

1979

In Re Phil L. Hansen : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE

:

PHIL L. HANSEN,

:

No. 15613

Appellant.

:

BRIEF OF APPELLANT

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE

:

PHIL L. HANSEN,

:

No. 15613

Appellant.

:

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal from an Order Recommending Suspension of a lawyer by the Board of Commissioners of the Utah State Bar. The Order, together with the Findings of Fact, Conclusions and Recommendations of the Hearing Committee was filed with the Supreme Court on January 13, 1978. Appellant filed his Notice of Appeal with the Supreme Court on February 9, 1978.

DISPOSITION BEFORE THE UTAH STATE BAR

On September 29, 1977, a Hearing Committee, consisting of three Commissioners of the Utah State Bar, conducted a disciplinary hearing of certain charges against appellant. The Hearing Committee filed Findings of Fact, Conclusions and Recommendations with the Board of Commissioners of the Utah State Bar dated January 12, 1978. The Findings of Fact, Conclusions

and Recommendations were approved by the Board of Commissioners on January 13, 1978. The Findings of Fact and Conclusions state that appellant violated Rule IV, Canon 5, DR5-105 of the Revised Rules of Professional Conduct of the Utah State Bar, for the asserted reason that appellant was prevented from exercising independent professional judgment on behalf of his client by reason of his representing another client. Appellant was further found in violation of Rule IV, Canon 2, DR2-106 of the Revised Rules for the reason that the fee charged a particular client was excessive.

RELIEF SOUGHT ON APPEAL

Appellant seeks review by the Supreme Court pursuant to Utah Code Ann. § 78-51-19 (Repl. 1953), reversal of the Findings and Conclusions, rejection of the Order Recommending Suspension, and such other relief as the Court deems appropriate.

STATEMENT OF THE FACTS

The facts developed in the hearing below are as follows:

I. The complainant's initial contacts with appellant.

Appellant is an attorney licensed to practice law in the State of Utah, with offices in Salt Lake City, Utah. On or about December 27, 1975, appellant was contacted by Kay Lou Behunin on behalf of Kay Lou Chevrolet-Oldsmobile Company, a Utah corporation. Tr. 14, 49. The corporation had been served with process in a lawsuit filed in the District Court of Sevier

County, State of Utah, styled "Theodore H. Burr, Plaintiff, vs. Randall Johnson and Kay Lou Chevrolet Company, a corporation, Defendants, Civil No. 7147." Tr. 15; Ex. 24. Three individuals, Mrs. Behunin, the company's business manager, and the company's bookkeeper all met with appellant and delivered to him the company files and other documents which they thought were relevant to the subject matter of the lawsuit. Tr. 16, 52, 53. At the time, Mrs. Behunin was the president and sole stockholder of the corporation, and she had previously been an employee of the corporation. Tr. 13. Theodore Burr, the plaintiff in the lawsuit, was a former owner of the dealership, and the lawsuit was in the nature of a breach of contract action seeking an accounting. Tr. 13, 54. Another former owner of the dealership (Randall Johnson) was named individually as a defendant, but Mrs. Behunin was not.

Appellant indicated he would accept the case and that his fee would be \$5,000, whether the action was tried or settled out of court. Tr. 16, 18. In setting his fee, appellant testified without contradiction that he considered the following facts: The suit was filed in Sevier County, some 263 miles from his office. The suit involved complicated facts and the amount in controversy was at least \$25,000. Tr. 57, 59; Ex. 24, 20. A counterclaim and cross-claim appeared meritorious. Tr. 53; Ex. 23. Plaintiff's records would have to be secured through

appropriate discovery procedures. Tr. 55. Depositions, including those of the plaintiff, plaintiff's accountant, and the defendant Johnson appeared necessary. Tr. 55. The plaintiff and Mr. Johnson resided in Sevier County, and the accountant resided in Weber County. Tr. 55. Appellant further testified that he knew the case would involve travel expenses, both for discovery and trial, and that he expected to utilize an investigator to investigate the facts. Tr. 55. The fee was set as a flat fee. Tr. 56. It was intended to cover all expenses of litigation, including lawyers' services, depositions, motel bills, meals, mileage and the investigator's services. Tr. 56. The fee was \$5,000 through trial -- "win, lose or draw at any stage." Tr. 58.

Appellant does not usually keep records of time spent in his clients' behalf, nor does he bill his services on an hourly basis. Tr. 56. He often charges about \$3,500 for a trial in the local district court. Tr. 57. Plaintiff's lawyer had prayed for a fee in the sum of \$3,500, and he was a resident of Sevier County. Tr. 56. Appellant expected trial to last one or two days. Tr. 60. Consistent with the issues and expenses involved, it was his opinion that \$5,000 was a reasonable fee. Appellant testified that he spent well over fifty hours preparing the case from December 27, 1975 until he was discharged. Tr. 117.

In fixing the fee, appellant also considered his experience, reputation and ability. He believed that the corporation came to him because of these factors, even though he resided in Salt Lake County and his services in Sevier County would involve additional expense. Tr. 62, 69, 115. Although he did not meticulously ponder each of the factors enumerated in DR2-106(B) of the Revised Rules of Professional Conduct of the Utah State Bar, he, in fact, did consider most of them. By check dated December 29, 1975, Kay Lou Chevrolet-Oldsmobile paid appellant \$5,000. Ex. 22.

Several weeks after the first meeting, Mrs. Behunin and the company's bookkeeper again met with appellant concerning the case. Tr. 18. Appellant reviewed legal research performed by other lawyers in his office. Tr. 63. He reviewed work performed by an investigator, Mr. Lord. Tr. 64. He consulted with Mrs. Behunin and other employees of the company at his office and at the company's place of business in Salina, Utah. Tr. 65. He also met and consulted with Mrs. Behunin in Helper, Utah. Tr. 20, 65. There were phone calls and correspondence. Ex. 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19. Appellant filed an answer, counterclaim and cross-complaint and had conferences with counsel for the plaintiff. Ex. 23. Mrs. Behunin wanted the case continued; and, since the continuances were appropriate and proper, the appellant moved for and obtained them. Tr. 90, 91, 94; Ex. 12, 14, 16, 17, 18, 19.

II. Facts underlying the alleged conflict of interest and the alleged excessive fee.

In the summer of 1976, Theodore Burr, plaintiff in the suit against Mrs. Behunin's corporation, was charged with criminal violations in Sevier County. Tr. 69; Ex. 13. Mr. Burr was charged with receiving stolen property during a time subsequent to his involvement in the Chevrolet dealership. Tr. 70. Mr. Burr asked appellant to represent him in that criminal action.

Also in the summer of 1976, Mrs. Behunin met with appellant in Helper, Utah. The testimony of Mrs. Behunin and the appellant conflicts as to what was discussed at that time. Appellant testified that he and Mrs. Behunin discussed the charges against Mr. Burr and whether or not the criminal action could help or hurt the corporation in the lawsuit Mr. Burr had filed. Tr. 75. In the complaining letter to the Bar, Mrs. Behunin indicated the appellant advised her at this meeting that he was, in fact, going to represent Mr. Burr in the criminal matter. Ex. 20. At the disciplinary hearing, Mrs. Behunin described the Helper meeting in different terms. She testified that appellant informed her that he was considering representing Mr. Burr (Tr. 22), and she described a subsequent telephone conversation during which appellant told her he would probably not take Mr. Burr's case. Tr. 27. Mrs. Behunin testified that sometime later she heard a rumor that appellant had taken Mr. Burr's

criminal case, whereupon the letter of August 25, 1976 was sent to the Bar. Tr. 28; Ex. 20. If, as Mrs. Behunin testified, the letter was written because she had just heard a rumor that appellant had taken Mr. Burr's case, it is incredible that the letter indicates he told her this at the earlier meeting in Helper.

Appellant characterized Mrs. Behunin's testimony in this regard as a lie. Tr. 77. He related a telephone conversation with her concerning his representation of Mr. Burr. Appellant had told Mr. Burr that he could not represent him unless Mrs. Behunin approved. Tr. 77. He did not think there would be an actual conflict since the two cases were totally unrelated, but he did not want Mrs. Behunin to feel uneasy; and, under the circumstances, he sought her consent. Tr. 78, 87. During the telephone conversation, Mrs. Behunin asked whether appellant's representation of Mr. Burr would help or hurt the company's case. Appellant stated that he did not think it would either help or hurt because the two cases were unrelated. Tr. 78. Appellant understood that Mrs. Behunin gave him her express consent. Tr. 79.

The appellant subsequently conversed with Tex Olsen, Mr. Burr's lawyer in the civil case against the corporation, and Kay McIff, the prosecutor in the criminal case. Neither expressed any objection to the dual representation. They discussed the

possibility of continuing trial of the civil case until the criminal trial was concluded; and all parties being in agreement, this was done. Tr. 78. In granting the continuance, the trial court obviously was aware of appellant's dual representation and expressed no concern in this regard. Appellant testified that Mrs. Behunin agreed to the continuance. Tr. 79. Appellant stated that Mrs. Behunin knew he was representing Mr. Burr because when he was in Salina for matters concerning the criminal case, he occasionally visited the automobile agency and talked with her about the civil case. She knew why he was in Salina, and she did not complain about his representation of Mr. Burr. Appellant first learned of her dissatisfaction when he received a copy of the letter of August 25, 1976, from the Bar. Appellant never received any complaints directly from Mrs. Behunin or any other representatives of her company. Tr. 83.

Mrs. Behunin admits that she never actually told the appellant of her discontent. At the hearing, she claimed she was unable to reach him by telephone, but conceded that she left no messages at his office to the effect that she was in any way dissatisfied. Tr. 30, 31. She did not write appellant a letter telling him that she did not want him to represent Mr. Burr. Tr. 31. She admits that the first complaint she made was to the Bar. Tr. 31.

The letter dated August 25, 1976, and addressed to the

Utah State Bar, was written on letterhead styled "Kay Lou Chevrolet-Olds" and was signed "Kay Lou Chevrolet-Oldsmobile" by Kay Lou Jenkins (Wheeler)* as president of the corporation. Ex. 20. The letter reflects concern that the appellant was going to represent Mr. Burr, which she says in the letter she learned directly from appellant at the meeting in Helper. The letter indicates that Mrs. Behunin had made several phone calls to appellant's office and had received no reply. Mrs. Behunin stated that she did not know what appellant's intentions were toward the case. The letter states:

"If Mr. Hansen isn't going to prepare my case, maybe I should consult another attorney and request Mr. Hansen to return my retainer fee. I expect to pay Mr. Hansen for any services he has performed, but I really can't see that he has done anything to prepare this case."

The corporation in its letter to the Bar stated a belief that there was a conflict of interest, but does not complain that the fee charged was excessive. The company did not request a refund and there was no complaint in the letter, or for that matter at any time, concerning a "nonrefundable fee." Ex. 20; Tr. 18. A copy of the letter was sent to appellant by the Bar on September 2, 1976. Ex. 1.

Mrs. Behunin testified that she did not thereafter request a refund of the fee. She talked to Mr. Sheffield (Executive Director of the Bar) about the matter and assumed that she

* Mrs. Behunin was previously known as Mrs. Wheeler and as Mrs. Jenkins.

should wait for the Bar to advise her "as to what to do about that and obtaining another attorney." Tr. 28.

Within ten days of September 2, 1976, Mrs. Behunin and her husband met with appellant in his office. Tr. 32, 89. Appellant asked why she had not complained to him. Tr. 89. According to Mrs. Behunin, appellant expressed his understanding that she had consented to his representation of Mr. Burr, and she stated her understanding that she had not consented. Tr. 32. Mrs. Behunin then testified as follows:

"And then I said I thought I should probably get another counsel and I also expressed that I might like some of my money back. I would be glad to pay him for what he had done but I thought I ought to obtain other legal assistance." Tr. 33 (emphasis added).

Appellant told Mrs. Behunin to think it over and let him know what she wanted to do. Tr. 33, 89. She answered as follows: "I said we would still think about it. . . ." Tr. 33. On this note, Mrs. Behunin and her husband left appellant's office. The corporate records were left with appellant. Tr. 33.

For the next twenty days, the appellant heard nothing from Mrs. Behunin and reasonably assumed she was still considering the matter. Since he had not been terminated, he continued to function as the corporation's lawyer, and he obtained another continuance of the trial date. On September 27, 1976, the Executive Director of the Bar sent appellant a letter indicating

that the Bar had advised Mrs. Behunin that she need not talk to appellant. Ex. 7. The civil case was still pending, and appellant was still counsel of record. Appellant still had not been advised of any decision to replace him with new counsel and, for that reason, he wrote to Mrs. Behunin on October 1, 1976. Tr. 89; Ex. 5. In part, the letter reads as follows:

"At the discussion that I had with you and your husband, it was agreed that I was to have your matter continued and you were to contact me as to your position relative to the continuation of my representing you. When we were unable to meet, I had the matter continued without date by stipulation with counsel for Mr. Burr and have continued to prepare your defense and counterclaim.

It has been assumed that I am still your lawyer, and the same assumption will continue unless you advise me to the contrary within five days from the date of this letter.

* * *

This office is proceeding with the assumption that we are still representing you and that we have no disagreement. If you have any thoughts to the contrary, please contact me at your convenience to otherwise inform me." (Ex. 5).

Appellant received no answer for five months. On February 28, 1977, he received a letter from Kay Lou Chevrolet-Oldsmobile dated February 26, 1977. Ex. 15. The letter refers to the conversation in appellant's office during the second week in September, 1976. The letter seems to indicate that a refund was requested during the meeting but denied. This is contrary to Mrs. Behunin's testimony at the hearing, when she denied that

a refund was ever discussed. Tr. 18, 28, 33. In any event, the letter itself does not request a refund of any part of the fee. It does indicate that other counsel had been obtained. Ex. 15.

Upon receipt of this letter, which was nearly two months after the formal Bar proceedings in this matter had commenced, appellant was finally advised that he had been discharged. He immediately turned the company's files over to its new lawyer, Gary Howe. See Response to Request for Production of Documents.

III. The Complaint against appellant and proceedings before the Bar Commission.

By letter dated September 2, 1976, the Utah State Bar advised appellant that a complaint had been filed against him and enclosed a copy of the letter dated August 25, 1976. Ex. 1. The letter from the Bar requested a response to the Disciplinary Screening Committee within ten days. On September 26, 1976, appellant sent a letter to the Executive Director of the Utah State Bar requesting an additional ten days within which to respond. Ex. 4. Another letter was sent to appellant on September 24, 1976, indicating that no response had been received. The appellant was advised by the second letter that the Disciplinary Screening Committee still desired an answer within ten days. Ex. 2. On October 26, 1976, appellant was sent a third letter by the Executive Director of the Utah State Bar, stating that he had failed to respond and advising him that he could meet with

the Disciplinary Screening Committee on October 28, 1976. Ex. 3. Appellant received this letter on October 28, 1976, and his secretary called the Bar to advise them that he had a conflict and could not meet with the Screening Committee on that date. Deposition of Phil L. Hansen, page 10 (March 22, 1977). It is noteworthy that during this period of time, appellant had met with Mrs. Behunin to clarify and resolve the problem. She did not discharge him and, according to her, said she would "think about it." Subsequently, the Bar's Executive Director advised Mrs. Behunin to cease communicating with her corporation's counsel of record.

Whether or not appellant was afforded a reasonable opportunity to appear before the Screening Committee prior to the filing of the formal Complaint, it is clear that any such opportunity was limited to the complaints, if any, contained in the August 25, 1976 letter to the Bar. Ex. 20. Nothing in the corporation's letter to the Bar can be construed as a complaint that the fee was excessive or otherwise improper. Appellant was not given any notice of such charge, let alone afforded the opportunity to appear before the Screening Committee to answer it.

The formal Complaint was filed on December 29, 1976. It alleged that appellant was employed by Kay Lou Jenkins (Wheeler) to defend her in a lawsuit brought by Theodore Burr, that appellant was paid the sum of \$5,000 as a fee, and that thereafter complainant had difficulty contacting appellant. The Complaint

further alleged that during the pendency of the proceedings in which appellant had contracted to represent complainant, appellant undertook the defense of Theodore Burr in criminal proceedings without the knowledge or consent of complainant. The Complaint charged

"that by reason of the action of Phil L. Hansen and his failure to make himself available to his client as aforesaid, the aforesaid Phil L. Hansen had violated the Canons of Ethics of the Utah State Bar, . . ."

The specific charges against appellant were as follows:

Rule IV, Canon 4, DR4-101 (placed himself in a position to violate the confidence of his client);

Rule IV, Canon 5, DR5-101 (undertook an employment interest adverse or in conflict with the interests of his client);

Rule IV, Canon 6, DR6-101(A)(3) (neglected a legal matter entrusted to him);

Rule IV, Canon 2, DR2-106 (charged a fee that was clearly excessive); and

Rule IV, Canon 1, DR1-102(A)(5) (engaged in action prejudicial to the administration of justice).

No reference was made to the nonrefundable nature of the fee or appellant's method of billing. As to the fee, the clear inference is merely that the dollar amount was excessive.

At the disciplinary hearing, the charges involving DR4-101 and DR6-101(A)(3) were dismissed on motion of the

prosecutor, and the hearing proceeded on the remaining charges -- alleged violations of DR5-101, DR2-106 and DR1-102(A)(5). Tr. 3.

In response to the Complaint, appellant filed a Motion to Remand the matter to the Screening Committee since appellant had not been afforded an opportunity to appear and present his defenses before the Screening Committee as provided by Rule II, Section 6 of the Revised Rules of the Utah State Bar. Subsequently, appellant received a pleading entitled, for no explainable reason, "Notice" and signed by the Executive Director stating that the Trial Committee had no authority to remand matters to the Screening Committee. It did not state by what authority the Executive Director acted.

At the disciplinary hearing on September 29, 1977, Mrs. Behunin and appellant were the only witnesses. In addition to their testimony and the exhibits introduced at the disciplinary hearing, the transcripts of the depositions of appellant and Mrs. Behunin were published, together with the exhibits attached to those depositions. Tr. 36.

In addition to eliciting the testimony previously set forth herein, much time was spent questioning appellant concerning speculative and hypothetical matters and his "general philosophical feeling." Most of these questions were asked by the three members of the Hearing Committee. See Tr. 98-137.

Appellant was questioned concerning his "concept in the normal course of charging a flat fee" (Tr. 105); his "philosophical belief" concerning the lawyer's role, and whether the reputation he brings "into a courtroom would carry some power or some weight with it because Phil Hansen is in that courtroom" (Tr. 113-115); whether he thought there was a refund due (Tr. 117); the method by which he charged for his services--not in this particular case, but the "principle in general" (Tr. 126); his "general philosophical feeling" as to whether a refund should be made (Tr. 127); whether appellant contemplated calling Mr. Burr as a witness in the criminal case as he "theorized about defending the case" and, if so, whether he would be vouching for Mr. Burr's credibility (Tr. 133, 145); whether Mr. Burr could conduct the civil suit if he were incarcerated (Tr. 135); and whether the Bar Association has any right to dictate what fees appellant should charge (Tr. 136).

Most of these questions had nothing to do with the charges contained in the Complaint. Nevertheless, the appellant and the Hearing Committee engaged in lively debate concerning how fees should be fixed. Obviously, the Committee disagreed with appellant's "philosophical" concept that a lawyer's fee should be governed by the marketplace. Significantly, however, the appellant's client did not complain about the amount of the fee--either in the letter of August 25, 1976, (Ex. 20) or in the

testimony of Mrs. Behunin, the company's president. The issue of the so-called "nonrefundable fee" first arose during appellant's testimony and in the debate which ensued between appellant and the Committee members. One looks in vain for any charge in the Complaint concerning nonrefundability of fees or retainers. Appellant was cited for charging a fee which was "clearly excessive," and there is no evidence that the corporation ever claimed the amount to be excessive. He received no notice prior to the hearing that refundability of the fee or his general "philosophy" as to fees would be in issue.

ARGUMENT

POINT I

APPELLANT HAS BEEN DENIED DUE PROCESS OF LAW.

Appellant was denied his right to due process of law in the proceedings before the Screening Committee, the Hearing Committee, and the Board of Commissioners. In addition, the Findings of Fact and Conclusions filed by the Hearing Committee and approved by the Board of Commissioners are not supported by clear and convincing evidence. Finally, the Disciplinary Recommendation of the Hearing Committee, which was adopted by the Board of Commissioners, is unreasonable and excessive. For each of these reasons, appellant urges the Court to reject the Board's Recommendation.

A. Appellant was not given proper notice of the charges upon which the Recommendation is based, and for that reason did not have a proper opportunity to defend himself.

The Order Recommending Suspension violates Article I, Section 7, of the Constitution of the State of Utah, Utah Code Ann. §§ 78-51-12, 78-51-16, 78-51-17, and 78-51-18 (Repl. 1953), the Revised Rules of Discipline of the Utah State Bar, and the Fourteenth Amendment to the Constitution of the United States because appellant was not given proper notice of what became the charge against him.

1. The violation of DR5-105.

In the formal Complaint, appellant was charged with violating DR5-101 of the Revised Rules of Professional Conduct of the Utah State Bar. DR5-101(A) states as follows:

"Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." (Emphasis added).

DR5-101(B) provides that a lawyer shall not accept employment in contemplated or pending litigation if he knows, or it is obvious, that he or a lawyer in his firm ought to be called as a witness except under certain circumstances.

Following the disciplinary hearing, the Hearing Committee concluded that appellant had violated 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."

In making this finding, the Hearing Committee paraphrased DR5-105(A), which reads as follows:

"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, or if it would be likely to involve him in representing differing interests. . . ."

Needless to say, DR5-101 and DR5-105 are concerned with different situations. DR5-101 is concerned with circumstances under which the personal interests of the lawyer may impair his independent professional judgment. DR5-105, on the other hand, is concerned with a situation where the interests of another client may impair the independent professional judgment of the lawyer.

Appellant was never charged with violating DR5-105. He was never given notice of the charge with which he was ultimately "convicted." The Complaint in this matter, which charged a violation of DR5-101, was never amended. At the outset of the hearing, the prosecutor and the chairman of the Hearing Committee agreed that appellant was charged with DR5-101 and DR2-106. Tr. 3. No mention of DR5-105, or the conduct it prohibits, was

made until after the hearing was over and the tribunal rendered its decision.

Not only was appellant never charged with a violation of DR5-105, but he was never afforded an opportunity to appear before the Screening Committee on that charge pursuant to Rule II, Section 6 of the Revised Rules of Discipline of the Utah State Bar. Appellant had no opportunity to present defenses to such a charge since he had no notice that DR5-105 was even in issue. The Bar's conduct in this regard violated the plain terms of Utah Code Ann. § 78-51-16 (Repl. 1953), which provides that "[a]ny member of the Utah State bar complained of shall have notice of the charges against him and opportunity to defend...."

Moreover, appellant was deprived of his constitutional right to due process by reason of the Bar's failure to give notice of the charges against him. The disciplinary rules promulgated by the Utah State Bar and approved by this Court provide

"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 with which the attorney is accused of violating." Rule II, Revised Rules of Discipline of the Utah State Bar.

In failing to comply with this provision, the Bar violated its own rules as well as appellant's fundamental rights.

Courts in virtually every jurisdiction considering the question have held that a lawyer cannot constitutionally be disbarred or suspended from practice without clear notice of the ethical violations with which he is charged. In United States v. Robel, 389 U.S. 258 (1967), the United States Supreme Court held: "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." 389 U.S. 265 & n. 11 (quoting from Greene v. McElroy, 360 U.S. 474, 492 (1959)). In Burkett v. Chandler, 505 F.2d 217, 222 (10th Cir. 1974), the United States Court of Appeals for the Tenth Circuit held that the Constitution requires notice of hearing "as a prerequisite to the validity of disbarment proceedings." In that case, the Tenth Circuit determined that judgments of disbarment were procedurally deficient for lack of notice and, therefore, invalid.

In another Supreme Court case, In re Ruffalo, 390 U.S. 544 (1968), the petitioner was disbarred from the practice of law in proceedings before the state bar commission and, subsequently, the Ohio Supreme Court. The United States Court of Appeals for the Sixth Circuit ordered petitioner to show cause why he should not be disbarred from federal practice, and ultimately determined that he should be disbarred from practice in the applicable federal court on the basis of the proceedings

before petitioner's state bar commission and the Ohio Supreme Court. Petitioner then sought Supreme Court review of the Court of Appeals' order of disbarment.

In the course of its review, the United States Supreme Court examined the proceedings leading up to petitioner's state disbarment. In those proceedings, petitioner was served with a written complaint setting forth twelve charges. After three days of hearings before the bar commission, and on the basis of testimony adduced at those hearings, petitioner was charged with a thirteenth offense. Although petitioner was permitted to respond to the last charge, no further evidence was taken, and the Ohio Supreme Court based its order of disbarment solely on the thirteenth charge. The Supreme Court reversed. With particular importance to the case before this Court, the United States Supreme Court stated:

"Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. Ex parte Garland, 4 Wall. 333, 380, 18 L.Ed. 366; Spevack v. Klein, 385 U.S. 511, 515, 87 S.Ct. 625, 628, 17 L.Ed.2d 574. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682. It was said in Randall v. Brigham, 7 Wall. 523, 540, 19 L.Ed. 285, that when proceedings for disbarment are 'not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence [sic]'. Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether

'the state procedure from want of notice or opportunity to be heard was wanting in due process.' *Selling v. Radford*, 243 U.S. 46, 51, 37 S.Ct. 377, 379, 61 L.Ed. 585.

"In the present case petitioner had no notice that his [conduct supporting the thirteenth charge] would be considered a disbarment offense until after both he and [his witness] had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.' 370 F.2d, at 462.

"These are adversary proceedings of a quasicriminal nature. Cf. *In re Gault*, 387 U.S. 1, 33, 87 S.Ct. 1428, 1446, 18 L.Ed.2d 527. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

"How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

"This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." 390 U.S. at 550-52 (emphasis added).

In the present case, as in *Ruffalo*, the state bar commission recommended a penalty solely on the basis of charges never contained in any formal complaint served upon appellant.

The U. S. Supreme Court's view that such failure of notice voids the proceedings, and any conviction based thereon, was anticipated by the Utah Supreme Court a half a century earlier. *In re Evans*, 42 Utah 282, 130 P. 217, (1913). In the

Evans case, the Utah Supreme Court held that any failure strictly to comply with prescribed procedures in disbarment proceedings, particularly notice requirements, voids the proceedings. There, attorneys were charged with champerty in disbarment proceedings before the Supreme Court, but exonerated by the Court's referee. The Court, while sustaining the referee's findings, disbarred the attorneys for failing properly to account to their clients. Upon further review, the Court found that this charge was not within the original complaint, and that no jurisdiction existed to base a conviction upon it. 42 Utah at 308-311. The Court stated:

"That such adjudication, on the face of the record, is wholly unsupported by the information or accusation and clearly without the issues, and hence the judgment founded upon it a nullity and subject to attack whenever and wherever brought in question, cannot be gainsaid." 42 Utah at 311.

The disbarment was declared void.

The same strict rule was applied in In re Oliver, 97 Utah 1, 89 P.2d 229, (1939), in which petitioner filed for reinstatement but was given no notice of proceedings before the Bar Association and no opportunity to appear and present evidence with respect to his petition. The Utah Supreme Court in review enumerated the procedural deficiencies, voided the Bar's refusal to reinstate, and reiterated the rule that strict compliance with prescribed procedures is required in disbarment.

proceedings. 89 P.2d at 234. The rule as to notice was succinctly stated by the Utah Supreme Court in Higgins v. Burton, 64 Utah 562, 232 P. 914 (1924), and Foster v. Burton, 64 Utah 550, 232 P. 917 (1924), companion cases regarding a disbarment proceeding in a District Court conducted without notice of the charges to the accused attorneys: "The right to be heard before one is condemned is, however, so fundamental that authority is unnecessary." 232 P. at 916.

The decisions of other courts require the same result. For example, in Committee on Professional Ethics and Grievances v. Johnson, 447 F.2d 169 (3rd Cir. 1971), a lawyer appealed the order of a district court suspending him from law practice for twelve months. The basis of the lawyer's suspension was a complaint by the Virgin Islands bar disciplinary committee alleging that the lawyer had acted unethically by failing to disclose to prospective purchasers of property certain material facts about the property. Toward the close of the hearing before the disciplinary committee, the attorney was advised for the first time that he was also charged with allegedly violating duties running to the seller of the property. The lawyer's suspension from practice was predicated solely on the latter charge. The Court of Appeals reversed the lawyer's suspension on the ground that his rights to procedural due process were violated in the hearings before the disciplinary committee and, thus, in the lower

court.

"We need not speculate as to how respondent would have altered the presentation of his case if he had been originally charged with this breach. It is enough to observe that the proceedings became a trap when the first warning of the charges came towards the end of the trial, at the conclusion of the testimony of respondent and his primary witness Due process contemplates notice which gives a party adequate opportunity to prepare his case. In these circumstances, respondent was entitled to know the exact charges against him before the commencement of proceedings." Id. at 173 (emphasis added).

In People v. Denious, 118 Colo. 342, 196 P.2d 257 (1948), the Colorado State Bar Association filed a written complaint against an attorney containing four specific charges of misconduct. In proceedings before a referee appointed by the Colorado Supreme Court, the bar association sought to introduce evidence of other alleged violations. The referee refused the bar's tender and concluded that the attorney had not been guilty of any misconduct. The Colorado Supreme Court adopted the decision of the referee and, in so doing, held that the lawyer could not be sanctioned on the basis of charges of which he was not notified in writing. "The right to be informed in advance of accusations to be made is fundamental in our Anglo-Saxon law." 196 P.2d at 265. The court concluded that the referee "could properly hear and determine only the specific charges contained in the petition before him." Id. at 266. See also, In re Evans, supra, 42 Utah at 302-03.

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In State v. Berkley, 520 P.2d 1255 (Kan. 1974), two attorneys were charged by the Kansas Board of Law Examiners with unethical solicitation of and advertising for legal business. At the close of a hearing, the Board held that the attorneys had violated certain provisions of Kansas' Code of Professional Responsibility, but not the sections which dealt with either solicitation or advertising. The Kansas Supreme Court rejected the Board's recommendations on the basis of a rule substantially identical to the provisions of Rule III.1, Revised Rules of Discipline of the Utah State Bar, stating:

"Under the circumstances the acts with which the respondents were found guilty were never the basis of a charge concerning which they were notified, and they were found not guilty of the charges concerning which they were notified." Id. at 1257.

Precisely the same can be said of appellant and the proceedings before the Utah State Bar Commission in this case. The Hearing Committee ultimately recommended sanctions against appellant on the basis of charges of which he never had notice. Appellant came to the disciplinary hearing prepared to defend himself against the charge of violating DR5-101 as set forth in the formal Complaint. Apparently, after hearing all of the evidence, the Hearing Committee decided not that his judgment was affected by his personal interests, as charged, but that he was "guilty" of something else. The Committee made no finding whatsoever insofar as DR5-101 is concerned. It must have concluded

that appellant violated DR5-105, since it found he had accepted employment (proffered by Mr. Burr) which was likely to impair his professional judgment (in the representation of Mrs. Behunin's company). This conclusion, upon which the Order Recommending Suspension by the Board of Commissioners of the Utah State Bar is based, cannot stand.

The Hearing Committee in its Conclusion No. 2 found that the appellant

"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 [appellant] that she did not want the [appellant] to represent Mr. Burr while the [appellant] was representing her."

Obviously, this conclusion is a corollary of Conclusion No. 1 and is also based on an assumed violation of DR5-105. As such, it suffers the same constitutional and statutory defects as Conclusion No. 1.

Moreover, the evidence, if any, is hardly clear and convincing as to Conclusion No. 2. The corporation's letter to the Bar dated August 25, 1976, (Ex. 20) does not support Conclusion No. 2. Similarly, Mrs. Behunin's testimony at the hearing fails to support that conclusion. The record is clear that after meeting with appellant in September of 1976, Mrs. Behunin was going to "think about it" and advise appellant whether or not she wanted other counsel. Tr. 33. At the hearing, Mrs. Behunin

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admitted that she never actually told appellant she was dissatisfied in any regard. She wrote no letters, she left no messages, and she did not advise the appellant that she did not want him representing both Mr. Burr and her company until after the disciplinary proceedings had commenced. Tr. 30, 31. During the hearing, Mrs. Behunin admitted that her first complaint to anyone was the letter that she sent to the Bar. Tr. 31. After she contacted the Bar, its Executive Director told her not to talk to appellant. Ex. 7. Faced with the obvious dilemma of being the subject of a bar complaint filed by a client, and still being counsel of record for that client in an ongoing case, appellant wrote to Mrs. Behunin on October 1, 1976 advising her that unless he was told otherwise, he could only assume that he was still her company's lawyer. Tr. 89; Ex. 5. Indeed, as counsel of record, it would be of questionable ethics to cease functioning as counsel without knowing the client's wishes and the Bar's interference prevented the very communication between Mrs. Behunin and the appellant which was necessary to clarify the matter. Finally, by letter dated February 26, 1977, almost two months following the filing of the formal Complaint, appellant was advised by the corporation that other counsel had been obtained. Ex. 15.

The formal Complaint, which had been filed by the Bar some two months earlier, contains no allegation that Mrs.

Behunin advised the appellant that she did not want him to represent Mr. Burr while he was representing her company. Appellant was never charged with a violation of DR5-105, nor was he given notice of any charge involving the prohibitions of that section.

2. The violation of DR2-106.

The formal Complaint filed against appellant alleged a violation of DR2-106, "in that he has charged a fee that is clearly excessive." This was the only notice which appellant received prior to the formal hearing of any charge that the fee in question was excessive or, for that matter, improper for any other reason. The corporation's letter to the Bar dated August 25, 1976, did not complain about the fee. Ex. 20. Indeed, the record does not indicate that Mrs. Behunin or the corporation ever complained about the fee. Mrs. Behunin testified that she did not request a refund from appellant. Rather, she talked to the Executive Director of the Bar about it and assumed that she should wait for the Bar to advise her. Tr. 28. At the meeting with appellant in September, Mrs. Behunin recalled that she "expressed that I might like some of my money back." Tr. 33. There is no evidence that Mrs. Behunin ever complained that the agreed upon fee was excessive.

Appellant was not afforded his right to a hearing before the Screening Committee as to this charge prior to the time the

Complaint was filed. Rule II of the Revised Rules of Discipline of the Utah State Bar provides in paragraph 6 as follows:

"The Screening 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."

Insofar as the charge under DR2-106 is concerned, the Bar did not comply with this rule.

Even though the Screening Committee did afford the appellant an opportunity to appear before it, it clearly did not do so after giving notice of any charge against him regarding his fee in this matter. Appellant could hardly appear before the Screening Committee and present defenses to a claim that his fee was excessive if he never was advised that he was charged with that violation until after the Screening Committee had met.

The Hearing Committee concluded, in Conclusion No. 3, that the conduct of the appellant violated DR2-106 since, among other things,

"it created a conflict of interest between the respondent and his client. . . . It would be against the financial interests of the respondent to incur any out-of-pocket expenses in preparation of the case, . . ."

The Bar ought to refrain from such patent speculation. There is no evidence that appellant ever avoided or minimized expenses in order to increase his fees. Indeed, the evidence establishes unequivocally that appellant incurred out-of-pocket

expenses that were substantial in proportion to the total amount of the fee charged. The Bar seems to say the fee was improper because the possibility of abuse by the attorney existed. Yet, such a possibility exists in every fee arrangement. If expenses are not included in the fee, an attorney may engage in needless discovery to obtain a free vacation to a warm climate in the wintertime. The mechanistic timekeeping and billing-by-the-hour system embraced by the Hearing Committee has perhaps the greatest potential for abuse in that an attorney could easily log hours in his time book which, in fact, he did not work. The "conflict of interest" referred to in Conclusion No. 3 exists in every fee arrangement because it would always be in the attorney's "interest" to prepare a case in a manner that would maximize his fee, regardless of the type of fee arrangement chosen. We do not censure attorneys for what may, but did not, happen.

Not only is Conclusion No. 3 speculative, and not only is there no evidence to support it, but there is absolutely nothing in the text of DR2-106 which would even suggest that such a conflict would make any particular fee "excessive and improper." The appellant did not receive notice of any charge concerning his fee prior to the filing of the formal Complaint, and the Complaint itself does not disclose this so-called conflict of interest as a matter with which appellant is charged.

The Hearing Committee's Conclusion No. 3 also states:

that the fee was excessive,

"since by virtue of being non-refundable the client could not terminate the attorney-client relationship without suffering an economic hardship."

Once again, the Committee's conclusion is in no way encompassed by the text of DR2-106, nor did the Complaint in any way factually allege that the nonrefundable nature of the fee was any part of the charge against appellant. Appellant was simply never given any notice that this was something with which he was charged. The corporation's letter complaining to the Bar was not concerned with the amount of the fee and said nothing concerning its refundable or nonrefundable nature. Ex. 20. The issue of whether or not the fee was refundable arose in connection with the appellant's testimony during the hearing and became important only in the context of the debate which subsequently developed between the appellant, the prosecutor, and the Hearing Committee members. There is no language in the formal Complaint concerning nonrefundability. Appellant was cited for charging a fee which was "clearly excessive." He received no notice of any charge concerning whether or not the fee was refundable, and he was not afforded the opportunity to appear before the Screening Committee or the Hearing Committee insofar as that charge was concerned.

The same authorities cited above in connection with appellant's alleged violation of DR5-105 also require the

conclusion that appellant's statutory and constitutional rights were violated in connection with the alleged violation of DR2-106.

B. The Board of Commissioners did not base its order on proper evidence.

In making its recommendation to this Court, the Board of Commissioners of the Utah State Bar misrepresents that it considered the evidence. The Order Recommending Suspension recites that the evidence adduced at the hearing was considered; however, the Board of Commissioners did not review or examine exhibits or engage in any activity known to appellate tribunals as consideration of the evidence. The most that can be said is that the full Bar Commission met and listened to the three commissioners who constituted the Hearing Committee. The Bar Commission then reviewed the Findings of Fact and Recommendations made by the Hearing Committee and, apparently with one change, approved them. In effect, the appellate tribunal asked the trial judges what the evidence was, and then adopted as its own the evidentiary findings of the lower court without any independent examination of a single piece of evidence. Such is hardly "consideration" of the evidence.

The Board purported to act in compliance with Utah Code Ann. § 78-51-18 (Repl. 1953), which requires it to make findings and reports to the Supreme Court of the results of its hearings

and investigations and conclusions with recommendations, and

"in all cases in which the evidence in the opinion of a majority of the Board justifies such a course, shall recommend such disciplinary action by public or private reprimand, suspension from the practice of law, or exclusion and disbarment therefrom, as the case shall in its judgment warrant." (Emphasis added).

The plain fact is that the Board charged with making findings, conclusions and recommendations based on the evidence did not even look at the evidence. This Court, in Evans, supra, held that violations of evidentiary procedures in disbarment matters will void any findings based thereon: "Facts so found and findings so made without the issues, and found and made by methods at variance with the forms and practice of the court, and unauthorized by law, cannot support a judgment." 42 Utah at 314.

POINT II

THE FINDINGS OF FACT AND CONCLUSIONS FILED BY THE HEARING COMMITTEE AND APPROVED BY THE BOARD OF COM- MISSIONERS OF THE UTAH STATE BAR ARE NOT SUPPORTED BY PROPER EVIDENCE.

Disbarment proceedings place in issue important professional interests of the accused, and for that reason, the standard of proof imposed upon the prosecution is substantially more stringent than the standard applied in ordinary civil proceedings. Much more than a preponderance of the evidence is required. The prosecutor must prove the charge to "a reasonable

certainty," by "clear and convincing evidence." E.g., In re McCullough, 97 Utah 533, 95 P.2d 13 (1939); In re Macfarlane, 10 Utah 2d 217, 350 P.2d 631 (1960). The reason for the clear and convincing evidence standard is succinctly stated in the case of In re Hanson, 48 Utah 163, 167, 158 Pac. 778, 779 (1916) and by Justice Wade in the Macfarlane case:

"To disbar an attorney is a very serious matter indeed. It not only may deprive him of gaining a livelihood for himself and a dependent family, but it may, and usually does, result in preventing him from making available all antecedent preparation, although that may cover practically the period of a lifetime. In no other calling are such far-reaching consequences visited upon a delinquent who has not been found guilty of some felonious act. The rule, therefore, that the evidence should be clear and convincing is based upon a most solid foundation. . . ." In re Macfarlane, 350 P.2d at 636 (dissenting opinion).

Because of the harsh consequences of this type of disciplinary proceeding, disputes in the evidence should be resolved in favor of the attorney. See Hallinan v. Committee of Bar Examiners of State Bar, 421 P.2d 76, 80 (1966):

"In disciplinary proceedings this court examines and weighs the evidence and passes upon its sufficiency. . . . Any reasonable doubts encountered in the making of such an examination should be resolved in favor of the accused. (Black v. State Bar, supra, 57 Cal.2d 219, 222, 18 Cal.Rptr. 518, 368 P.2d 118; Browner v. State Bar, 48 Cal.2d 814, 818, 313 P.2d 1; Browne v. State Bar, 45 Cal.2d 165, 168, 169, 287 P.2d 745; Hildebrand v. State Bar, 18 Cal.2d 816, 834, 117 P.2d 860; see also Zitney v. State Bar, 64 A.C. 852, 855, 51 Cal.Rptr. 825, 415 P.2d 521, and In re Bar Association of San Francisco v. Sullivan, 185 Cal. 621, 623-624, 198

P. 7.)"

The Hearing Committee's essential Findings of Fact were not supported by clear and convincing evidence. Indeed, many of the Findings have no support in the evidence at all.

Finding No. 4 states that Ted Burr sued Mrs. Behunin. This is simply not true. Ted Burr filed a civil action against "Kay Lou Chevrolet Company, a corporation." Ex. 24. Finding No. 4 also incorrectly states: "That prior to that time Mrs. Behunin had never been involved in civil litigation other than divorce proceedings." Mrs. Behunin was not involved in this civil action. A corporation in the business of selling automobiles was the defendant. Finding No. 4 seems to infer that Mrs. Behunin was some naive individual, unsophisticated and ill-equipped to strike a fair bargain with a lawyer. To the contrary, the record indicates that Mrs. Behunin was the president, the sole stockholder, and the principal executive of a corporation engaged in the daily business of selling automobiles. The inference properly to be drawn is that she was a rather sophisticated business person who ought to have known whether or not she was getting a good bargain. In any event, the finding is erroneous, as is Finding No. 5, which states that Mrs. Behunin was served with summons and complaint. She was not. The corporation was served.

Finding No. 6 is concerned with the payment of the \$5,000 fee and implies that Mrs. Behunin paid the fee. She did not; the fee was paid by the corporation. Ex. 22. That finding is further erroneous because it states: "[T]he money would be retained regardless of whether or not the case went to trial." The only evidence from Mrs. Behunin in the record indicates that what was actually said was that the fee was \$5,000, "whether we settled out of court, whether we went to court." Tr. 16. Finding No. 13 states that the respondent represented Mrs. Behunin in the civil action. Again, he did not; he represented the corporation. Finding No. 14 states that the \$5,000 was paid by Mrs. Behunin. It was not. The corporation paid the \$5,000 fee. Ex. 22.

Finding No. 16 states that after the appellant advised Mrs. Behunin that he was representing, or intending to represent Mr. Burr, Mrs. Behunin advised him that this was contrary to her wishes. The evidence does not support this finding. See Point I of this Brief.

Finding No. 17 again states that the civil action was filed against Mrs. Behunin. No civil action was ever filed against Mrs. Behunin, and the finding is completely erroneous.

Finding No. 18 indicates that Mrs. Behunin filed a written complaint with the Utah State Bar. She did not; the corporation filed the complaint. The complaint was written on the

corporation letterhead, and it was signed, "Kay Lou Chevrolet-Oldsmobile, by Kay Lou Jenkins (Wheeler), President." Ex. 20.

Finding No. 19 refers to the meeting in appellant's office with Mrs. Behunin and her husband. It states that Mrs. Behunin requested the return of a portion of appellant's fee and said she would retain other counsel. The evidence in the record is contrary. Mrs. Behunin testified that she left that meeting with the idea that she would think it over and decide whether or not she wanted appellant for her lawyer. Tr. 33. She did not contact appellant again until her letter dated February 26, 1977. Ex. 15. It is true that this letter seems to indicate that a refund was requested during the meeting in question; however, this is contrary to Mrs. Behunin's testimony at the hearing, where she denied that a refund was ever discussed. See Tr. 18, 28, 33.

Finding No. 20 concerns the letter of February 26, 1977. The finding states:

"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."

The letter in question does not request a refund of the fee. Ex. 15. Moreover, there is absolutely no evidence in the record that the respondent thereafter refused to make a refund of any portion of the fee. The finding is erroneous.

The Conclusions of the Hearing Committee are erroneous as well, in part because they also assume that appellant was representing Mrs. Behunin in the civil action. On this basis, if for no other reason, Conclusions No. 1 and 2 are factually erroneous.

Conclusion 3(a) states that the fee 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."

There is no evidence to support this Conclusion, and it completely ignores the testimony of the appellant which was the only evidence presented on this point. The appellant testified that in fixing the fee he analyzed the case, its complexity and the location of the court in which it was pending. Tr. 57, 59; Ex. 24, 20. He considered the work which would be required and the time required for that work. Tr. 55. Appellant considered his experience, reputation and ability; he estimated the time and expense of preparation and the time which would be required for trial. Tr. 60, 62, 69, 115.

The record is clear that appellant considered most of the factors enumerated in DR2-105(B) of the Revised Rules of Professional Conduct of the Utah State Bar. There is nothing in the record to the contrary other than the argument of the prosecutor and the members of the Hearing Committee. Absolutely

no evidence was presented as to what a reasonable fee would be under the circumstances. No lawyers were called to testify concerning that matter. There is nothing in the record against which to measure the fee fixed by the appellant and the reasons he gave in justifying the amount. Disregard of the only evidence offered in point and the total absence of contradictory evidence hardly constitutes clear and convincing support for the Committee's Conclusion No. 3(a).

Neither the Hearing Committee nor the Board of Commissioners can take it upon itself to decide what a reasonable fee would be under the circumstances without any evidence. Indeed, a court cannot make such a determination without evidence, and courts would seem as competent in this regard as Bar Commissioners. In this connection, Rule III.6 of the Bar's Revised Rules of Discipline provides that hearings before the Board or its designees "shall be conducted in accordance with the rules and law of evidence and procedure applicable to conduct of trials in the District Courts of the State of Utah." As a matter of fact, one can easily argue that a fee of \$5,000 to defend an automobile dealership in a civil action pending in Sevier County involving breach of contract and an accounting is unreasonably low. This is especially true if the fee is a flat fee, meant to include all costs and expenses, including the costs of travel and discovery. Although the appellant could be

criticized for charging an unreasonably low fee, it is difficult to imagine how the Bar or anyone else could criticize him for charging an excessive fee. Perhaps this is why there is nothing in the record to indicate that his client accused him of that.

The general rule is that the amount of a lawyer's fee is not a matter for disciplinary action unless the fee is so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called. See In re Richards, 202 Or. 262, 274 P.2d 797 (1954).

In the case of In re Wiltse, 109 Wash. 261, 186 P. 848 (1920), the court held a claim of an excessive fee to be without merit and in so doing stated:

"we do not feel like depriving a practitioner of his right to continue his profession on a question as debatable as the propriety of the amount of a fee. Such a question is so much a matter of individual opinion that it should not be the basis of disbarment, except in the most aggravated and extreme cases."

Conclusion No. 3(c) states that since appellant's fee was nonrefundable, the client could not terminate the attorney-client relationship without suffering an economic hardship. A glaring non sequitur follows:

"In effect, the lawyer was no longer accountable to his client for the quality of his services or the propriety of his actions."

It is interesting that the only conflict of testimony which was resolved in favor of the lawyer in this matter was his

claim that the fee was not refundable. Mrs. Behunin disputed this; and, if the Hearing Committee had agreed with her, there would be no issue as to the propriety of that type of fee arrangement. More importantly, the fact that the fee may have been nonrefundable does not mean that the lawyer was no longer accountable to his client for the quality of his services or the propriety of his actions. Once again, the Committee indulges in pure speculation. No evidence was offered to demonstrate that the appellant ceased to deem himself, or cease to be, accountable to his client.

The Findings of Fact and the Conclusions of the Committee which were adopted by the Board are, by and large, erroneous. They are not supported by evidence in the record. Therefore, the Recommendation based upon the Findings and Conclusions is equally erroneous.

POINT III

THE RECOMMENDATION OF THE HEARING COMMITTEE WHICH WAS ADOPTED BY THE BOARD OF COMMISSIONERS IS UN-REASONABLE AND EXCESSIVE.

Aside from the unlawful manner in which appellant was charged and the denial of due process, and aside from the fact that most of the Findings and Conclusions are erroneous and not supported by proper evidence, the Recommendation of the Bar is simply unreasonable and excessive in light of the facts of this case.

This matter does not involve dishonesty. At the most, it involves a misunderstanding between appellant and his client concerning whether or not he was free to represent Mr. Burr, and whether or not he should refund some portion of the fee. Indeed, if the appellant and his client had a contract whereby for a set sum of money he would represent the company through trial, the dispute is whether appellant remained fully able to provide the contracted for service after he began representing Mr. Burr. If a court were to conclude that Mrs. Behunin consented to the appellant's representation of Mr. Burr, as the appellant testified she did, it is submitted that a court should find he remained able to provide the contracted for services and, therefore, was entitled to the entire contract price of \$5,000, regardless of the dispute as to whether it was a nonrefundable retainer.

There is no claim or even a suggestion that the client was hurt in any way. There is no evidence that any confidence was ever betrayed. There is no evidence that the civil case was lost or that the company's defense was in any way impaired by what happened. When Mrs. Behunin obtained other counsel and thereby actually asked the appellant to withdraw as counsel, he promptly did so.

The record contains no evidence that at least part of the fee was not earned. The issue concerning its

nonrefundability arose in the midst of the hearing itself. There is no evidence that the appellant would not refund a reasonable portion of the fee to his client. Appellant, in fact, testified that he would do that very thing, although he argued that he was not legally bound to do so. A review of the transcript indicates heated disagreement between appellant and the Hearing Committee concerning appellant's methodology as to how fees should be set. The Hearing Committee was not so much concerned with the case at hand as it was with appellant's disagreement with the timekeeping and billing practice preferred by the Committee.

Absent the procedural infirmities, this case can be reduced to rather simple terms. At most, the appellant accepted a fee in the nature of a nonrefundable retainer which was to be a flat sum from which all expenses, including his fee, were to be paid through trial of a civil matter. Subsequently, he thought he had the consent of Mrs. Behunin to represent Mr. Burr in another matter,* but later learned that Mrs. Behunin did not believe she had consented to that representation. Appellant then met with her to clarify the matter and she said she would

* Appellant also obtained the consent of Mr. Burr's attorney in the civil action, Tex Olsen, and the prosecutor in the criminal action, K. L. McIff. It is most unlikely that he would do this if he did not believe he had Mrs. Behunin's consent.

"think about it." The Bar interceded and told her to cease communicating with her company's counsel of record, and the Bar now claims this all constituted a conflict of interest and an excessive fee.

As to the conflict of interest, appellant ended up trapped by the Bar's instruction to his client. Initially, he thought there was no conflict and, even if so, he thought he had his client's consent. At the point in time when he learned otherwise, he was counsel of record charged with the ethical and legal obligation to continue representing Mrs. Behunin's company in a matter that had been set for trial until arrangements had been made that would insure no prejudice by his withdrawal. He met with his client to clarify the matter but the Bar interfered and eliminated communications to him which would have resolved the alleged conflict. The "conflict" promptly ended when, several months later, he was informed that new counsel had been retained. As soon as he learned that Mrs. Behunin had made up her mind to discharge him, he withdrew and the conflict, if it ever existed, promptly was terminated. At most, appellant continued representing the company when it was not clear in his mind whether or not he had his client's consent to the continued dual representation. However, he had little choice to do otherwise since he was counsel of record in a case set for trial. The "conflict" would have been resolved much more quickly and

the dilemma avoided had Mrs. Behunin ignored the Bar's instruction at an earlier date and informed the appellant of her decision.

As to the nonrefundable retainer and flat fee, the dispute is more properly for courts than Bar Commissioners. As noted previously, if a court found that appellant remained able to render the contracted for service, he is entitled to the entire contract price upon his wrongful discharge. The factual dispute as to whether or not Mrs. Behunin consented to appellant's representation of Mr. Burr would likely determine if appellant remained able to render the services for which Mrs. Behunin contracted. The Bar converts what is really a contract dispute into a charge that keeping the whole \$5,000 after termination of the relationship is improper. The Bar ignores the possibility that, if confronted with the issue, a court of law just might find that Mrs. Behunin improperly terminated the appellant and thereby breached the contract.

Moreover, at this point in time, the law is less than clear as to the proper area of concern for a bar association in connection with fees charged by individual lawyers. The Supreme Court of the United States recently held that a minimum fee schedule promulgated by a bar association was price fixing in violation of the Sherman Antitrust Act. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). If the Utah State Bar has some

idea that flat fees or nonrefundable retainers are improper, it should, at least, announce that policy in advance. To condemn appellant to a one year suspension for a flat fee or a nonrefundable retainer smacks of an ex post facto application of bar policy. Prominent attorneys throughout the United States often require a nonrefundable retainer before they will take on a matter for a new client. If nonrefundable retainers are to be outlawed, only the most prestigious lawyers in this state will be affected by the ruling. Similarly, flat fees, including therein all out-of-pocket expense, are not atypical in this community. They are most often utilized by lawyers defending clients in criminal matters. If flat fees or nonrefundable retainers are to be condemned by the Utah State Bar, all of the lawyers in this state should have notice of that fact in advance of disciplinary proceedings against any one of them. Common usage may not make a fee practice proper, but it certainly seems harsh to declare for the first time that what is a common practice is deemed improper; and, at the very same time, suspend a lawyer who engaged in that common practice. A notice to the effect that continuance of the practice would result in disciplinary action would seem much more appropriate.

Suspension of a lawyer for a period of one year is a harsh and severe penalty to exact. Appellant's prospective loss of income involves many thousands of dollars, and the injury to

his reputation and his standing in the community cannot be measured.*

Conflicts of interest are not unusual in this community or elsewhere. It is unusual to think, however, that a lawyer risks suspension for one year every time he begins representing someone who, in an unrelated matter, sued one of his clients. This is especially the case where he believes the first client consented to the second representation.

Assuming, arguendo, that appellant did have a conflict of interest in violation of the Code of Professional Responsibility and assuming, arguendo, that appellant charged an excessive fee, under all of the facts and circumstances of this case, it is unconscionable to suggest that appellant should be disciplined by suspension for a period of one year. The recommendation of the Board of Commissioners is unreasonable and excessive. It reflects prejudice and jealousy, not true concern with any danger to the public occasioned by the appellant's conduct.

* An example of the extent of the moral turpitude required for suspension of one year is In re Macfarlane, 10 Utah 2d 217, 350 P.2d 631 (1960). In that case, an attorney received a one year suspension for exercising undue influence on a 60 year old woman (with a mentality of a 12 year old) to include himself in wills and codicils prepared by him for 1/3 of her estate or \$285,000.

CONCLUSION

Appellant has not been accorded a fair hearing. The letter which the corporation wrote to the Bar complained of the conflict but not of the fee and sought advice from the Bar. Appellant was never afforded a hearing before the Screening Committee on the precise charges which were contained in the formal Complaint. When he moved to remand the matter to the Screening Committee, his motion was improperly denied. Moreover, the Complaint did not charge appellant with the specific violations which were later found by the Hearing Committee. Appellant had no notice of these charges and no opportunity to properly defend himself. Appellant has been denied due process of law, the benefit of the Utah statutes concerning the discipline of lawyers and the rights protected by the Bar's own disciplinary rules. The Bar's Hearing Committee evidenced a total lack of impartiality; they denied fundamental due process, they engaged in debate with the accused, they indulged in speculative findings, they accepted every simple piece of evidence offered against the appellant, they rejected everything he said unless it could be used against him, and they recommended the most severe penalty which their one-sided, speculative findings could support. The Findings and Conclusions of the Bar are not supported by clear and convincing evidence. Indeed, they are in large part not supported at all and are clearly erroneous.

Moreover, the Board of Commissioners did not consider the evidence in making its Order Recommending Suspension.

Beyond all of the defects which are fatal to the Order, the Recommendation contained therein is simply unreasonable and excessive in light of the facts of this case. The Findings of Fact and the Conclusions of the Hearing Committee which were adopted by the Bar should be reversed. The Order Recommending Suspension should be rejected by this Court.

Respectfully submitted,

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