1978

In Re Phil L. Hansen : Reply Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE :

PHIL L. HANSEN, : No. 15613

Appellant. :

REPLY BRIEF OF APPELLANT

APPEAL FROM AN ORDER RECOMMENDING SUSPENSION
BY THE BOARD OF COMMISSIONERS OF THE UTAH STATE BAR

VAN COTT, BAGLEY, CORNWALL & McCARTHY
GERALD R. MILLER
E. SCOTT SAVAGE
ALAN L. SULLIVAN
141 East First South
Salt Lake City, Utah 84111

RICHARD L. DEWSNUP
455 East Second South #9
Salt Lake City, Utah 84111

ROBERTS, BLACK & DIBBLEE
JOHN L. BLACK
Ten Broadway Building, #400
Salt Lake City, Utah 84101

Attorneys for Appellant

PHILLIP R. FISHLER
604 Boston Building
Salt Lake City, Utah 84111

CRAIG S. COOK
3645 East 3100 South
Salt Lake City, Utah 84109

Prosecutors

IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE :

PHIL L. HANSEN, : No. 15613

Appellant. :

REPLY BRIEF OF APPELLANT

APPEAL FROM AN ORDER RECOMMENDING SUSPENSION
BY THE BOARD OF COMMISSIONERS OF THE UTAH STATE BAR

VAN COTT, BAGLEY, CORNWALL & McCARTHY
GERALD R. MILLER
E. SCOTT SAVAGE
ALAN L. SULLIVAN
141 East First South
Salt Lake City, Utah 84111

RICHARD L. DEWSNUP
455 East Second South #9
Salt Lake City, Utah 84111

ROBERTS, BLACK & DIBBLEE
JOHN L. BLACK
Ten Broadway Building, #400
Salt Lake City, Utah 84101

Attorneys for Appellant

PHILLIP R. FISHLER
604 Boston Building
Salt Lake City, Utah 84111

CRAIG S. COOK
3645 East 3100 South
Salt Lake City, Utah 84109

Prosecutors

TABLE OF CONTENTS

AUTHORITIES

Cases

Statutes

Rules

Tr. Transcript of the proceedings of the Disciplinary Hearing held September 29, 1977.

IN THE SUPREME COURT OF THE STATE OF UTAH

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

REPLY BRIEF OF APPELLANT

INTRODUCTION

Appellant Phil L. Hansen respectfully submits the following brief in reply to the Brief of the Utah State Bar.

The Bar's brief to this Court is for the most part a personal attack upon appellant, his "attitude" toward the Bar, and his general philosophy concerning the charging of legal fees. Even more disagreeable, however, is the Bar's manifest contempt toward appellant's assertion of his constitutional rights. Of all the institutions of our community, one would expect the Bar to abide by its own rules, especially as those rules implement fundamental concepts of due process. Yet the Bar in this case has violated its own rules and, just as significantly, has belittled appellant for calling those violations to the attention of this Court. The Bar has lost perspective in this case; in its zeal to prosecute appellant, it has transgressed its duties to the community.

The Bar faults appellant for suggesting that the "distinguished members of the Utah State Board of Commissioners" committed error in connection with this proceeding. For appellant to claim error is characterized as "most brazen." Yet even courts on occasion err. To claim error is not a personal assault on the integrity of a tribunal. The Bar's unrestrained reaction in this appeal is therefore surprising. In the context of this entire proceeding, however, it is symptomatic. For the dominant theme of the Bar in this proceeding has been and continues to be that the nonconformist must be expelled from the club. To the Bar, allegations concerning the incident in question seem quite beside the point. Rather, the individual, his attitude, his philosophy and his brazen impudence to question the Bar, are the points upon which the Bar has chosen to focus.

ARGUMENT

Notwithstanding the Bar's arguments to the contrary, appellant was denied due process of law with respect to the alleged violations of DR5-105 and DR2-106. Moreover, in drawing all inferences against appellant, the Bar Commissioners consistently ignored repeated and obvious contradictions in the testimony against appellant. For this reason, among others, the Bar Commission's recommendation to this Court was

not based upon clear and convincing evidence. The Bar Commission's overriding concern for appellant's general philosophical position on client relations is not an appropriate ground for the severe punishment it recommends. Finally, the Bar's recomended discipline is, by all standards, unreasonable and excessive.

I. APPELLANT HAS BEEN DENIED DUE PROCESS OF LAW.

A. Appellant was never charged with a violation of DR5-105.

The Bar admits that the Complaint herein charged appellant with a violation of DR5-101 and that appellant was found in violation of DR5-105, which was never mentioned in the Complaint. The Bar characterizes this as a "mistake ... caused either by a typographical error or by inadvertence on the part of the Screening Committee." Brief of the Utah State Bar at 12. If this, in fact, was a mistake (and there is no evidence in the record which would support such an assertion), it was certainly compounded by the action of the prosecutors representing the Bar. The Complaint was never amended; no motion to amend was ever made. The Complaint was filed on December 29, 1976, discovery was pursued, and the hearing was held almost a year later on September 29, 1977. Although the Complaint had been pending for almost a year, no effort was made at the hearing to correct what the Bar now characterizes as a

mere typographical error. Indeed the Bar's prosecutor confirmed its "mistake" as fact at the hearing:

> "MR. FISHLER: We will proceed with the issue of conflict of interest and we will proceed on the issue of an excessive fee. I'm talking about 2-101 insofar as we are talking about conflict of interest, 2-106 insofar as the fee is concerned.
>
> "MR. MOFFAT: Okay, then you at this time move--
>
> "MR. BLACK: I think that's 5-101.
>
> "MR. MOFFAT: Yes, 5-101 and 2-106.
>
> "MR. FISHLER: That's correct." Tr. 3.

It is irrelevant, however, whether one characterizes the Bar's failure to allege any violation of DR5-101 as a mistake. Mistake or not, the Complaint was defective and deprived appellant of notice of the charge against him.

Remarkably, the Bar argues that appellant is himself at fault for not correcting the Bar's error. The Bar asserts that appellant somehow had actual knowledge of what the correct charge should have been; the defenses asserted by appellant are held to be indicative of his understanding and "obvious notice of the correct charge." Brief of the Utah State Bar at 15. Since all lawyers are charged with knowledge of the Code of Professional Responsibility, the Bar further argues, appellant should have known that his conduct was in violation of DR5-105. Appellant, in effect, is charged with the burden to fashion the charge against himself.

These arguments deserve but two comments. First, it is perfectly proper for an accused to interpose such defenses as he deems appropriate under the circumstances. It does not follow, however, that he be required to guess at the rule that he is said to have violated. Second, Rule III, paragraph 1 of the Revised Rules of Discipline of the Utah State Bar provides in part:

> "The complaint shall set forth in clear and concise language the facts upon which the charge of professional misconduct is based and the particular provision of the Code of Ethics which the attorney is accused of violating." (Emphasis added.)

The Rule is clear and mandatory. Not only must the Complaint contain sufficient factual allegations to notify the accused of the charge; but it must also specify the exact disciplinary rules that the lawyer is accused of violating. In this respect, the Rule implements the statutory requirement that "[a]ny member of the Utah State Bar complained of shall have notice of the charges against him and the opportunity to defend ...." Utah Code Ann. § 78-51-15 (1953). The Bar admits that no such notice was given appellant; the Bar's failure to give notice is not cured by calling it a mistake.

The Bar's more adventurous contention in this regard is (1) that disciplinary proceedings in this State are governed by the Utah Rules of Civil Procedure, and (2) that appellant's failure to object to the "erroneous" Complaint constituted his

implied consent to an amendment of the pleadings in conformity with the evidence, under Rule 15(b), Utah Rules of Civil Procedure. The Bar fails to cite, however, any Rule of Discipline that adopts the provisions of the Utah Rules of Civil Procedure to Bar disciplinary proceedings. With the sole exception created by Rule X, paragraph 4 of the Revised Rules of Discipline (which provides that participants in such proceedings may conduct discovery in accordance with Rules 26 to 37), the Utah Rules of Civil Procedure have no bearing upon a lawyer's procedural rights in disciplinary proceedings. The Bar mistakenly relies upon the ruling of the New Mexico court in In re Sedillo, 84 N.M. 10, 498 P.2d 1353 (1972). In that case the court based its ruling upon a state supreme court rule to the effect that attorney disciplinary proceedings are governed by applicable rules of civil procedure in circumstances not otherwise provided for under the supreme court rules. The Utah Supreme Court has not approved or promulgated any similar rule applicable to this case. Thus, the Bar's argument entails an unwarranted application of the rules of civil procedure to disciplinary proceedings. More importantly, the Bar would have this Court ignore the plain terms of its own Rules of Discipline, which required the Complaint to set forth the provisions of the Code of Professional Responsibility that appellant is said to have violated.

The Bar's position ultimately reduces itself to the nonsensical proposition that, because "[d]isciplinary proceedings ... are technically neither civil nor criminal" (Brief of the Utah State Bar at 15), the Bar is free to ignore its own rules of procedure and arbitrarily to adopt some more liberal standard of notice in order to sustain appellant's suspension from practice. The United States Supreme Court, however, has characterized such proceedings as this one as "adversary proceedings of a quasicriminal nature." In re Ruffalo, 390 U.S. 544, 552 (1968). Contrary to the Bar's arguments, both the United States Supreme Court and this Court have held that attorneys accused of ethical violations are entitled to full protection of the guarantees of due process. Id. at 550; In re Evans, 42 Utah 282, 130 P. 217 (1913). See also Higgins v. Burton, 64 Utah 562, 232 P. 914 (1924). Appellant was charged with violation of one disciplinary rule and convicted of violating another. Appellant has been denied the procedural due process guaranteed him by the Bar's rules of discipline.

B. Appellant had no notice that the Screening Committee was considering any alleged violation of DR2-106.

Rule II, paragraph 6 of the Bar's Revised Rules of Discipline provides:

> The Ethics and Discipline Committee shall afford to the accused attorney an opportunity to

> appear and present any defenses which he may have to the charges before the Committee shall recommend censure, or before the filing of a formal Complaint."

The foregoing rule necessarily assumes that the accused attorney shall have notice of the charges against him in advance of the Screening Committee hearing. How else can the accused reasonably present defenses to those charges?

The only notice of any charge against appellant was that contained in Kay-Lou Chevrolet-Oldsmobile Company's letter of August 25, 1976 to the Bar (Ex. 20), a copy of which was forwarded to appellant on September 2, 1976. Nothing in that letter suggests or implies that either Kay-Lou Chevrolet-Oldsmobile or its president, Mrs. Behunin, believed appellant's fee to be excessive. Nothing in the letter complains of appellant's flat fee having included costs. Nothing in the letter reflects displeasure with the "structure" of appellant's fee. The very most that can be said of the letter in this respect is that Mrs. Behunin expressed her desire to recover a portion of the fee if and when she should decide to hire another lawyer in appellant's place. As a matter of fact ignored by the Bar, appellant returned a portion of his $5.00[illegible] fee, and Mrs. Behunin executed a release therefor. Thus the only dispute raised in the August 25 letter has been settled. The Bar, however, has used the letter as the basis of its

general attack upon appellant's "fee structure." Appellant had no notice of the Bar's intentions in advance of the Screening Committee hearing.

The Bar argues that if appellant was not satisfied with the specifics of the initial charge, he could have conducted discovery in order to refine his knowledge of those charges. Once again, the Bar indulges in the fantasy that one accused in a disciplinary hearing has the burden to insure that due process is done to himself. The Bar suggests that throughout the proceedings appellant had adequate notice "that both the amount of his fee and the structure of his fee was being scrutinized and examined." Brief of the Utah State Bar at 22. The Bar cannot be serious in suggesting that the accused must divine the nature of charges against him by analyzing questions asked by the prosecutors or comments made by the Hearing Committee. The clear and erroneous import of the Bar's argument is that the disciplinary rules do not require notice; if an accused claims a denial of due process on that account, his claim "can only be termed as a smokescreen attempt to divert this Court from an examination of the substance of the charge." Brief of the Utah State Bar at 22. The Bar's position in regard to the constitutional questions at issue in this matter is cavalier to say the least.

II. THE BAR'S RECOMMENDATION IS NOT SUPPORTED BY PROPER EVIDENCE.

A. The record contains no evidence to support the Bar's conclusion that appellant's fee was clearly excessive.

DR2-106(B) provides in part:

> "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."

The only evidence adduced at the hearing concerning appellant's fee was the testimony of appellant himself. As demonstrated in detail at pages 3 to 5 of appellant's initial brief herein, appellant considered a variety of factors in fixing his fee to Kay-Lou Chevrolet-Oldsmobile Company, including the amount at stake in the suit, anticipated needs of discovery, travel from Salt Lake City to Richfield, the need for an experienced investigator, and appellant's experience, reputation and ability. Pursuant to his agreement with Mrs. Behunin's company, appellant and his associates researched the legal questions involved in the suit (Tr. 63); appellant met with Mrs. Behunin and her company's bookkeeper (Tr. 18, 20, 65); appellant employed an investigator and reviewed his work (Tr. 64); appellant conferred with opposing counsel and filed appropriate pleadings (Ex. 33); and, at Mrs. Behunin's request, appellant obtained continuances of the trial (Tr. 90, 91, 94 and Ex. 12, 14, 16, 17, 18, 19). The fee that appellant and

Mrs. Behunin agreed upon was not clearly excessive in light of the facts known to appellant at the time of their agreement. Nor, in light of appellant's refund of a portion of the fee, was he paid a clearly excessive fee for the services that he performed.

But the burden was not upon appellant to prove that his fee was reasonable. Rather, the burden was upon the Bar to prove, by clear and convincing evidence, that his fee was in excess of a reasonable fee. The Bar failed to offer any such evidence at the hearing. The Bar argues that the members of the Hearing Committee, the Board of Commissioners and this Court are lawyers 'of ordinary prudence" and therefore able to determine a reasonable fee without aid of evidence on the question. Either the Bar ignores the law of evidence or it is arguing, without authority, for a unique rule of proof in disciplinary proceedings such as the present one.

In the vast majority of jurisdictions, the party seeking to prove the reasonableness or excessiveness of an attorney's fee must present evidence establishing a reasonable fee. The judges, whether they be the members of a Hearing Committee or the members of this Court, cannot supply the missing evidence simply because they are lawyers. In Crncevich v. Georgetown Recreation Corp., 541 P.2d 56 (Mont. 1975), the court considered whether a party could be awarded a reasonable

attorney's fee without presenting evidence on the question of what constituted a reasonable fee under the circumstances. The court held:

> "[I]n contested cases we are inclined to follow those states requiring the introduction of proof from which a reasonable fee may be determined. To award a fee in such a case without proof would be to disregard the fundamental rules of evidence. An award of fees, like any other award, must be based on competent evidence."

541 P.2d at 59. Accord: O'Donnell v. McGee Trucks, Inc., 294 Minn. 110, 199 N.W.2d 432 (1972); Smith v. Davis, 453 S.W.2d 340 (Tex. Civ. App. 1970); Boyette v. Reliable Finance Co., 184 S.2d 200 (Fla.App. 1966); Franklin Nat. Bank v. Feldman, 42 Misc.2d 839, 249 N.Y.S.2d 181 (1964); Bradford v. Sturman, 86 Idaho 178, 384 P.2d 64 (1963); Getman v. Hayhow, 103 Okla. 161, 229 P. 559 (1924).

Although the foregoing cases are not disciplinary proceedings against attorneys, the principle is precisely the same in the present case: neither this Court nor the members of the Bar Commission can take judicial notice of what constitutes a reasonable fee under the circumstances. That fact must be proven by clear and convincing evidence. As a substitute for that evidence, the Bar offers the Court what it believes to be the "method of computation of fees ... used in the normal legal community" (Brief of the Utah State Bar at 47), and "the custom of the legal community" (id. at 48), which, the Bar asserts, are somehow fairer than appellant's

method of charging fees. The Bar presented no evidence of any such standard "method" or "custom." Just as importantly, the Bar presented no testimony that would support the inherent fairness of the "custom" vis-a-vis appellant's practice. Without evidence relating to the reasonableness of the particular fee charged by appellant, the Bar indulges in generalized speculation that falls short of clear and convincing evidence. Each of the authorities cited by the Bar at pages 50 to 53 of its Brief is directed at impeaching what the Bar calls "Hansen's market theory" of fees. That theory -- and whatever general ethical and economic questions it raises -- are not at issue here. The only question before the Court is whether the fee charged and paid by Kay-Lou Chevrolet-Oldsmobile Company was clearly excessive. The Bar failed to adduce any evidence that the fee was excessive.

E. The Bar Commission arbitrarily resolved all issues of fact against appellant.

The Bar argues that appellant has distorted the evidence in support of his assertion that the findings and conclusions of the Commission were not supported by the evidence. It is claimed that appellant cites evidence most favorable to himself and ignores conflicting evidence which the Bar accepted as true. Appellant vigorously denies this assertion. Only two witnesses testified at the hearing. The prosecution

called Mrs. Behunin, and the appellant testified for himself. Mrs. Behunin's testimony was full of errors, contradictions and in some cases obvious falsehoods. Appellant, on the other hand, was direct, forthright and consistent in his testimony. The record speaks for itself, and an examination of the record suggests that the Commission acted arbitrarily, capriciously and unreasonably in believing Mrs. Behunin in every instance of a conflict.

Mrs. Behunin must have been a seasoned witness, since she had been married five times (to Jenkins, Wheeler, Johnson, Hill and Behunin) (Behunin Deposition at 3-7; Tr. 36), and she had a regularly retained lawyer for her business affairs (Behunin Deposition at 7-10). Nevertheless, her testimony demonstrated anything but accuracy, consistency and candor. A few examples are illustrative.

1. On February 26, 1977, Mrs. Behunin wrote a letter to appellant, saying that she had retained another lawyer to handle the case for which she had hired appellant; but she later admitted that this representation was false and that she did not in fact hire another lawyer until about one month after she had written that letter. Behunin Deposition at 55-56.

2. During the hearing, Mrs. Behunin was asked whether she "ever" asked for a refund of the fee she had paid to appellant, and she said no. Tr. 28. A few minutes later,

she told a different story, and said that she had asked for a refund of part of the fee during a meeting with appellant and that appellant refused to say anything at all in answer to her request. Tr. 45-46. Not only is this testimony of Mrs. Behunin completely contradictory, but anyone who knows appellant knows that he would not remain mute when asked for a refund of the attorney fee. See Tr. 66-67.

3. Mrs. Behunin testified at her deposition that she met with appellant in the Helper Club at Helper, Utah, in June 1976 (Behunin Deposition at 37), and that they discussed the possibility that appellant might represent Ted Burr, but that there was never any discussion as to whether it would be wise to continue the civil case until the criminal case of Ted Burr was concluded. Behunin Deposition at 48-49. Within one week following that meeting, however, Mrs. Behunin induced Dr. Robert H. Crist to write to appellant in behalf of Mrs. Behunin, requesting that the civil case be continued because of Mrs. Behunin's mental health, explaining that she was suffering from insomnia and severe anxiety, and that she needed "to prepare herself psychologically and avoid further emotional stress." Ex. 19. At the hearing, Mrs. Behunin admitted that she had obtained this letter for the purpose of aiding appellant in getting a continuance of the trial. Tr. 28-29.

4. Mrs. Behunin testified in her deposition that her

first meeting with appellant was in September or October of 1975. Behunin Deposition at 14. She later admitted that the meeting actually occurred in the latter part of December of that year. Behunin Deposition at 24-25. She said that she was "sure" that she hadn't been served with summons and complaint when she first met with appellant (Behunin Deposition at 20), and then said that the lawsuit was "dated" December 30, 1975 (Behunin Deposition at 25). She later admitted that she was actually served on December 17, 1975 (Behunin Deposition at 26), and that at her first visit with appellant she had in fact been served and that she was concerned about having an answer prepared to the complaint. Behunin Deposition at 26.

5. Mrs. Behunin also testified in her deposition that she "made about three visits" to appellant's office before Christmas in 1975 (Behunin Deposition at 20-21), and further testified to meeting with appellant in Helper, Utah (Behunin Deposition at 34, et seq.), and in his office in September 1976. Tr. 46. In stark contradiction to this testimony, Mrs. Behunin testified at the hearing that she only met twice with appellant. After describing her first meeting in appellant's office, she was asked whether she "ever again" met "person to person" with appellant, and she said that she met with him "once" after the first meeting. Tr. 18. She then said that the second meeting was in appellant's office

about two weeks after the first meeting, or sometime in January 1976. Tr. 18-19. She then was asked:

> "Q. Okay, subsequent to that [second] visit with Mr. Hansen, did you ever again meet with him person to person either at his office or any other location?
>
> "A. No." Tr. 19.

6. In her deposition Mrs. Behunin testified at length concerning a conversation with appellant in Helper, Utah. Behunin Deposition at 34, et seq. She was asked:

> "Q. Did you ever, other than that conversation in the Helper Club, talk to Phil Hansen after that about his representation of Burr in the criminal case?
>
> "A. No, I was so upset because he didn't call me back. I couldn't reach him to even discuss it with him, that I just gave up. I called my lawyer down there and asked him what he would suggest I do, Mr. Jackson." Behunin Deposition at 48.

This is entirely inconsistent with Mrs. Behunin's later testimony that appellant did in fact call her back to discuss the possibility of representing Ted Burr, when Mrs. Behunin was at her sister's house in Salt Lake City. Behunin Deposition at 46.

7. Mrs. Behunin was less than candid about the correspondence between herself and appellant concerning the lawsuit. She was asked:

> "Q. There was correspondence that went back and forth. Do you recall that?
>
> "A. I didn't ever write him a letter." Behunin Deposition at 56.

Mrs. Behunin later admitted that there were a number of letters and memoranda that passed between appellant and herself, and Exhibits 8 through 19 illustrate the nature and range of this correspondence.

The foregoing contradictions are in the testimony of Mrs. Behunin herself, and are not contradictions between the testimony of Mrs. Behunin and appellant. In contrast to her testimony, appellant testified in a candid, forthright and consistent manner. There is not a single contradiction or inconsistent statement in any part of appellant's testimony. He testified in his deposition, and the evidence is uncontradicted, that the letter from the Bar dated October 26, 1976, advising him of his hearing before the Screening Committee on October 28 was received by him on October 28, the very day of the hearing, and that his secretary advised the Bar office that appellant had a conflict in his schedule and could not appear on such short notice. Appellant's Deposition at 5, et seq. He defended his method of charging fixed or flat fees, explaining that he did not follow the pattern of "pegboard" lawyers who charge for each telephone call. Appellant's Deposition at 23, 43. He also said that he not only had the permission of the corporation through Mrs. Behunin to represent Mr. Burr, but that he obtained approval of such representation from counsel for Mr. Burr in the civil suit and from the

Sevier County Attorney. Appellant's Deposition at 47, et seq.

At the hearing appellant explained his usual method of determining and charging fees. Tr. 56-60. He said that a flat fee is something of a gamble on his part; even though such a fee is often adequate, it sometimes turns out to be too low. The client, however, always knows what the exact and total cost of litigation will be. Tr. 105-06. Appellant said that although his flat fees are nonrefundable so long as he is ready, willing and able to perform the appropriate legal representation, his fees are refundable if it is his fault that a client must retain another lawyer. Tr. 127. He also said that he would be willing to make a voluntary adjustment of the fee and an appropriate refund in this matter, but that he thought he had no legal obligation to do so as a result of any Bar proceedings. Tr. 118. And appellant said that he certainly would have answered if Mrs. Behunin had asked for a refund, as she testified that she did. Tr. 66-67.

With respect to his representation of Ted Burr, appellant said that the first time he ever met Mr. Burr was at a meeting in his office on July 22, 1976. Tr. 71. Appellant could establish the exact date because it is his practice at the first interview to take notes and to write at the top "New File" and place the date. Tr. 93, 97. Since appellant never met Ted Burr until July 22, 1976, he explained that it would have been

impossible for him to have discussed his potential representation of Burr when he met Mrs. Behunin the previous month in Helper. Tr. 71, 73. Appellant did recall, however, that he obtained permission from Mrs. Behunin to represent Mr. Burr (Tr. 76) and was quite sure that he did so by virtue of a telephone call from his office. Tr. 86. Appellant could fix the date of this call as between July 22 and July 26, 1976, because he first saw Mr. Burr on July 22, and he accepted Burr's retainer on July 26; he would not have accepted the retainer prior to receiving Mrs. Behunin's consent to his representation of Mr. Burr. Tr. 82-86.

The foregoing testimony is consistent with the care exercised by appellant in getting the consent of everyone else involved. Tex Olsen, the lawyer for Mr. Burr in the civil suit, consented, as did Kay McIff, the Sevier County Attorney, who would prosecute the criminal case. Tr. 84-85. The District Judge, who presided over both the civil case and criminal case, was advised of the fact that appellant was representing both the corporation and Mr. Burr. Tr. 103-04. (It also should be noted that co-defendants Jim Ross and Ted Burr both came to see appellant on July 22, 1976, and both desired appellant to represent them. But appellant saw that their different positions would create a conflict if he were to represent them both. He forthwith advised them that he could

not represent both and that he could represent Mr. Burr only if Mrs. Behunin consented. Tr. 77.)

Any objective examination demonstrates that the evidence falls far short of clear and convincing proof that appellant has violated any ethical standards of the Utah State Bar.

III. APPELLANT'S GENERAL PHILOSOPHY IS NOT RELEVANT TO THIS PROCEEDING.

Over and over again the Bar in its brief ridicules the "attitude" of appellant and argues that his "philosophy" and "theory" concerning the setting of fees is wrong. The Bar criticizes appellant's philosophy respecting his relations to all clients (Brief of the Utah State Bar at 46), his practice in regard to his other clients (Brief of the Utah State Bar at 47), and his failure to conform to "the custom of the legal community" (Brief of the Utah State Bar at 48). These arguments reflect the tenor of the entire proceeding against appellant.

The record discloses that the present proceeding really is not an effort to suspend appellant from the practice of law because of any specific conduct in the matter of Kay Lou Behunin and her corporation, but rather because of sharp philosophical conflicts between appellant and members of the Bar Commission. Since appellant is not a shy or retiring lawyer, these conflicts in philosophy sometimes resulted in sharp

exchanges of opinion. During his deposition, appellant responded to criticism leveled at his practice of charging flat fees by calling those lawyers who charge for each hour, fraction of hour, or telephone call, as "pegboard" lawyers. Appellant's Deposition at 23, 43. This carried through to the hearing. After appellant testified that he had obtained the consent of Ted Burr, Burr's lawyer, and the Sevier County Attorney, appellant was asked if he intended to call them as witnesses to support his testimony. Appellant said no because, even though they would verify his testimony, such verification would be unnecessary unless the Bar decided to attack his credibility as a witness -- and then advised the Bar prosecutors that they could attack his credibility if they wished in rebuttal. The prosecuting attorney sarcastically said, "Thanks for the advice." Appellant in similar vein replied that he did not have a fee agreement with the prosecutor for such advice and would not charge by the hour. The prosecutor rejoined that he would rather go to a pegboard lawyer than get legal advice from appellant. Tr. 84-85.

Exchanges such as this indicate only the tone of the proceeding. The specific philosophical differences are best illustrated by excerpts from the transcript. It is important, of course, that the entire record be examined with care, and the only purpose of the following excerpts is to illustrate

tne nature of some of the discussion.

The following exchange took place between Commissioner Sorenson and appellant.

"MR. SORENSON: Well, my question raises in this part, Mr. Hansen, goes to this, that I suppose there is a certain degree of credibility given one's client by the person who represents the client and you represented here today that they hire you because of your name and reputation to champion of causes and represent people and so forth. Now you also said that in no way was she ever compromised or she was never in present jeopardy. I can't remember the exact phrase you used by your representing Mr. Burr. My question, I suppose, is when you filed the answer alleging false allegations and you in effect place yourself behind Kay Lou herself as saying that she is the truthful one in the situation and that the plaintiff has damaged her by his false representations. Then when you represent Mr. Burr in a criminal matter you are saying that you represent him for his truthfulness in the matter and put him on the stand and therefore, he becomes the good guy because you are representing him and I suppose that's what we are is advocates. Do you feel that that dual position in these two lawsuits by your name and reputation constituted a conflict of interest?

"A. Our philosophical concepts are diametrically [sic] opposed. If you think that because a lawyer represents somebody that's a good guy, therefore he's a good guy, and if he represents a bad guy, he is a bad guy, you've got it all wrong compared to what I think. A lawyer's role [and] the client's stand on their own. They don't stand behind reputation of their lawyer.

"MR. SORENSEN: Do you believe that?

"A. I certainly do or otherwise I would never represent a person charged with a crime for fear you would be the criminal. You mean to tell me if I represent a rapist that I am a sex fiend? If I represent a bank robber, I'm a thief, if I represent a murderer, I'm a murderer?

"MR. SORENSON: I'm asking you if a person comes to Phil Hansen because of his reputation as being a super lawyer or a good--

"A. Again, innuendoes about that, but I think in all honesty I do have a good reputation for results I get in court and that has nothing to do with the credibility of a client or an opponent in a lawsuit.

"MR. SORENSON: I didn't say you stand up and vouch for him for the truthfulness.

"A. That's what I think you are insinuating.

"MR. SORENSON: You are misunderstanding. Let me get the question to you, Phil, so you can understand it. Do you feel by virtue of the fact that you have acquired in this state, and I think that goes without saying, a reputation as being a good defense criminal lawyer. Would you agree with that?

"A. Precisely.

"MR. SORENSON: Okay, now if that is true and Mr. Burr comes to you and says I want you to represent me because of your reputation of being a good lawyer, do you feel that he hires you because of the reputation that you carry into a courtroom would carry some power or some weight with it because Phil Hansen is in that courtroom?

"A. No, I think they hire you for a reputation for the way you handle a lawsuit, not because your reputation is going to swing the results of the lawsuit or make your defendant look like a nice guy if you've got a nice guy reputation or a bad guy reputation. I think the two are totally unrelated and should be.

"MR. SORENSON: That's what I wanted to find out, if that was your philosophical belief in that regard. Now do you feel in reference to these two complaints that, obviously you've stated this many times, but in reference to the allegations, one a criminal matter that you defend on and another a civil matter which you become a plaintiff's attorney by reference of a counterclaim, do you feel there is any conflict of

interest between your representing two people that are on opposite sides of one lawsuit and you spin off and represent another one in another lawsuit that coincides in the same time frame before the courts?

"A. I think I'm perfectly proper in the action and I decided the canon of ethics with the consent of the parties permitting it." Tr. 113-16.

Later the following exchange took place between Commissioner Moffat and appellant:

"MR. MOFFAT: Phil, in relation to the method by which you charge for your services, do you feel that at any point--I'm not talking about this case in particular but about the principle in general--do you feel that at any point a client for whatever reason has a right to discharge his attorney?

"A. Certainly.

"MR. MOFFAT: Do you have any general philosophical feeling about whether or not given an agreement such as the one that you had with Kay Lou here there is a point at which there should be a refund of the client's money?

"A. Yes, if it's my fault that they change lawyers, I think that's right.

"MR. MOFFAT: If it's not, then you don't regard that any of the fee is refundable?

"A. That's right, from an obligation. I've done it voluntarily on a case.

"MR. MOFFAT: That's true even if you get the fee one day and they discharge you the next day before you've done anything?

"A. According to our agreement, yes, but in situations like that I've refunded--I can give you a glaring example. Blair Lund--I mean--what's the--Blair is the brother--Fran Lund, his wife, came to me for representation, paid me four thousand something dollars one day and came back the next day and said

that she couldn't get the rest and wanted to get somebody else and I gave her all of it back.

"MR. MOFFAT: I think you said on questioning by Mr. Fishler that you feel that you are paid to get a result and if you get the result--

"A. Well, not necessarily result, that's I think what--the results I think are what brought the reputation of people to come to me for. You don't charge for results because you can't promise results. What we do is you say if we do that, if we feel that can be done within the abilities that you've got, but I never promised results. I think the results--what I meant to imply by results in that series of questions was that's what brings the reputation.

"MR. MOFFAT: So your fee is not in fact based upon the results you actually obtain but upon what you hope to obtain?

"A. Not at all. In fact, that's what I tell them also, win, lose or draw, phrase that I use in the letter. I tell them I can't promise results whether I win or whether I lose or whether we break even. This is my fee." Tr. 126-28.

A short time later, Commissioner Moffat and appellant continued discussing their differences in philosophy:

"MR. MOFFAT: Now Tex Olsen was representing Burr in the civil action against Kay Lou, is that right?

"A. Yes, he was. I heard today that he is no longer.

"MR. MOFFAT: Phil, did you see any problem or do you see any problem now in representing Burr with an action where he gets convicted, a trial that had some relatively widespread notoriety and then later on defending against the claim brought by him on behalf of Kay Lou in the same court and within a relatively short period of time?

"A. I still don't see any problem. I think they both can be handled objectively and in a professional

manner without intermingling the two.

"MR. MOFFAT: Would you have any difficulty in impeaching Burr at the later trial, impeaching his credibility?

"A. No, by a rule of law that Mr. Moyle stated, if the conviction is upheld--I disagree with Mr. Moyle's interpretation of the law, that it can be used even though the conviction is overturned, but assuming that it stands, then I think the question can be asked and the answer compelled.

"MR. MOFFAT: Well, even forgetting about the conviction, there are lots of ways in which you can impeach a party, are there not, I mean other than that?

"A. Sure, and if I thought that he was saying things that were inconsistent with what I thought to be the truth, I would attempt vigorously to impeach him.

"MR. MOFFAT: Would that be true even if the source from which you had the knowledge that he may be stating something that was untrue would have been from information that you received from him in representing him?

"A. I couldn't because the two cases are totally unrelated." Tr. 129-31.

Mr. Fishler, the prosecutor, then engaged in a philosophical exchange with appellant. With respect to a potential conflict of interests, the following discussion took place:

"Q. Did you call Mr. Burr to testify in a criminal matter when he was tried in Sevier County?

"A. I don't think I did. I'm not sure.

"Q. You don't recall whether or not you called the defendant?

"A. I really don't recall.

"Q. Did you ever contemplate calling him as you theorized about defending the case?

"A. Sure, you always contemplate.

"Q. Otherwise if you called Mr. Burr to testify in that criminal case even if you contemplated it, you would be vouching for his credibility, wouldn't you?

"A. So far as I would know, I wouldn't be vouching for his credibility. I would just be saying that I wouldn't know of any incredibility.

"Q. Maybe not to the layman but when you call a witness to the stand, you are saying to the other lawyers in so many words that I believe what this man is going to say is the truth.

"A. Oh, absolutely not.

"Q. You are saying though that you don't believe he is committing perjury?

"A. Well, I'm saying that I don't vouch for anybody's truthfulness but I don't put a person on if I know he's going to lie or think he's going to lie. I can vouch for that part of it but I can't say because I call this witness he's going to tell the truth and neither can you and neither can anybody else.

"Q. Okay, but so on the one hand you might have to call Burr to the witness stand with the understanding that if you did, you wouldn't do so if you thought he was going to commit perjury and in the civil lawsuit you were going to attack his credibility?

"A. As to the conviction, yeah.

"Q. And this lawsuit that Burr has against Kay Lou, is that kind of ground to a halt?

"A. I'm not their counsel any more.

"Q. It would be very difficult for Burr to conduct a civil lawsuit against Kay Lou if he were serving time at the Point, would he?

"A. Of course not, that happens frequently." Tr. 133-35.

Mr. Fishler then turned to the matter of the attorney fee:

"Q. Getting back to the fee, you are taking the position that you have a service to sell in the marketplace and that service and the value of that service can set the fee, is that right?

"A. Between consenting parties, yes.

"Q. And you feel that when a client comes to you, that that's a total arms-length transaction and you are in no better bargaining position than the client?

"A. Well, I don't know how you can evaluate the better bargaining position, but he's free to take me or leave me.

"Q. Clients that come to attorneys are generally in some cases distraught and emotionally upset if they are being sued for $35,000, would you agree with that?

"A. Well, I'm sure that people would be distraught being sued for $35,000.

"Q. Okay, so it's not a total arms-length transaction between two people?

"A. Well, certainly it is, just because she might be upset because she's being sued doesn't put me in an advantage to charge a fee. She's got all you unique guys to go to also so the fact that she decides to hire me doesn't make it that I'm doing it with my knee in her chest holding a disadvantage. Some lawyers get $100,000 for a lot less than I do for a lot less money. Some people charge a million dollars fees.

"Q. In this town?

"A. Well, I'm not qualified in saying who gets

what, but if they are going to try and set down that we all have to charge the same price, then we are bordering on an anti-trust and I think that the fee, if the two people bargain in advance, is between the two people and that's as simple as I can state it and succinct. I don't think that the Bar Association has any right whatsoever to dictate what fees I should charge if I do it in advance and the client has the right to accept or reject." Tr. 135-36.

After the hearing concluded, memoranda were submitted by counsel for the parties. In their Reply Memorandum, prosecutors Fishler and Cook emphasized that they were not so much interested in disciplining appellant for any alleged misconduct in this particular matter as they were in removing him from the practice of law because of the general methods and philosophies of appellant with respect to all clients. A few excerpts from that memorandum illustrate the point:

> "The prosecutors in this case are not attacking the particular fee charged to Kay Lou but are attacking the method utilized by Mr. Hansen as to Kay Lou and to all clients." Reply Memorandum of Prosecutors at 3.

> "Obviously a system which locks a client into a relationship with a member of the Bar through economic pressure cannot be tolerated. The fact that Mr. Hansen is willing to discuss a refund to this particular client is immaterial since his practice is still to utilize the non-refund method as to all other clients. It is unknown how many clients in the past or how many in the future have been forced to continue with Mr. Hansen's representation because of this economic duress.

> "The fact that Hansen's fee system subtracts the cost of litigation from his flat fee can only serve as an inducement to Hansen not to incur necessary expenses on behalf of the client for litigation. Why

should Hansen take depositions when these costs will merely deduct his ultimate fee in the case?" Reply Memorandum of Prosecutors at 3-4.

"During the testimony Hansen justified his failure to keep time records with the statement that some of his most crucial thoughts occur away from the office and, therefore, he did not think it fair to bill his clients on an hourly basis .... Mr. Hansen surely is not saying that even lawyers charging by the hour bill their clients for those thoughts occurring during their morning shower. However, Hansen seems to think this is the case and that somehow he is different from other lawyers and, therefore, graciously does not charge his clients for thoughts occurring away from the office. Such an argument as was pointed out in the initial memorandum does not justify the failure to keep some hourly record of the time expended on a case.

"In conclusion, this case is not a minor dispute between a 'disgruntled client' and Mr. Hansen. Instead it shows a complete disregard for the ethical responsibilities of a lawyer as to Kay Lou, Ted Burr, and all other clients presently being represented by Hansen under his intolerable fee program." Reply Memorandum of Prosecutors at 4.

The Hearing Panel and the Bar Commissioners obviously adopted the prosecutor's position and sought to suspend appellant from the practice of law because of his general philosophy and methods of charging legal fees. If there is anything wrong with appellant's methods as a general matter, then the Bar should set forth specific guidelines with respect to flat fees before lawyers are disciplined for charging such fees.

IV. THE BAR'S RECOMMENDATION IS UNREASONABLE AND EXCESSIVE.

In attempting to justify its recommendation of a one-year

suspension, the Bar argues that appellant has been the subject of other disciplinary proceedings throughout the years. Once again, one senses the true nature of this proceeding: although the instant case does not itself warrant such a severe penalty, appellant's involvement in other disciplinary matters has a cumulative effect on the Bar's recommendation. The Bar fails to indicate, however, that none of the other disciplinary proceedings ever resulted in a conviction. That one has been previously accused and has successfully defended himself is surely not a matter relevant to the imposition of a penalty in a subsequent matter. The Bar should know better than to consider old charges that were resolved in appellant's favor.

The Bar urges this Court to consider the "attitude of appellant Hansen in its decision" in that appellant throughout the proceeding

> "never admitted any conflict existed ... never admitted that a misunderstanding between himself and Kay Lou existed ... never agreed that he was legally obligated to pay Kay Lou a refund ... and continually stated that he did not have to keep track of his time or records for anybody." Brief of the Utah State Bar at 57.

It is true that appellant denied the charges against him. It is true that he sought to defend himself against those charges to the best of his ability. If appellant is to be punished for acting in his own defense, it is indeed a dark day for

justice in Utah.

The Bar makes unwarranted assumptions of fact that "Hansen neither offered to withdraw ... nor offered to refund Kay Lou any of her money." As noted in appellant's brief, he discussed the possibility of withdrawal with Mrs. Behunin at a meeting in September 1976. Mrs. Behunin left his office, however, to "think about" whether she really wanted appellant to withdraw. Tr. 33. Appellant received no answer from Mrs. Behunin for five months, when he finally received the letter dated February 26, 1977 advising him that he had been discharged. He then turned the company's files over to its new lawyer. Brief of Appellant at 10-12. These undisputed facts are based on the testimony of Mrs. Behunin. It is difficult to imagine how the Bar can assert that appellant refused to withdraw.

The Bar also argues that appellant's conduct is reprehensible because "it is undisputed that Hansen has not refunded Kay Lou any of her money as of the writing of this brief." Brief of the Utah State Bar at 45. See also, id. at 44, 53, 56 and 57. The Bar then proceeds for the first time to request that appellant be ordered to make an accounting of his services and to refund a portion of the fee based upon the funds not expended. The Bar suggests that "if Mrs. Behunin is dissatisfied with his accounting, she could then seek recourse

through the Utah State Bar or through her own independent court action."

The Bar's assertion that no refund has been made is erroneous. The Bar did not bother to make inquiries of appellant or of Mrs. Behunin or their present counsel. If it had, it would have learned of negotiations between these parties and that, without in any way admitting liability, appellant returned a portion of his fee to Mrs. Behunin and that general releases were executed and exchanged between appellant and Mrs. Behunin. These negotiations and this settlement were completed quite apart from the Bar proceedings, as they should have been. The dispute between Mrs. Behunin and appellant was always a civil matter. It was not and is not relevant to the matter before this Court. Important, however, is the cavalier fashion with which the Bar treats what it deems to be fact.

The propriety of disciplinary measures recommended against attorneys is, of course, to be evaluated in light of the facts of each case, and comparisons are difficult. The perspective afforded by this Court's decisions, however, demonstrate that the one year suspension recommended against appellant is excessive. It is particularly excessive if, as the record reflects, the Bar seeks to punish appellant for his general method of conducting his profession, and not for any harm done to any client. This Court's rulings indicate that

suspensions of the kind recommended by the Bar are reserved for lawyers who knowingly and dishonestly harm their clients or the system of justice itself. For example, in In re Macfarlane, 10 Utah 2d 217, 350 P.2d 631 (1960), the Court concluded that an attorney had exercised fraud and undue influence upon his client while acting as her confidential advisor; in doing so, he drafted her will and codicils thereto to make himself a major beneficiary of her estate. The Court suspended the attorney from practice for one year. In In re Hatch, 108 Utah 446, 160 P.2d 961 (1945), a lawyer unlawfully induced his client in a workmen's compensation proceeding to pay him as a fee an amount four times the sum awarded him by the Industrial Commission. The same lawyer dishonestly collected and kept a sum of money owed by his client to another. For these offenses, the lawyer was suspended from practice for one year. In In re Lund, 29 Utah 2d 181, 506 P.2d 1272 (1973), a lawyer commingled his client's money with his own and failed to establish a trust for his client's children in accordance with her instructions. He misused the money and concealed the fact later. For these offenses, the lawyer was suspended for one year.

Appellant respectfully submits that, whatever the merits of the Bar's philosophical debate with appellant, the Bar has not proven any offense that verges on deception. The Bar has

never questioned appellant's honesty in these proceedings. The Bar's recommended discipline is manifestly excessive.

CONCLUSION

The appellant was denied due process of law. The Bar in fact admits that the notice contained in the Complaint was improper. It is clear that no evidence was presented to support a finding that the fee fixed in this matter was excessive. The Bar's brief and the record in this matter demonstrate that appellant has been prosecuted not so much for his actions in the instant matter but rather for his attitude and philosophy in general. These items are not relevant to this proceeding and should not be considered in resolving the legal questions before this Court. The recommendation of the Bar is excessive and unreasonable and has not been justified by the Bar. The findings, conclusions and recommendation of the Bar are improper and cannot stand.

VAN COTT, BAGLEY, CORNWALL & McCARTHY
GERALD R. MILLER
E. SCOTT SAVAGE
ALAN L. SULLIVAN
141 East First South
Salt Lake City, Utah 84111

RICHARD L. DEWSNUP
455 East Second South #9
Salt Lake City, Utah 84111

ROBERTS, BLACK & DIBBLEE
JOHN L. BLACK
Ten Broadway Building, #400
Salt Lake City, Utah 84101

Attorneys for Appellant

CERTIFICATE OF MAILING

THIS IS TO CERTIFY that two copies of the foregoing REPLY BRIEF OF APPELLANT were mailed, postage prepaid, on this 19th day of June, 1978, to each of the following:

Phillip R. Fishler, Esq.
604 Boston Building
Salt Lake City, Utah 84111

Craig S. Cook, Esq.
3645 East 3100 South
Salt Lake City, Utah 84109

Prosecutors