay Lou stated that she paid Hansen a \$5,000 retaining fee, that he had undertaken the defense of Ted Burr, that he had not contacted her concerning the preparation of her case, that she expected to pay Hansen for any work he had performed but could not believe he had done anything to prepare the case, and that she was greatly concerned about the conflict of interest between Burr and herself. (Ex. 20).

Certainly these facts were sufficient to apprise Hansen of Kay Lou's claim of a conflict and of her concern over the fee which had been paid to him.

A preliminary investigation of a State Bar Association is merely for the purpose of deciding whether formal charges should be brought. Hogan v. State Bar, 228 P.2d 554 (Cal. 1951). It is the function of the Screening Committee to sift out the facts of a lawyer's representation of a client and to determine if a violation of ethical standards has occurred. If a client is unhappy with a lawyer's conduct the client has the opportunity to tell the full story to the Screening Committee for its determination whether such conduct constituted a violation of ethical standards. It is not the function of the client to decide beforehand what violations had occurred since in most cases the client will not know the intricate rules and regulations concerning a lawyer's conduct.

Hansen was not denied due process as to the opportunity to attend the Screening Committee hearing nor as to the subject matter of the hearing.

B. Hansen Has Not Been Deprived Due Process Concerning the Charges of Violating DR5-105.

The Utah State Bar will readily admit that the initial complaint filed in this action by the Screening Committee erroneously referred to DR5-101 rather than DR5-105. This mistake was caused either by a typographical error or by inadvertence on the part of the Screening Committee since both sections involve a conflict of interest.

This mistake, however, is hardly worthy of twelve pages

of Hansen's brief and the extensive claims and charges made within those pages. (Appellant's brief, pp. 18-30). There can be no doubt from a review of this record that Hansen, his attorney, the Utah State Bar prosecutors, the Hearing Committee, and the Utah State Bar Commission all were aware that the substance of Section 5-105 was being alleged and for Hansen to claim, "He was never given notice of the charge with which he was ultimately convicted" (Appellant's brief, p. 19) is simply not true.

The initiating complaint of Kay Lou Jenkins clearly stated her concern with the conflict between Hansen's representation of her and Mr. Burr. She stated, "I feel there is conflict of interest in the behalf of Mr. Hansen". (Ex. 20).

Hansen's letter to the State Bar dated November 11, 1976 also speaks in terms of the dual representation of Burr and Kay Lou and states, "She consented that I could represent Mr. Burr in his criminal case and continue to represent her in the civil case". Hansen then quotes DR5-105(C) which states that a lawyer may represent multiple clients if he can adequately represent their interests and if each consents to the representation. (Ex. 6).

A portion of the formal complaint filed against Hansen states the following:

That during the pendency of the Civil Proceedings aforesaid in which he had con-

tracted to represent the complainant, the aforesaid Phil L. Hansen, undertook the defense of Ted Burr in a criminal proceeding without the knowledge or consent of the complainant, that he intimated to her that his handling of the criminal proceeding could be of assistance of them in her lawsuit.

Hansen in his answer denied any violation of the Canon of Ethics and affirmatively alleged that his conduct "is squarely within the terms of DR5-105(C)" and then stated the rule once again that a lawyer may represent multiple clients if he can adequately represent the interests of each and if each consents to the representation.

In his deposition Hansen stated: "I wanted her consent because of the Canon of Ethics that I cited in my letter to the Bar about consent of both parties." (Hansen Depo., p. 36).

At the hearing itself Hansen stated he realized at the time the importance of getting Kay Lou's consent before he could represent Burr and again cited DR5-105(C). (Tr., pp. 82-83, 116).

For Hansen now to complain in this appeal that he had no notice of the charge against him concerning this conflict is truly incredible.

It is difficult, for example, to understand how Hansen did not have notice of the correct 5-105 provision when he specifically and repeatedly referred to the affirmative defense of 5-105(C) in his answer and throughout the proceedings.

DR5-105(C) specifically states the following:

In the situations covered by DR5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each. (Emphasis added).

If Hansen truly believed he was being charged under 5-101 why would he repeatedly refer to 5-105(C) which is by its own terms limited solely to 5-105 (A) and (B)?

Hansen's attempt to exploit the initial mistake in the complaint can only be deemed as a last desperate effort to avoid the substance of the charge itself. However, for the sake of argument Hansen's claim of lack of due process is without merit even assuming that the initial mistake in the complaint was not corrected by Hansen's obvious notice of the correct charge and his failure to object to it throughout the proceedings.

Disciplinary proceedings before a State Bar are technically neither civil nor criminal in character. McComb v. Commission on Judicial Performance, 564 P.2d 1 (Cal. 1977). A disciplinary proceeding is an internal action conducted by a State Bar Association and the State's highest court to determine if a lawyer should remain as an officer of the court. As such, it is governed by its own rules as supplemented by the

Rules of Civil Procedure.

Under any standard Hansen has not been denied due process. Had this been a criminal offense Section 77-21-8, U.C.A. would have required that the offense be stated sufficiently to "give the court and the defendant notice of what offense was intended to be charged". Paragraph 4 of subdivision III clearly sets out the facts going to the conflict of interest charge and the language following the erroneous DR5-101 further states:

In that he has undertaken employment interests adverse or in conflict with the interests of his client.

Such complaint clearly gave Hansen notice of the charge against him especially when read in light with the initiating letter of Kay Lou Jenkins.

Under the Rules of Civil Procedure Hansen's failure to object at the time of hearing to the erroneous citation waived any right to object and allowed an amendment to be made to conform to the evidence. The Supreme Court of New Mexico clearly stated this rule when it said:

It is true that the complaint of the Grievance Committee failed to allege respondent's wrongful retention of monies dispersed for insurance premiums. This court has held that, in the absence of any objection to evidence on issues raised by the pleadings, the party failing to object has impliedly consented to the amendment of the pleadings to conform to the evidence. . . . The record does not indicate that respondent offered any objection to the

evidence brought out in the testimony of several witnesses concerning the retention of insurance premium money. Respondent cross-examined the witness concerning the premium money and, in his final statement to the Commission, made reference to the money.

We hold that respondent impliedly consented to the amendment of the pleadings to conform to the evidence adduced at the hearing and respondent's contention is without merit. In Re Sedillo, 498 P.2d 1353 (N.M. 1972).

Here, Hansen made no objection to the erroneous section number, testified as to the consent given by Kay Lou, and cross-examined Kay Lou as to this consent. Under Rule 15(b) of the Utah Rules of Civil Procedure an amendment has been made to conform to the evidence since no prejudice has been shown by Hansen and this Court should so hold. Buehner Block Co. v. Glezos, 310 P.2d 517 (1966).

Finally, as to Bar proceedings themselves it is universally held that as long as sufficient facts are alleged against an attorney he is put on notice as to any violation of the Canon of Ethics since "It is incumbent on every attorney to know the disciplinary rules regulating his profession." State v. Turner, 538 P.2d 966 (Kan. 1975); In Re Kellar, 493 P.2d 1039 (Nev. 1972); In Re Lenske, 523 P.2d 1262 (Or. 1974).

The cases cited by Hansen in support of his due process argument are not applicable to the instant case. These cases involve instances where attorneys were not formally charged,

where amendments were made during the Bar proceedings different from the original complaint, or where no hearing at all was held. In the Ruffalo case cited by appellant (brief, p. 21) an amendment to the original charges was made on the second day of Bar Commission hearings with no prior notice that such a charge was being considered.

In the Evans case (Appellant's brief, p. 23) the original complaint had no correlation either factually nor legally with the ultimate charge issued against the lawyers. This case involved prior procedure before the present Rules of Discipline were established.

In the Oliver case (Appellant's brief, p. 24) the lawyer was given no opportunity for a hearing to answer the charges against him and the matter was remanded to the Bar Association for further consideration. In the Foster case (Appellant's brief, p. 25) the court required that the charges be filed in writing, that notice of the charges be given, and that a hearing be held as to the charges.

Finally, in the Berkley case, (Appellant's brief, p. 27) the lawyers were charged with soliciting and advertising but were ultimately convicted of completely separate charges.

Hansen was not denied due process in the conflict of interest charge and to make such a claim can only illustrate the weakness of his position on this appeal.

C. Hansen Was Not Denied Due Process of Law Concerning the Violation of DR2-106.

Hansen complains in his brief that except for the allegation in the complaint that he had charged a fee that was clearly excessive he had no notice prior to the formal hearing "of any charge that the fee in question was excessive or, for that matter, improper for any other reason". (Appellant's brief, p. 30). He then complains that the initial letter of Kay Lou Jenkins failed to advise him of any problem with his fee and finally concludes that he was given no opportunity to present any defense to the Screening Committee. Hansen's complaints are not justified by the record in this case.

The letter of Kay Lou Jenkins stated that she had paid Hansen \$5,000 and further stated that she expected to pay Hansen for any services he had performed but did not believe he had done anything to prepare the case. (Ex. 20).

In the second week of September prior to the Screening Committee hearing Kay Lou met with Phil Hansen and discussed his continued employment of the case. At that time she asked for a refund of her retainer fee. Hansen was obviously aware of her desire for a refund since in his letter of October 1, 1976 to Kay Lou Jenkins he wrote the following:

You will remember that my nonrefundable fee of \$5,000 was the amount upon which we agreed as payment in full for all necessary preparation and court appearances through trial, if necessary, and also if the matter were

settled before trial.

In your letter to the Utah State Bar Association, you indicated that you were willing to pay for the services I had rendered thus far but insinuated that if you were to substitute counsel that a refund would be expected. This is contrary to our initial agreement relative to the fact that I would not charge you on a piecemeal basis or an hourly rate, but that the \$5,000 fee was for win, lose, or draw, at any stage of the completion of your case through trial, if necessary, from the date of your contracting with me to represent you. (Ex. 5). (Emphasis added).

Thus, Hansen knew from the letter and from his own conversations with Kay Lou that she was concerned about not receiving her money back if she was to hire another lawyer.

In addition, the question of the refundability of the fee and the basis upon which Hansen sets a fee was extensively gone into during his deposition. (Hansen Depo., pp. 22-29). It is obvious from reading this testimony that all facets of his fee arrangement were examined and he was repeatedly asked to justify the \$5,000 fee which he had charged Kay Lou.

Adequate notice of the general charge of excessive fee was clearly given by the complaint. DR2-106 is the only ethical standard relating to the amount and structure of a fee. It advised Hansen that the flat fee was being challenged as to the basis of the original demand and as to the work that was actually performed based upon that fee. In other words, while \$5,000 may have been reasonable if the matter went to

trial it would be completely unreasonable if the client wished to terminate the lawyer and only five hours of work had been done. Hansen completely ignores paragraph 4 of Rule V of the Revised Rules of Discipline of the Utah State Bar which states: "Depositions and discovery may be held and conducted in accordance with Rules 26 to 37 inclusive of the Utah Rules of Civil Procedure." If Hansen was not satisfied with the specifics of the initial charge he certainly could have sent interrogatories or conducted other discovery proceedings to satisfy his desire. No discovery was undertaken by Hansen, however, in this respect since, once again, Hansen as well as all of the other parties concerned were aware of the charges concerning his fee structure.

During the hearing Hansen's counsel questioned Kay Lou specifically about the refund issue. (Tr., p. 33). Hansen was asked by the prosecutor as to his arrangement with Kay Lou regarding the refundability of the fee and Hansen went into elaborate detail as to his understanding with her. (Tr., pp. 62, 66-68). Subsequently Commissioner Sorenson asked Hansen whether he would refund the money to Kay Lou and he replied that he did not believe he had any legal obligation to do so and that he did not think he should be dictated to by the Bar or Kay Lou as to how much that should be. (Tr., p. 118). At no time during the proceedings did Hansen object that the

question of refund was not properly plead. Accordingly, any such claim has been waived and cannot be raised at this time. In Re Sedillo, 498 P.2d 1353 (N.M. 1972).

Hansen was not denied due process of law in the charge of violating DR2-106. Throughout the proceedings he had adequate notice that both the amount of his fee and the structure of his fee was being scrutinized and examined by the Utah State Bar and because of this knowledge did not offer any objection to the testimony at the hearing. This claim of due process can only be termed as a smokescreen attempt to divert this Court from an examination of the substance of the charge.

D. The Board of Commissioners Based its Order on Proper Evidence and Proper Procedure.

Appellant Hansen argues in his brief that the Utah State Bar Commission did not properly review the evidence introduced in this case but merely rubber-stamped the findings of the Hearing Committee. (Appellant's brief, pp. 34-35).

Of all of Hansen's claims this is the most brazen. How can appellant Hansen make statements such as "The most that can be said is that the full Bar Commission met and listened to the three commissioners who constituted the Hearing Committee. . .and then adopted as its own the evidentiary findings of the [Committee] without any independent examination of a single piece of evidence"? The Court will note that there is

no record as to what transpired at the Board of Commissioners' meeting and Hansen's statement as to what went on is pure and simple speculation on his part.

Hansen's apparent factual statements concerning this failure are typical of his asserted statements throughout his brief which are equally unsupported by the record. It is clearly surprising that Hansen would make such an attack upon the distinguished members of the Utah State Board of Commissioners without some evidentiary basis for his accusation.

This claim of procedural infirmity together with the other claims must fall. Hansen was clearly not denied due process of law as to any of the charges made against him as is amply demonstrated by the exhibits and record in this case. His claim of due process deficiency must be deemed as an attempt to camouflage the substantive issues of this case.

POINT II

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED BY THE HEARING COMMITTEE AND APPROVED BY THE BOARD OF COMMISSIONERS OF THE UTAH STATE BAR ARE SUPPORTED BY PROPER EVIDENCE AND ARE NOT ARBITRARY OR CAPRICIOUS.

Although the action of the Utah State Bar Commission is only a recommendation upon which this Court may act, this Court has held repeatedly that it will presume the action of the Bar to be correct and proper and will not change it unless the Commission has acted capriciously, arbitrarily, or beyond the

scope of its powers. In Re Johnston, 524 P.2d 593 (Utah 1974). This Court has also stated that it will not lightly disregard the unanimous conclusions reached by those appointed to seek out the facts unless they have misconceived the nature of the relationship between counsel, client, and the court, or have misinterpreted the facts. In Re King, 322 P.2d 1095 (Utah 1968).

Hansen asserts that the recommendation of the Board of Commissioners "is unreasonable and excessive." He states, "It reflects prejudice and jealousy" and not concern with any danger to the public caused by his conduct. (Appellant's brief, p. 49). (Emphasis added). Such statement again illustrates Hansen's unsupportable position since he finds it necessary to repeatedly attack the members of the Utah State Bar Commission rather than the merits of his case. This statement also illustrates Hansen's attitude throughout these proceedings that he is somehow above all other lawyers and is entitled to do anything he desires. His claim that Commissioners Lee, Beaslin, Frandsen, Gould, Hansen, Kipp, Moffat, Moyle, and Sorenson are "jealous" needs no further comment.

The Utah State Bar Commission and its committee have carefully considered the case against Hansen as evidenced by the diminution of charges initially made against him. The complaint in this case charged Hansen with violation of five specific disciplinary rules. At the time of the hearing, the Utah State

Bar prosecutors moved to dismiss two of these charges and such dismissal was granted by the Hearing Committee. (Tr., p. 3). The final Findings of Fact and Conclusions of Law issued by the Hearing Committee concerned the violation only of DR5-105 and 2-106--dismissing the charge under 1-102(5). This process of elimination of charges shows without question that the Bar Commission acted honestly and prudently in sifting the evidence and weighing it with the disciplinary standards established by this Court.

Hansen attacks the findings and conclusions of the Bar Committee as not supported by the evidence. In most cases, however, Hansen cites evidence most favorable to himself and ignores conflicting evidence which the Bar Commission accepted as true. The following review of the Record and the findings entered by the Bar Commission amply support the Commission's recommendation to suspend Hansen for one year from practicing law in Utah.

A. The Bar Commission was Correct in Finding that Hansen had Violated DR5-105 in that he Represented Two Conflicting Clients Simultaneously Without Obtaining the Consent of One Client and with No Showing That the Clients were Informed as to the Conflict.

Disciplinary Rule 5-105 states the following:

DR5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

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A. A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR5-105(c).

B. A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105(c).

C. In the situations covered by DR5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

It should be noted at the offset that there is no question that Hansen represented Ted Burr in the criminal case simultaneously with representing Kay Lou in the civil case. It also should be noted that Hansen himself admitted that he believed it was necessary to obtain the consent of Kay Lou before he could represent Ted Burr. (Tr., pp. 82-83). Thus, it can be assumed without question that Hansen represented multiple clients in a situation which his independent professional judgment would be or would likely be adversely affected by his representation of another client. The sole question is whether Kay Lou had consented to this dual representation and whether Hansen had given full disclosure to her of the possible effect

of such representation as is required by DR5-105(C) which Hansen repeatedly relied upon as his defense.

It should also be noted at this point that while Hansen attacks the findings of the Bar Commission for referring to Kay Lou Behunin as an individual rather than a corporation (Appellant's brief, pp. 37-40) such distinction is irrelevant. First, Kay Lou is the sole stockholder of the corporation (Tr., p. 13) and secondly even Hansen admitted himself that the complaint attacked Kay Lou personally as well as the corporation. (Tr., p. 112). Hansen's extensive attack upon this "error" again illustrates his preoccupation with form over substance.

The following is a review of the Findings of Fact issued by the Bar Commission which are relevant to the question of conflict and a brief discussion of each finding with reference to the evidence introduced at the hearing:

(3) That Kay Lou Behunin, also known as Kay Lou Johnson Wheeler, resided in Salina, Utah and was married in 1975 to Randall Johnson. That Johnson at that time owned a Chevrolet dealership jointly with Ted Burr. Johnson subsequently bought out Burr's interest, and in November of 1975 Mrs. Behunin divorced Johnson and purchased the entire Chevrolet dealership.

This finding is undisputed by Hansen.

(4) That in the latter part of 1975 Ted Burr sued Mrs. Behunin and Mr. Johnson over alleged deficiencies in the accounting of the dealership's sale. That prior to that time Mrs. Behunin had never been involved in civil litigation other than divorce proceedings.

Hansen questions this finding by stating that the inference is that Kay Lou was a naive, unsophisticated, ill-equipped indivi-

dual to strike a fair bargain with a lawyer. (Appellant's brief, p. 37). Hansen then states that since she was president and sole stockholder of this corporation she obviously was a sophisticated business person who ought to have known whether or not she was getting a good bargain. Hansen's statement, like many others, is his opinion and speculation. It can just as easily be said that the fact a person is a good business man or woman does not mean they are familiar with the cost and procedures of litigation.

(15) That during the summer of 1976 Mr. Burr was charged in the District Court of Sevier County, which was the same court in which Mr. Burr had sued Mrs. Behunin and that after being charged with a felony Mr. Burr requested that respondent represent him as defense counsel.

There is no dispute as to the accuracy of this finding. The fact that the suit was to take place in the same court in a small town compounded the representation by Hansen of both clients as was thoroughly discussed in the hearing. (Tr., pp. 94-95, 129-130).

(16) That after being contacted by Mr. Burr, the respondent advised Mrs. Behunin that he was representing or intended to represent Mr. Burr, and Mrs. Behunin advised respondent that this was contrary to her wishes.

This finding as to the consent of Mrs. Behunin was the gravamen of the hearing concerning the conflict of interest. Kay Lou testified that in June or July of 1976 she contacted Hansen at the Helper Club in Carbon County. (Tr., pp. 20-21). According to her testimony Hansen called her and requested that he

her about the case. She testified that she met him at the Helper Club in a back bar room and that he requested she accompany him to a motel to discuss the business. (Tr., p. 22). She informed him she did not want to discuss any business in a motel room and asked what he wanted. She then testified he informed her he had been contacted by Ted Burr, plaintiff in the suit filed against her, and that he was considering representing him in his criminal defense. (Tr., p. 22).

Kay Lou testified she knew Burr had been charged because she had read about it in a newspaper and was familiar with the charges from hearsay in the town. (Tr., pp. 22-35). She testified at the time she told Hansen she was afraid the legal charges involved transactions of the dealership and that she was afraid some of the dealership's property was involved. (Tr., pp. 22-26). She also told Hansen she did not want to be connected with the situation at all and that she did not want Hansen to have her records which were vital to her case. She testified she was afraid that Burr may receive some information through Hansen. (Tr., p. 26). She testified that Hansen told her he hadn't decided to take the case but would advise her of his decision that night. (Tr., p. 26).

She testified that that night he subsequently called her and said he would not take the Burr case. She stated that this was good and it was a great relief to her. (Tr., p. 27).

Kay Lou testified that shortly thereafter she heard by

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word-of-mouth that Hansen had indeed taken the Burr case. (Tr., p. 28). She then tried many times to contact Hansen and tell him that she was dissatisfied about him taking the case but he never returned her calls. Subsequently, approximately one month after her original conversation with Hansen concerning Burr she wrote the initiating letter to the Utah State Bar complaining of this conflict. (Ex. 20).

Ten days after the Bar notified Hansen of the complaint she met with Hansen and "made it very clear that I had not told him it was all right" to defend Ted Burr. (Tr., p. 32). He told her to think it over awhile and to talk it over. (Tr., p. 33).

Hansen testified that he met Kay Lou at the Helper Club at her insistence and that it was only for the purpose of being advised about the criminal charge pending against Burr. He stated that he had not even known Burr at that time. (Tr., pp. 73-75).

Hansen testified that later he was contacted by Burr and told him that he could not represent Burr unless he received the approval of Kay Lou. (Tr., p. 82). He accordingly called her and she agreed to the dual representation. (Tr., p. 82). He admitted at the hearing that he had no documentary evidence showing her consent or no other witnesses to verify that her consent was given. (Tr., p. 85).

(17) That the respondent undertook the representation of Mr. Burr while at the same time representing Mrs. Behunin in the civil action filed against her by Mr. Burr.

This finding is also undisputed. Hansen represented Burr from the summer of 1976 to the time of the hearing before the Panel. Shortly before the hearing Burr was convicted of five counts of receiving stolen property. (Tr., p. 70). Hansen was still representing Burr on the appeal to the Utah Supreme Court. Hansen's employment with Kay Lou was terminated in October of 1976 (according to Kay Lou's testimony; (Tr., p. 33, Ex. 15) or February of 1977 according to Hansen's testimony (Tr., p. 89, Ex. 5, Appellant's brief, p. 29).

(18) That the respondent did not obtain the permission of Mrs. Behunin to represent Mr. Burr and that after Mrs. Behunin learned of the respondent's representation of Mr. Burr, she filed a written complaint with the Utah State Bar.

The question of permission has been discussed previously under Finding 16.

The following two conclusions were made by the Screening Committee and subsequently adopted by the Board of Commissioners.

1. That the conduct of the respondent violates Rule 4, Canon 5, DR5-105, in that the undertaking by respondent of the representation of Ted Burr prevented the respondent from exercising independent professional judgment in behalf of his client, Mrs. Behunin, or was likely to so impair his professional judgment.

Kay Lou testified that she was concerned about Hansen's representation of Burr because of the possible involvement of the dealership in the fraudulent transaction since there were ques-

tions raised by the authorities whether some of the items involved in the criminal case had been purchased through the dealership. In addition, Burr had an office at Kay Lou's dealership and she felt uneasy about the dual representation. (Tr., p. 26). Hansen testified that the two cases were completely dissimilar although he admitted that later he discovered dealership typewriters had been turned over by Kay Lou to the police (Tr., p. 99) and that Burr was charged with possession of a gun he owned during the time of his involvement in the Chevrolet corporation. (Tr., p. 92).

Innumerable conflicts are apparent from a dual representation by Hansen of the two clients. If, for example, Hansen failed to properly prepare Burr's defense and Burr was convicted of the felony, Hansen could then impeach Burr in the civil case for the felony conviction which could be attributable to Hansen's own efforts. (Tr., p. 102). Hansen admitted he told Kay Lou that Burr's credibility "wouldn't be too hot" if he were convicted. The delay in the civil case was obviously caused by Hansen's reluctance to depose Burr at the same time he was representing him. (Tr., p. 103).

Other conflicts are also apparent. Hansen could have learned of facts from either client during his representation which may have been pertinent to the defense or prosecution of the other's case. Hansen denied disclosing any confidences to

either client but he certainly could not deny the opportunity nor the appearance of impropriety in the dual representation. Hansen may have been forced to pursue Burr to collect a money judgment obtained in a civil case while at the same time appealing his conviction in the criminal case.

These facts together with the testimony at the hearing show that Hansen could not possibly represent both clients effectively without an impairment of his professional judgment and without the appearance of a severe conflict.

2. That the respondent continued in the employ of both Mr. Burr and Mrs. Behunin, even though his independent professional judgment was or was likely to have been adversely affected or impaired, notwithstanding Mrs. Behunin advising the respondent that she did not want the respondent to represent Mr. Burr while the respondent was representing her.

As has been previously discussed Kay Lou testified repeatedly that she informed Hansen she did not want him to represent Burr. (Tr., pp. 26, 27, 30, 32). There certainly is no doubt from the August 25, 1976 letter to the Bar that Kay Lou did not want this dual representation. (Ex. 20).

After learning of Kay Lou's dissatisfaction with his dual representation Hansen never informed Kay Lou that he would not represent Burr. He told her during the September conference to think it over as to whether he could continue the dual representation. According to his letter of October 1, 1976 it was agreed between himself and Kay Lou that she would contact him to let him know whether she wished him to continue her de-

fense. (Ex. 5). Hansen, therefore, neither obtained Kay Lou's initial permission to represent Burr nor agreed to drop that case upon her complaint. He continued to keep her money, however, even after she informed him that she did not want this dual representation and had obtained another lawyer.

This review of the findings by the Commission shows that they were based upon substantial evidence and were not made arbitrarily or capriciously.

It is undisputed that Hansen represented both Burr and Kay Lou concurrently. This concurrent representation created both an actual conflict upon Hansen and an appearance of impropriety.

DR5-105 assumes that a lawyer will not represent multi-clients unless provision (C) has been complied with. This provision requires that if it is obvious a lawyer can represent the interests of each party then each person must consent to the representation after full disclosure of the possible effect of such conflict. Hansen recognizes affirmative defense of consent in paragraph 6 of his answer and during the hearing. (Tr. p. 16).

The burden is upon Hansen to show that all clients involved were properly informed of any possible conflict and gave their consent. See Clancy v. State Bar of California, 454 P.2d 329 (Cal. 1969). There was a sharp dispute in the testimony between Hansen and Kay Lou concerning the representation of Burr. Kay

Lou consistently stated that she never approved such representation because of her fears the business would be involved in the criminal case and for a number of other reasons. She wrote the letter to the State Bar complaining of this dual representation within one month after Hansen elected to take the Burr case.

Hansen denies Kay Lou's failure to consent but has no documentation or independent witnesses substantiating his claim. He also produced no evidence that Ted Burr approved of the dual representation. Thus, the credibility of the witnesses was sharply at issue and it was up for the trier of fact, in this case the Hearing Committee, to weigh the credibility of the witnesses.

Hansen argued throughout the proceedings that the cases were completely unrelated and therefore no conflict existed. It was shown, however, that certain typewriters turned over to the authorities by Kay Lou were in the possession of the dealership and had some link to Burr's previous illegal activity. (Tr., p. 99). Likewise, the gun mentioned during the hearing also involved the same period of time. (Tr., p. 92). The fact that the authorities examined Kay Lou's records and inventory at the dealership again revealed at least the appearance of some connection between the dealership and Burr's criminal activity. (Tr., p. 25).

But even without an actual conflict between the two cases there still remains an apparent credibility conflict in the dual representation. Hansen was defending Kay Lou in a suit where she was charged with failing to properly pay Ted Burr the money owing to him. In the counterclaim Hansen alleged that Burr was untruthful in making defamatory statements against Kay Lou and the dealership. (Tr., p. 112). Obviously, Hansen had to attack the credibility of Burr to succeed in the defense and counterclaim of the civil suit.

At the same time, however, Hansen had to defend Burr on criminal charges attacking the accusations of the State that Burr was dishonest. To compound matters both cases were filed in a small town or county where the jury could not help but know of the dual representation.

The cases are obviously factually connected and even if they were not the Canons of Ethics allow such dual representation only in extreme cases where the clients are fully informed of the potential conflicts. Here, there was no evidence that Burr was ever informed of the conflict and certainly no evidence that Kay Lou was told all of the ramifications of such a dual representation even if it were assumed that she did in fact give her consent.

An examination of similar cases in other states supports Hansen's violation of the Professional Code. In Grievance Com-

mittee of the Bar of Hartford County v. Rottner, 203 A.2d 82 (Conn. 1964) a law firm represented a client in several minor collection cases for a period of years. While still maintaining the collection actions the law firm instituted a suit against the client for assault and battery and sought to execute on the client's house. The lawyers vehemently maintained that they did not violate any ethical code since the two cases had nothing in common. The Supreme Court of Connecticut rejected this contention. In supporting the lower court's decision the Supreme Court stated:

The Court found such violations to exist even apart from any consideration of the existence of a conflict of interest. In other words the Court concluded that a firm may not accept any action against a person who they are presently representing even though there is no relationship between the two cases. In arriving at this conclusion the Court cited an opinion of the Committee on Professional Ethics of the New York County Lawyer's Association which stated in part: "While under the circumstances. . . maintenance of public confidence in the Bar requires an attorney to decline, while representing such client, any employment from an adverse party in any matter even though wholly unrelated to the original retainer." Id. at 84.

The Supreme Court of Connecticut succinctly stated the reasons why Mr. Hansen should not have represented both Mr. Burr and Kay Lou concurrently. The Court stated:

We feel this rule should be rigidly followed by the legal profession. When a client engages the services of a lawyer in a gi-

ven piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion. If, as in this case, he is sued and his home attached by his own attorney, who is representing him in another matter, all feelings of loyalty are necessarily destroyed, and the profession is exposed to the charge that it is interested only in money.

The almost complete absence of authority governing a situation where, as in the present case, the lawyer is still representing the client whom he sues clearly indicates to us that the common understanding and the common conscience of the Bar is in accord with our holding that such a suit constitutes a reprehensible breach of loyalty and a violation of the preamble to the canons of professional ethics. Id. at 84-85.

In a case very similar to this one, In Re Kushinsky, 247 A.2d 665 (N.J. 1968), the Supreme Court of New Jersey upheld the Bar Commission's finding that a lawyer who represented a corporation suing a debtor and concurrently represented the debtor in a charge of rape had violated the canons of ethics. The Court stated:

The respondent argues before us that his representing. . .Damon in the criminal case were totally unrelated to his duties as attorney for Fencecraft in his actions against Damon. While it is true that the. . .criminal action was unrelated to the actions of Fencecraft against. . .Damon, the respondent was under an obligation to devote his full allegiance to his first client Fencecraft. . . .It is self-evident that without the consent of Fencecraft the respondent could not

fulfill his obligation as an adversary to do all in his power to press Damon for payment of the judgment, and at the same time defend Damon against the criminal charge. What would respondent's duties be to Fencecraft if in representing Damon he were to discover a previously undisclosed asset? An attorney, in fairness to either client, cannot be permitted to place himself in such an ambivalent situation. Id. at 666.

Finally, the New Jersey Court noted that a lawyer must have in mind not only the avoidance of a relation which obviously results in a conflict but must also consider the probability or even remote possibility that such a situation can develop.

In Memphis and Shelby County Bar Association v. Sander-son, 378 S.W.2d 173 (Tenn. App. 1963) a lawyer was disbarred for many charges of impropriety, including the representation of a woman suing her husband for a divorce while concurrently representing the husband in a workman compensation claim. The lawyer insisted that the wife agreed that he could represent her husband in the workman compensation claim. But the court stated that even if the testimony of the wife was entirely dis-regarded it would be clearly established by the testimony of the lawyer himself that he acted improperly in representing conflicting interests by accepting a retainer from the husband after having accepted employment from the wife.

In In Re Cohn, 216 A.2d 1 (N.J. 1966) a lawyer's suspen-

sion was upheld by the New Jersey Court for the lawyer's representing a tavern owner in a criminal charge while concurrently representing the chief witness against the tavern owner in an unrelated civil case. The court again was concerned with the appearance of impropriety in such a relationship and stated:

Further, and perhaps even more importantly, the impact on the public of Cohn's representation of both the State's principal witness and the defendant in the revocation hearing would not be conducive to respect for law, order, and the judicial process. Public knowledge of those relationships could and probably would endanger, at the least, a serious doubt about the integrity of the proceedings. Cohn's conduct in accepting Vincent as a client reveals a basic misconception of ethical standards. Id. at p. 7.

From these cases it is obvious that the fact that two matters are "unrelated" is not necessarily controlling. Conflicts or apparent conflicts are numerous in such situations. Even had Hansen fully documented and explained the potential problems to both Mr. Burr and Kay Lou it is questionable whether they would have the knowledge to understand such a conflict. As stated by the Supreme Court of Oregon:

The unsophisticated client, relying upon the confidential relationship with his lawyer, may not be regarded as able to understand the ramifications of the conflict, however much explained to him. . . . The consent of both clients does not of itself accord complete exoneration. Even if obtained after full disclosure, the consent

does not relieve the attorney of searching his conscience to discover any latent impropriety not readily perceptible to the consenting layman. In Re Bovin, 533 P.2d 171, 174 (Or. 1975) (Emphasis added).

There is no evidence of consent by either Burr or Kay Lou except for Hansen's assertion. Furthermore, Hansen never testified that he informed either Kay Lou or Burr as to the possible conflicts which could result from the dual representation. He specifically stated that he did not inform Burr that his conviction in the criminal case could be used to impeach him in the civil case (Tr., p. 102) or that the trial of the civil case following the criminal case could make Burr's position worse. (Tr., p. 131). Hansen admitted at the hearing that it was essential that he obtain the consent of Kay Lou and that he failed to document such an important event because he "takes people's word". (Tr., pp. 82, 85).

For these reasons, the Bar Commission was justified in finding that Hansen had violated the professional code of responsibility in representing both clients concurrently.

B. The Bar Commission was Correct in Finding that Hansen had Violated DR2-106 by Charging a Fee Not Based Upon Proper Considerations, Including Costs, and Being Nonrefundable.

DR2-106 states that a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when "After a review of the facts a lawyer of ordinary prudence would be left with a defin-

ite and firm conviction that the fee is in excess of a reasonable fee."

The rule then outlines factors to be considered as guides in determining the reasonableness of a fee including the time and labor required, the novelty and difficulty of the question involved, the skill requisite to perform the legal service properly, and likelihood that the employment will preclude other employment by the lawyer, the fee customarily charged in the locality for similar legal services, the amount involved, the results obtained, the time limitations imposed by the client, the nature and length of the professional relationship with the client, the experience, reputation, and ability of the lawyer, and whether the fee is fixed or contingent.

After careful review of the evidence the Hearing Committee concluded that both the amount and structure of Hansen's fee were improper and clearly excessive in light of the circumstances of this case. The Hearing Committee and the Board of Commissioners adopted the following findings and conclusions concerning this violation:

(6) That the respondent did indicate that he would take the case only if Mrs. Behunin would immediately pay to him the sum of \$5,000. The respondent informed Mrs. Behunin that the money would be retained regardless of whether or not the case went to trial.

It is undisputed that Hansen requested and received the \$5,000 fee within one week after the initial interview. Kay Lou testified that Hansen told her the money would be retained whether

it was settled out of court or whether the case went to court.
(Tr., pp. 16, 47).

(7) That at the first meeting between respondent and Mrs. Behunin, the respondent felt that he should file an answer and a counterclaim, which he then did. Other than requesting continuance of the trial date, no other pleadings were filed by respondent.

It is undisputed that the only pleading filed in the civil action during the 1-1/2 years of representation was the Answer, Counterclaim, and Cross-claim. (Ex. 23). It consists of four pages.

(8) That at the first meeting when the amount of the fee was determined, the respondent felt that the lawsuit was in the nature of a breach of contract requiring more factual accounting than legal preparation.

This finding is in accordance with Hansen's own testimony.

(Tr., p. 54).

(9) That the initial meeting lasted approximately 10 to 15 minutes.

This fact was undisputed.

(10) That Mrs. Behunin was not informed that no part of the fee was refundable, even if Mr. Hansen was discharged. No contract of employment was ever signed by Kay Lou reducing the terms of the employment to writing.

Kay Lou testified at the time of the initial meeting Hansen never informed her that the \$5,000 fee was non-returnable regardless of what events transpired. (Tr., pp. 17-18, 43). No contract of employment was ever signed by Kay Lou reducing such terms to writing. (Tr., p. 42). Hansen agreed that no writing

exists showing that such fee was nonrefundable, (Tr., p. 67)

but claimed throughout the proceeding that the nonrefundability was agreed upon by Kay Lou.

(11) That the respondent at all times material to these proceedings was of the opinion that the fee was not refundable. Hansen testified to this during the hearing (66, 67) and stated it in his letter to the Bar and to Kay Lou. (Ex. 5, 6). When asked whether he thought a refund should be given to Kay Lou at the time of the hearing he replied that he may have a moral obligation to do so but he did not think it was a legal matter or obligation and "I don't think that I should be dictated to by the Bar or Kay Lou Wheeler as to how much that should be". (Tr., p. 118, 126). No refund has been made.

(13) That during the period of time that the respondent represented Mrs. Behunin in the civil action no depositions were taken, nor was any other discovery taken by the respondent. This fact is undisputed.

(14) It was agreed between the respondent and Mrs. Behunin that all out-of-pocket expenses incurred in the preparation of the case would be paid by respondent out of the \$5,000 paid by Mrs. Behunin and further that the fee would remain the same regardless of the amount of time or effort expended by respondent in the preparation of the case or the result obtained.

Kay Lou testified that Hansen did not say anything about costs but that she assumed that the \$5,000 fee would be the total cost and nothing else would be added. (Tr., p. 47). Hansen testified that the \$5,000 fee would include all expenses including travel, meals, mileage, depositions, and other assistance. (Tr., p. 56).

Hansen testified that in setting the \$5,000 fee he did not consider the time required to be spent on the lawsuit. (Tr., pp. 58, 117). He likewise stated that the complexity of the lawsuit was not taken into consideration except to the extent that it was in the District Court and did not look to be anything out of the ordinary. (Tr., pp. 58-59). This fee would be the same whether it took five minutes or five years, win, lose, or draw. (Tr., pp. 62, 128; Ex. 5).

(19) That the Utah State Bar advised the respondent of Mrs. Behunin's written complaint and the respondent then contacted Mrs. Behunin, at which time she requested that she would like a portion of the fee returned to her and that she would retain other counsel, but that the respondent refused to refund any portion of the fee previously paid and refused to withdraw as counsel for Mrs. Behunin.

Kay Lou testified that after Hansen contacted her regarding the Bar letter she went to his office and told him that she would like to get other counsel and would like some of her money back. She told him she would pay him for what he had done but thought she had better obtain other legal assistance. (Tr., p. 33). She reiterated that at the meeting with Hansen she requested a refund of her money less actual work done. (Tr., pp. 41, 45). He told her to "think it over" as to his representation. (Tr., p. 33). She then called Dean Sheffield and told him she did not wish to talk to Hansen any further. (Tr., p. 42). Sheffield advised Hansen of her desire. (Ex. 7). In spite of her request not to deal with him further, Hansen "assumed" he was still her

lawyer in a letter to her dated October 1. (Ex. 5). She did not respond to this letter because Sheffield said she didn't have to. (Tr., p. 44).

(20) That thereafter in February of 1977, Mrs. Behunin again wrote to the respondent and advised him that new counsel had been obtained and requested a refund of the fee, but that the respondent again refused to make a refund of any portion of the fee.

This letter is contained as Exhibit 15. In that letter she stated, "I asked for a refund of my \$5,000 less any convenience and expense to you". It is undisputed that Hansen has not refunded Kay Lou any of her money as of the writing of this brief.

The Hearing Committee entered the following conclusion based upon the findings:

3. That the conduct of the respondent violated Rule IV, Canon 2, DR2-106 for the following reasons:

(a) The fee of \$5,000 charged, collected and retained was clearly excessive and improper in that the fixing of said fee by the respondent did not take into consideration all relevant circumstances, including the time required, the nature of the case, the responsibility involved and the results obtained.

(b) The fee was excessive and improper, since it created a conflict of interest between the respondent and his client, Mrs. Behunin in that after the payment of the fee by the client it would be against the financial interests of the respondent to incur any out-of-pocket expenses in preparation of the case, i.e., the hiring of experts, including accountants, the taking of depositions, and even travel.

(c) The fee arrangement was excessive and improper, since by virtue of being nonrefundable the client could not terminate the attorney-client relationship without suffering an economic hardship. In effect, the lawyer was no longer accountable to his client for the quality of his services or the propriety of his actions.

These conclusions were correct based upon the findings previously stated, other evidence in the trial, and law from other

According to the philosophy of Hansen all clients are at arm's length status and any lawyer may ask any amount he so desires if a client is willing to pay it. As he put it, "Some lawyers get \$100,000 for a lot less than I do for a lot less money. Some people charge a million dollar fee." (Tr., p. 136).

If, indeed, Hansen were correct concerning the propriety of a fee then there would certainly be no need for a canon specifically prohibiting an "excessive" fee since any fee agreed to by a client would necessarily be fair. If such were the case the criteria listed in DR2-106(B) would be unnecessary and no analysis of the facts would be required. Obviously, this is not the case and the fee of a lawyer cannot be equated to the "market-place" of selling corn. Ethical considerations as well as economic considerations must govern the setting of a lawyer's fee.

A brief analysis of Hansen's statements at the hearing clearly shows both his attitude concerning fees and the impropriety of his actions. When asked whether the fee took into account the time to be spent on the lawsuit Mr. Hansen replied "No". He likewise stated that the complexity of the lawsuit was not taken into consideration except to the extent that it was in District Court and it did not look to be anything out of the ordinary. (Tr., pp. 58-59).

Hansen adamantly stated that time involved has no correlation to the amount of fee recovered and that if a case can be settled in 5 hours a thousand dollars an hour is reasonable.

(Tr., p. 65).

Obviously, Hansen's flat fee method produces cases where he receives an enormous amount per hour and in other cases perhaps receives a very low amount per hour. (Tr., p. 106). Hansen did not recall ever telling Kay Lou that his method of computation of fees was materially different from that used in the normal legal community. (Tr., p. 106). In other words, Hansen did not inform Kay Lou nor does he make it a practice to inform his other clients of the gamble the client is taking by hiring Hansen in a case where a very short number of hours may dispose of the entire matter and in which Hansen may be fully aware of its ripeness for quick disposal.

Hansen argues that neither the Hearing Committee nor the Board of Commissioners can take it upon themselves to decide what a reasonable fee would be under the circumstances without any evidence. (Appellant's brief, p. 41). Obviously, the evidence in this case consisted of the agreement itself, the amount of work which Hansen had already done, and the complexity of the case as shown from the pleadings. Members of the Hearing Committee, the Board of Commissioners, and this Court are all lawyers and in a disciplinary proceeding to determine a violation of an ethical rule certainly qualify as lawyers "of ordinary prudence" as defined in DR2-106(B). The expression of Hansen that the fee is for "five minutes or five years, win, lose, or draw" (Tr., p. 62) shows a prudent lawyer that the elements of time and result are not considered in establishing the fee, and cannot meet the criteria established under DR2-106.

Hansen argues that the Hearing Committee's conclusion that paying out-of-pocket expenses from the initial retainer created a conflict of interest was based upon pure speculation. (Appellant's brief, pp. 31-32). Hansen then argues that it is no more subject to abuse than when an hourly rate is charged and costs are separately added to the client's bill. Hansen continues that in such a case an attorney may engage in "needless discovery to obtain a free vacation to a warm climate in the wintertime". (Appellant's brief, p. 32).

Hansen ignores the fact that the custom of the legal community is to charge all clients costs in addition to the initial fee. If a lawyer wishes to go to a warmer climate for a vacation and charges his client he must at least be able to justify it to the client. Here, however, it is much easier for Hansen not to do anything in the way of expenses since the client has no input as to what has or has not been done on the case. This failure to expend money was no doubt taken into account by the Trial Committee since no discovery was undertaken in this case after 1-1/2 years.

The inclusion of costs in the initial fee charged by Hansen also shows his failure to consider the factors necessary to properly evaluate a fee. How can Hansen, for example, take into consideration all the factors required by Disciplinary Rule 2-106 when he is not even aware of how much money will be deducted from his fee because of litigation costs?

Finally, the nonrefundable feature of Hansen's contract is also objectionable and in violation of the ethical standards. Hansen seems to believe that regardless of the outcome of a case he is entitled to keep the retainer. Hansen's assumption is erroneous for a number of reasons. First, a client such as Kay Lou Pays the \$5,000 fee on the assumption that a favorable conclusion, either settlement or trial, will be achieved. Hansen admits that a client pays this amount under this assumption. (Tr., p. 116). And while the client can hire another lawyer if he becomes dissatisfied with Hansen the client can't get his money back. Consequently, unless the client is able to raise the additional money for a new attorney, the client is forced to "ride the case out" with Hansen regardless of his performance. (Tr., p. 66).

The nonrefundability locks a client into Hansen. As stated by Conclusion 3(c), "In effect, the lawyer was no longer accountable to his client for the quality of his services or the propriety of his actions". Thus, a client who cannot afford to donate his money to Hansen and then pay another lawyer is forced to accept whatever representation Hansen decides to give him. Hansen can do as little or as much for the client as Hansen desires--the client can only grin and bear it.

Hansen stated at the hearing that he does not think a refund is legally required regardless of his actions and he does not like being told by the Bar what he can or cannot do. (Tr.,

p. 118). Hansen in his brief states, "As noted previously, if a court found that appellants remained able to render the contracted for service, he is entitled to the entire contract price upon his wrongful discharge." (Appellant's brief, p. 47).

Hansen is wrong in all respects concerning the legality of his policy. In Kimball v. Public Utility District No. 1 of Douglas County, 391 P.2d 205 (Wash. 1964) lawyers were terminated by their clients and claimed they were entitled to the full amount initially agreed upon. The Court stated that a client at any time may terminate a lawyer "wantonly and without cause" and that "If the attorney is discharged or prevented by the client from completing the work or undertaking, the measure of attorney damages is not the fee agreed upon for completion of the task, but reasonable compensation for the professional services actually rendered." Id. at 209. See also Salopek v. Schoemann, 124 P.2d 21 (Cal. 1942).

Cases in other jurisdictions clearly show that Hansen's "market" theory is untenable and that Hansen's conduct and attitude are in clear violation of the professional code of conduct. In In Re Greer, 380 P.2d 482 (Wash. 1963) the Supreme Court of Washington stated that there can be no dispute between any reasonable persons concerning fees for services not rendered. The Court said:

Can an attorney conscientiously assert that his years of study, his learning, his standing at the Bar, justify his payment for professional services where no services were

performed? Or can it sensibly be argued that money for costs should be kept when no costs were incurred? Mere statement of the proposition is in itself an answer. By no criteria known to us could the attorney be permitted to keep either the contingent fee on interest never recovered by him or cost monies never expended by him. To place the stamp of approval on such transactions endorses the unconscionable. Id. at 487.

A very analogous case to the present situation is Bushman v. The State Bar of California, 522 P.2d 312 (Cal. 1974). In that case Bushman, the California attorney, was retained by a wife for divorce and custody of a minor child. At Bushman's request the client signed a promissory note for \$5,000 and agreed to pay a retainer of not less than \$60 an hour. The Court noted that the attorney did not produce any records to substantiate his claim of 100 hours spent on the case and noted that the other attorneys spent slightly more than five hours on the case.

The Supreme Court of California concluded, "The fees charged, and those which Bushman attempted to collect, were excessive, overreaching, exorbitant, and unconscionable." Id. at 314. The Court stated, "Furthermore, there was no reasonable relationship between the face amount of the note and the services actually rendered. The note contained no provision for its surrender in the event the actual services performed by Bushman did not warrant a \$5,000 fee."

The Supreme Court concluded with affirmance of the defendant's suspension for one year by stating, "It is appropriate

to repeat the observation of this Court that the right to practice law 'is not a license to mulct the unfortunate'".

Finally, in Potenza v. Oneida County Bar Association, 287 N.Y.S.2d 138 (App. Div. N.Y. 1968) a lawyer was accused of charging an exorbitant fee to a client whose husband was imprisoned. According to the opinion the lawyer requested the wife to give him \$2,000 and he would accordingly obtain the release of her husband. He claimed that he did extensive legal research but as the Court found, "Curiously, however, he made no notes of legal principles or authorities resulting from such research, and submitted no brief at the hearing." At the hearing the defendant attorney obviously viewed a legal fee much like Mr. Hansen; that is, any fee obtainable is fair. The New York Court specifically rejected this theory and stated:

Respondent's thinking on the subject of legal fees is perhaps revealed by the testimony of another lawyer called by Potenza. That attorney testified that he paid no attention to any schedule of fees--'If I'm going to work for a man and he agrees on how much to pay me, that ends the matter.' The law, of course, is to the contrary. Matter of Cohen, 169 App. Div. 544, 547, 155 N.Y.S. 517, 520, where it was said that 'It is no less improper for an attorney to take advantage of his client's necessities and inexperience to induce him to make a contract in advance to pay an exorbitant fee for service than it is to take advantage of those necessities and that inexperience to exact an unreasonable fee after the services have been rendered.'" Id. at 141.

In suspending the defendant for a one-year period the Court stated: "Charging an exorbitant fee grossly disproportionate

to the services performed is misconduct that warrants disciplinary action."

Mr. Hansen's philosophy that legal fees are a fair-trade item and that no consideration should be given to the situation of the client, their familiarity with legal problems, or the terrorizing situation they usually are found in does not comply with the Professional Code of Responsibility. Stated by the Supreme Court of the state of Nebraska, "In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade." State v. Richards, 84 N.W.2d 136, 143 (Neb. 1957).

Hansen has clearly violated the letter and spirit of the Utah Code of Responsibility. When the services performed by Hansen, the inexperience of Kay Lou in civil lawsuits, and Hansen's adamant refusal to legally refund any of the \$5,000 are all considered no other result can be reached. Hansen's entire fee scheme is questionable at best even for sophisticated clients who are willing to gamble upon the all-or-nothing approach Hansen believes is permissible. But in the cases of uninformed clients who are not aware of Hansen's unique "no-time-correlation" method of billing, his "no-charge-for-costs" method, and his "no-refund-no-matter-what-happens" system there can be no doubt that such a system is tantamount to fraudulent misrepresentation.

Hansen complains that an ex post facto application of Bar policy has been made to Hansen. He states that prominent at-

torneys throughout the United States often require a nonrefundable retainer before they will take a matter on for a new client. (Appellant's brief, p. 48). If this unsupported statement is true then these "prominent" attorneys are also committing ethical violations. No lawyer, no matter how prominent he may be, can ethically justify a nonrefundable fee which in effect pays the lawyer for work he has not done.

In the instant case Hansen has completely failed to meet his burden in showing that his irregular fee agreement was fully understood by Kay Lou and has failed to document in any way his claim that Kay Lou fully understood the ramifications of his unique billing system.

The Bar Commission was correct in finding that the billing system of Hansen is unreasonable and in violation of the criteria used in determining a fair fee and also that the particular fee in this case is grossly excessive in light of the work actually performed, and in Hansen's criteria for setting the fee.

POINT III

THE RECOMMENDATION THAT HANSEN BE SUSPENDED FROM THE PRACTICE OF LAW FOR ONE YEAR IS REASONABLE.

Hansen argues in his brief that this case does not involve dishonesty but merely a misunderstanding. Furthermore, Hansen argues, there is no evidence that any confidence was ever betrayed or that the client was hurt in any way. (Appellant's brief, p. 44).

While such argument may at first seem appealing a closer examination shows that Hansen's conduct merited one-year suspension. First, Hansen has practiced law since 1950 (Tr., p. 49) and has been the subject of other disciplinary proceedings throughout the years. (Hansen Depo., p. 14). He is not a young lawyer out of law school or a lawyer inexperienced as to the customs in the community. His testimony throughout the proceeding shows his distaste for the so-called "pegboard" lawyers who go by the hour and use conventional fee arrangements.

It does not require a legal scholar to understand that representing two clients simultaneously constitutes a serious conflict of interest. Even if it were assumed that Hansen obtained the consent of Kay Lou and Burr this does not excuse him from this dual representation in light of the circumstances of this case. When it is assumed, however, that no such consent was given then the matter is even more serious.

Hansen as a lawyer was seriously compromised by representing both parties and his client's and the public's image of law and lawyers could not be anything but seriously damaged. As stated by the Nebraska Supreme Court, "An attorney should not only avoid impropriety but should avoid the appearance of impropriety." State ex rel. Nebraska State Bar Association v. Richards, 84 N.W.2d 136 (Neb. 1957).

Hansen's charge that this conflict was created by a "trap" by the Bar is absurd. (Appellant's brief, p. 46). It was Ka

the Bar, who desired to stop communication with Hansen. (Tr., p. 42). If Hansen was so concerned about his continued representation of Kay Lou after being notified she did not wish to talk to him further, he should have asked the Bar to obtain her permission for withdrawal or filed a request with the Court. The only trap set was Hansen's desire for two fees--not the action of the Bar.

The \$5,000 is equally reprehensible. Hansen charged Kay Lou, an unsophisticated client, a fee which was not based upon any evaluation of the factors necessary and required by the ethical standards. He then refused to refund her fee even though her desire for his withdrawal as her counsel was caused by his own actions and inaction. Hansen thus attempted to force Kay Lou to either maintain his services, conflict or not, or lose her \$5,000 fee.

This conduct is certainly no better than a lawyer who co-mingles a client's money with his own even though the client suffers no monetary loss. This Court has on numerous occasions approved a one-year suspension for the mere act of co-mingling funds with no other showing needed. In Re Lund, 506 P.2d 1273 (Utah 1973); In Re Hughes, 534 P.2d 892 (Utah 1975)

Lawyers in other jurisdictions have been totally disbarred from the practice of law for failing to refund a client's money, In Re Hall, 118 P.2d 67 (Ariz. 1941), and for failure to file will timely, People vs. James, 502 P.2d 1105 (Colo. 1972).

The Bar Commission could properly take into account the attitude of appellant Hansen in its decision. In Re Fullmer, 405 P.2d 343 (Utah 1965). Hansen throughout the proceeding never admitted any conflict existed between the two cases, never admitted that a "misunderstanding" between himself and Kay Lou existed but rather termed her as a liar (Tr., p. 77), never agreed that he was legally obligated to pay Kay Lou a refund, resented the Bar's interference with the amount of any refund (Tr., p. 118), and continually stated that he did not have to keep track of his time or his efforts for anybody.

It should also be remembered that after the initiation of the complaint by Kay Lou, Hansen neither offered to withdraw from the representation of Burr nor offered to refund Kay Lou any of her money. At the time of the hearing he had tried the Burr case and still had not refunded any money to Kay Lou even though he was no longer employed. No refund has been made at this writing.

The Utah State Bar Commission was certainly justified in considering all these factors to merit a one-year suspension for Hansen. In addition, the prosecutors in this case would request that Hansen be ordered to give a full and complete accounting of his services and the services rendered by his office to Kay Lou and to refund his fee based upon the remaining funds not expended. In the event Kay Lou is dissatisfied with such accounting she could then seek recourse through the Utah State Bar or

through her own independent court action.

Finally, Hansen should be ordered to pay the costs of the proceedings incurred by the Utah State Bar in the prosecution of this action.

CONCLUSION

Attorney Phil Hansen has not been denied due process of law before the Utah State Bar Commission and its Committee. Hansen was adequately apprised of the charges against him by the letter of Kay Lou to the Bar and given ample opportunity to attend the Screening Committee Hearing. He chose not to attend, however, and now complains that it was the Bar's fault for his non attendance.

Hansen complains that he did not know the charges against him concerning the conflict of interest in spite of the fact he specifically alleged on numerous occasions the very affirmative defense to the charge which was made against him. He also claims surprise as to the charges of excessive fee even though all facets of the fee were fairly examined prior to the hearing and even though Hansen himself did not inquire from the Bar as to any clarification of the charges. In addition to all of these facts, Hansen did not object to any of the evidence introduced at the Bar concerning either the conflict or the fee and cannot now claim error.

The findings of the Bar Commission are amply supported by the evidence and are not arbitrary or capricious. Unquestionably

Hansen undertook the defense of Kay Lou while simultaneously representing her adversary, Ted Burr. It was Hansen's burden to show that this dual representation was proper. Hansen could not show with any evidence aside from his own statements that Kay Lou consented to this representation and offered no testimony that either Kay Lou or Ted Burr were informed as to the consequences of the representation.

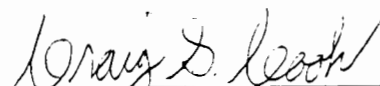
There is also no doubt that Kay Lou paid to Hansen \$5,000 to represent her and her company in the civil lawsuit. Hansen's computation of \$5,000 was not based upon any time relevancy or result factor but was a fee calculated to be paid regardless of the time required or the result obtained. In addition, Hansen's inclusion of costs in the fee was instrumental in his failure to do any discovery or make any expenditures on behalf of Kay Lou during the 1-1/2 years of his representation. Finally, his adamant refusal throughout the proceedings to refund Kay Lou that portion of her money which he had not earned attempted to force Kay Lou to continue to retain Hansen whether she desired him or not. Such a fee and structure is clearly in violation of legal ethical standards.

Finally, the recommendation of the Bar to suspend Hansen from the practice of law for one year in Utah was reasonable. It was reasonable in light of the facts and circumstances of the case and was reasonable in light of other disciplinary proceedings against other lawyers. Hansen should also be ordered to

give an accounting to Kay Lou and give her a refund in addition to paying the Utah State Bar its costs of prosecution.

The Utah State Bar respectfully requests that its recommendation be adopted by this Court.

Respectfully submitted,



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