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Hasan v. Nuclear Power Services, Inc., 86-ERA-24 (ALJ Sept. 25, 1986)

U.S. Department of Labor
Office of Administrative Law Judges
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San Francisco, California 94105

Commercial (415) 974-0514

Government 8-454-0514

CASE NO. 86-ERA-24

In the Matter of

S. M. A. HASAN
Complainant

v.

NUCLEAR POWER SERVICES, INC.,
STONE & WEBSTER ENGINEERING CORP.,
TEXAS UTILITIES ELECTRIC CO., INC.,

Respondents

DECISION ON MOTIONS TO DISQUALIFY RESPONDENTS' COUNSEL, FOR DEFAULT JUDGMENT, AND FOR SANCTIONS

Procedural background

This is a "whistleblower" case under the Energy Reorganization Act, as amended. 42 U.S.C. § 5851; 29 C.F.R. Part 24. On August 29, 1986, complainant filed a motion to Disqualify Respondents' Counsel, a Motion for Default Judgment, and a Motion for Sanctions. All three motions are based on certain events that

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occurred on July 31 and August 1, 1986, when complainant appeared to turn over documents that had previously been subpoenaed by respondents. On September 5, 1986, respondents filed their Opposition to Complaint's Motions. Following a telephone conference call on September 8, 1986, wherein the parties were advised that the pending motions were construed to include a motion under 29 C.F.R. § 18.34(g)(3) to deny respondents' counsel the authority to appear further in this action and that said section afforded the opportunity for hearing, the parties were allowed to file further affidavits and reply briefs in support of their respective positions, and to show cause why the matters should not be decided without a hearing. In response, complainant requested a hearing while respondents reasserted that no hearing was desired and that in lieu thereof the motions may be decided on the basis of all affidavits filed to date.

The general rule is that a hearing on motions is discretionary, 29 C.F.R. § 18.6(a-c), except in the case of an action to deny counsel the right of appearing that party is entitled to a hearing under 29 C.F.R. §18.34(g)(3). I do not find that the motions for default or sanctions require hearing in this case. And since it is respondents' counsel, not complainant, who is entitled to the hearing on the motion for disqualification, and respondents' counsel has waived the hearing,[1] it is concluded that all pending motions may be decided on the basis of the affidavits submitted by both parties.

Facts

Complainant in this matter is an engineer, residing in Fort Worth, Texas, who is alleging a violation of the Act as a result of discrimination against him by one or more of the respondents after he engaged in some form of protected activity. His attorneys are the Government Accountability Project ("GAP"), located in Washington, D.C. In late May of 1986, the person representing him was Ms. Billie Garde; when she subsequently took a leave in order to take the Bar examination, complainant's representation was turned over to Ms. Marya Young; at a deposition of complainant scheduled for August 13, 1986, in Dallas, Texas, the attorney appearing from GAP was Michael Kohn. Respondents are represented by the Washington, D.C., law firm of Bishop, Liberman, Cook, Purcell & Reynolds ("Bishop"). Bishop's attorney who dealt with Garde, Young and Kohn at the times relevant to the instant motions was McNeill Watkins, II.

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On or about May 28, 1986, respondents having previously subpoenaed the production of documents from complainant, Watkins and Garde agreed that prior to the deposition of complainant at which he would be questioned about the documents, they would be produced "informally." Subsequently, by which time Garde was away from the office to take the Bar examination, Watkins and Young agreed that the documents, estimated to be contained in 14 boxes, were to be delivered by complainant, without his attorney present, to a prearranged copy center in the Fort Worth area. Two days before the arranged date, Watkins called Young and asked that the documents be delivered instead to the offices of a Dallas law firm ("Worsham") in order that respondents could examine the originals for handwriting or other markings. Watkins's affidavit states that he advised Young that "a lawyer from our offices would be present to receive and examine the documents." Young agreed that complainant would appear with the documents on July 31 and August 1, 1986. Her affidavit states that because complainant preferred to stay with his documents she "requested that he be allowed to sit

near the documents while they were copied." In a subsequent telephone conversation Watkins and Young agreed that complainant's deposition was to take place on August 13, 1986.

On July 29, 1986, Watkins instructed William A. Horin, an associate attorney in the Bishop firm, to go to Dallas "to review documents to be produced by complainant and to supervise the copying of those materials." Horin, who is also an engineer, was instructed to "note whether there were any extraneous markings on or alterations of the documents," and to "attempt to organize the documents and to categorize them for use in an anticipated deposition." Horin's affidavit also states "I was further instructed not to engage Mr. Hasan in discussions concerning the substance of his claims."

At 9:00 a.m. on July 31, 1986, Hasan brought seven boxes of documents to the Worsham law offices. His wife and children were also with him. Horin met him in the lobby and assisted carrying the boxes to the law firm's offices on the 32nd floor. When Hasan was advised that a photocopy service employee would take the documents away to be copied, he indicated his desire to be present both while they were reviewed and copied. Hasan's affidavit states "I was specifically instructed by Mr. Horin not to go with this individual because I was needed to answer questions

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concerning the documents I had brought with me." Horin's affidavit states "Mr. Hasan then informed me that he had decided it would not be necessary, after all, for someone to accompany the documents to the copy center that day, but that he would probably want to do so the following day.... " The documents were divided and some three or four boxes were sent with the representative of the photocopy center; the balance remained in a conference room with Horin and Hasan. Hasan's wife and children were given access to another room to wait.

By about 11:00 a.m. Horin commenced reviewing the balance of the documents, with Hasan present, utilizing a copy of the subpoena and a legal pad to take notes. Horin's affidavit states: "I asked Mr. Hasan to tell me in response to which of the five subpoena specifications he was producing documents .... in order to place these documents in context, I asked Mr. Hasan where he had worked prior to and subsequent to Comanche Peak and the dates of such employment .... I asked how he came by these documents." After a lunch break from 12:00 to 1:00 p.m., Horin resumed his review of the documents in the conference room with Hasan present. Horin's affidavit states further:

> During the entirety of the time that we spent together while I reviewed the documents, Mr. Hasan and I spoke little. We did, however, engage in occasional small talk and, on occasion, I asked a question regarding a particular document. During the day, we discussed our engineering backgrounds: Hasan's in civil engineering and mine in chemical engineering. We exchanged the names of our alma maters and dates of graduation. Somewhat later in the day, I inquired, out of curiosity, if he had ever met Mrs. Juanita Ellis, the president of CASE, the organization that had intervened in the Comanche Peak licensing proceedings. I also asked how he had met his attorney, Ms. Billie Garde. Mr. Hasan described how he came to know each of those individuals ....
>
> The balance of what conversation we had related exclusively to the documents that Hasan had produced. I asked him, for example, if the handwriting on some of the documents was his or someone else's, what the subject of certain documents concerned, if it was not readily apparent from the face of that document, and as

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> I mentioned previously, in the case of documents that did not appear to relate to any of the jobs he had mentioned, I asked him to tell me where those documents had come from. On two occasions, we discussed the technical aspects of documents that had been produced.
>
> ...He then volunteered that he had gathered such documents at Comanche Peak and had assembled them in boxes at his desk prior to leaving the site. He explained, however, that before he left Comanche Peak with the documents he had so gathered, one of his supervisors, a Lead Engineer on the site, inspected the materials. I asked whether he knew if that was the normal procedure concerning the removal of documents from Comanche Peak. ....I did not pursue the topic any further.
>
> One of the documents produced by complainant depicted a strap-like pipe support design from a nuclear project other than Comanche Peak (and, thus, likely had no relevance to this case) .... out of curiosity, I asked Mr. Hasan what the purpose of the support was and where it was used. In that the cover memorandum to that study was from Mr. Hasan, I also inquired whether he had worked on the study. He answered these questions. I did not ask any further questions on this topic.
>
> Somewhat later, a similar conversation occurred in connection with a baseplate verification study, again from a project other than Comanche Peak, that I found among the documents produced .... I asked him what was the nature of the study reflected in that document. After Hasan told me, ...I posed no further questions on this topic.
>
> ... As Mr. Hasan had not mentioned before that he had worked in Chicago when I asked for a list of his employers at the beginning of the review, I inquired whether he had worked in Chicago after leaving Comanche Peak. He told me that he had not. I asked no further questions on this topic.
>
> Toward the end of the day, in response to a question I had raised regarding the source of one of the documents produced, Hasan stated that I should already be aware

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> of answer from having read his interrogatory responses .... Although I did not seek to pursue the matter further, Mr. Hasan stated that he thought it best if we did not talk further without his attorney present. I assured Hasan that I had no wish to do anything but accommodate his desires in this regard. In an attempt to assure him and make him feel more comfortable, I pointed out that everything that had passed between us was in the nature of friendly, informal conversation. I explained that formal questions and answers would come at his deposition....

From about 4:00 to 5:00 p.m. "the important documents" Hasan had separated for photocopying at the law firm's offices were photocopied in his presence. Since Horin had not completed his review of the three or four boxes of documents by 5:00 p.m., Hasan agreed that Horin could complete the boxes before him that night without Hasan being present, and that they would resume the next morning. Hasan left with the other boxes that had by then been returned from the outside photocopy center.

Hasan's affidavit states that in answering Horin's questions "[a]t all times I painstakingly gave complete and thorough responses, believing that I was required by law to do so." In the evening of July 31, 1986, Hasan attempted to telephone an attorney at GAP but was unable to reach any; instead he reached one of GAP's directors, who advised him not to answer any questions by Horin or anyone else when he presented the balance of the documents on the following day. When Hasan returned to the law

firm offices with the remaining documents on August 1, 1986, Horin's affidavit states: "he announced that he had spoken to his attorneys the previous evening and that he had been advised not to have further conversations with me, except in relation to the production of documents. I assured him that that was no problem and expressed my view that, in fact, we had so limited our discussions the preceding day." Hasan was asked and answered two questions, one concerning whether handwritten notes on a document were Hasan's, and another concerning what the number "40" meant on the same document. Also, pursuant to Hasan's proposal, he accompanied the documents to be photocopied to the copy center and his wife sat with Horin while he reviewed the remaining documents.

There is no evidence of any further communications regarding the July 31-August 1 meetings, either between Hasan and his

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attorneys or between them and Bishop, until Kohn appeared at the scheduled August 13 deposition of Hasan. At that time, Kohn claimed to have just learned the nature of the Hasan-Horin meetings, various objections were raised, and Watkins offered to stipulate not to use any information obtained at the meetings. A telephone conference call was held, in my absence, with judge Burch, who quashed the deposition subpoena and allowed the parties to take whatever further action they deemed appropriate. Respondents noticed another deposition of complainant and complainant moved to quash that subpoena until the instant motions could be filed; a temporary protective order was issued precluding said deposition until the pending motions are resolved.

Arguments

Complainant contends that "Fifth Circuit Court of Appeals jurisprudence," applying Canons 7 and 9 of the Texas Code of Professional Responsibility (Tex.Rev.Civ.Stat. Title 14 App.Art.12, § 8),[2] mandates disqualification of counsel where: 1) there is "at least a reasonable possibility that some specifically indentifiable impropriety" has occurred, and 2) the likelihood of public suspicion of, or obloquy regarding, such an impropriety is sufficiently strong to outweigh the interest of respondents being represented by counsel of their choice. *See Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976); *Shelton v Hess*, 599 F.Supp. 905 (S.D. Tex. 1984). It is argued that the questioning by Horin of Hasan on July 31-August 1, 1986, without his counsel present, constituted violations of both Canons 7 and 9, that the information obtained by Horin, if "reflected in trial preparation and trial strategy employed by Respondents' Counsel," will cause complainant irreparable harm, and that the public interest underlying the Energy Reorganization Act outweighs the interest of respondents in being represented by the Bishop firm.

Respondents contend there was no violation of ethical standards where complainant's counsel knew about the meetings between Horin and Hasan, expressed no limitations on the communications that were to occur, did not instruct complainant in advance of the meetings, and where the communications that did occur "did not concern the merits or the substance" of the claims in this action. Respondents further assert there was no prejudice shown as a result of the subject meetings and communications. In support of their position respondents distinguish those cases cited by complainant and instead rely, in part, on a Wisconsin disciplinary

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proceeding, *In the Matter of the Disciplinary Proceeding Against Bartley C. Mauch*, 107 Wis.2d 557, 319 N.W.2d 877 (Wis. 1982), where a referee concluded an attorney's meeting with the adversary party outside the presence of counsel was not actionable because the adversary's counsel knew of the planned meeting and did not forbid it.

Discussion and Conclusions

While the analyses applying the Canons of Ethics in Texas and Wisconsin are instructive, I do not consider them dispositive in this case. These proceedings are governed by the Federal Rules of Civil Procedure and the Regulations, see 28 U.S.C. § 2072; 29 C.F.R. §§18.1(a), 18.29(a), 24.5, which empower an administrative law judge to take appropriate action consistent with regulating the course of a fair hearing within the meaning of the Administrative Procedure Act. *See* 5 U.S.C. §§554-556. Thus, while under 29 C.F.R. § 24.5(d) respondents have the right to be represented by counsel, under 29 C.F.R. § 18.34(g)(3) the "privilege of appearing" as counsel may be denied if it is found that counsel "has engaged in unethical or improper professional conduct;" and under 29 C.F.R. § 18.36(b) counsel may be excluded, suspended or barred from participation in a particular proceeding for "refusal to adhere to reasonable standards of orderly and ethical conduct." Implicit in these provisions is the premise that unethical or improper professional conduct by one party's counsel deprives the other party of "rights essential to a fair hearing." See 29 C.F.R. § 18.35(c). Therefore, the question before me is whether the meeting or communications between Horin and Hasan on July 31- August 1, 1986, constituted unethical or improper professional conduct on the part of the Bishop firm. I must conclude that while the meeting itself was authorized and proper, the questioning by Horin was improper professional conduct.

It is clear to me from the affidavits that complainant's counsel, Young, had initially agreed with respondents' counsel Watkins to have Hasan turn over voluminous documents at an independent photocopy center in advance of the occasion when he was to be deposed about those documents. The ostensible purpose of the advance turn over procedure was two-fold: to allow GAP to avoid the expense of two trips to Texas, and to enable respondents' attorneys to examine the documents and prepare before the time when complainant would be questioned about them. The change of plans two days before the date set for the turn over was for the

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convenience of respondents, to allow them to have someone determine, before photocopying the documents, whether any had any notations that might not photocopy. I am convinced that Young, in agreeing to the change of plans, allowing Hasan to turn over the documents at the Worsham law offices instead of at the copy center, was only permitting the delivery to the Worsham offices to be a substitute, as far as her client was concerned, for what was first intended to occur at the photocopy center. Stated differently, just as Hasan would have had merely to wait at the copy center while someone designated by respondents examined each document, so he should have been dealt with at the Worsham offices. I must reject respondents' contention that Young had "an affirmative duty to raise objections and forbid or condition the meeting between [her] client and opposing counsel." Respondents' Brief at p. 13. That argument is tantamount to saying Young had a duty to have respondents promise not to do anything unethical while her client was there; clearly Young had a right to expect that respondents would behave properly and ethically without exacting a written statement to that effect. Respondents' counsel should have done nothing more than take the documents, examine them for written notations, and have them photocopied, consistent

with Watkins's representations to Young.

While I am sympathetic to Horin's position in trying to be a gracious host to Hasan while he sat with him for the better part of the day, I reject the inference that since Hasan had requested to be present while the document examination took place, it was permissible to engage him, first, in "some innocuous questioning about the documents" and, second, in "some idle chit chat" about subjects that arose in the course of eight (or even fewer) hours. Respondents say "this is not the stuff of prejudice," see Respondents' Brief at p. 18. That is not the point; it was especially because Young had agreed to allow complainant to turn over the documents at a law office, without her being present, that it was respondents' counsel who had an affirmative duty to be scrupulous in seeing to it that there was no over-reaching. First, with respect to the questioning about the documents, it is apparent that Horin began the type of process that occurs at a formal document return of subpoena, *e.g.*, asking which documents pertain to which specifications, etc. That was not what the July 31- August 1 meeting was supposed to be. It was to be an opportunity for respondents to examine the documents in advance of photocopying nothing more. That could have been accomplished almost as a ministerial act by a clerical person or, as respondents were free

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to choose, by a lawyer/engineer who was presumably more knowledgeable in assessing the relevance of the documents as he went through them. But the underlying point is that but for Hasan's preference not to let his documents out of his sight, respondents would have had to review the documents without any access to him for questions about the documents or how he came into possession of them, etc. That is all that should have occurred while Horin reviewed the documents with Hasan present; *i.e.*, since Hasan chose to remain in the conference room, he should have been allowed to do so, treated civilly, even been given a magazine or newspaper to pass the time, but he should not have been used as a resource to explain anything about the documents. That was to come later, at his deposition, with his counsel present.

It is, however, to use respondents' term, the "idle chit chat" at the July 31 meeting that I find most objectionable. It was in the course of just such exchanges, which would not have occurred in a deposition setting with opposing counsel present, that respondents' counsel had the opportunity to obtain an assessment of their adversary. Culled from not only the actual answers elicited but from observations of his demeanor or even impressions gained during the course of some eight hours of exposure, such assessment of his potential pressure points is of obvious use in cross-examination, in further investigation of leads, and in settlement negotiations. In this connection I note that respondents have submitted a sealed envelope, intended for my in camera inspection; it is stated that the envelope contains the actual notes taken by Horin during the course of his meetings with Hasan, and it is argued that the notes are "probably the most inherently reliable evidence of what it was that Horin believed significant." Respondents' Brief at p. 18. Since, as I will explain, I disagree as to the relevance of the notes and their evidentiary weight, I decline to examine them. First, it is self-evident that the notes are not a transcript of what transpired between Horin and Hasan during eight-plus hours. Second, assuming arguendo that some grossly improper communications took place, they could have easily been omitted from the notes. Finally, and in my view, most important, even assuming that no grossly improper questions were asked, the types of mental impressions and observations of Hasan's demeanor, character, and vulnerabilities that may have been gleaned during the course of the meetings were not likely to have been reflected in notes taken contemporaneously.[3] In short, no one can know with certainty

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what was communicated or transmitted to respondents as a result of the "innocuous questioning" in this case. To the extent there remains the possibility that even one item of information or impression was gleaned, as evidenced by Watkins's offer not to use any information obtained, respondents gained an unfair advantage that was and is prejudicial to complainant. *Cf. Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1202-1203 (11th Cir. 1985).

In summary, I find that the questioning of complainant at the July 31, 1986, meeting went beyond the mere delivery of documents that had been agreed to, and was therefore improper professional conduct within the meaning of 29 C.F.R. § 18.34(g)(3).

Sanctions

As I readily recognize the severity of the sanction of disqualification, I have considered whether there is an alternative short of disqualification that would remedy the objectionable conduct. Unfortunately, I conclude that there is none. First, regarding respondents' offer to stipulate not to use any information obtained at the July 31-August 1 meetings, I believe that would be a remedy that is impractical, if not impossible. As indicated, the gravamen of the impropriety was the opportunity to glean not only information but impressions to be used in furtherance of the preparation of respondents' defense. The bell cannot be unrung either insofar as Horin's observations and impressions are concerned, or as to any debriefing that subsequently took place between him and other members of the Bishop firm. Similarly, the sanction of prohibiting respondents from any further contact with complainant, including taking his deposition, would not cure the effects discussed above. Lastly, prohibiting Horin or any member of the Bishop firm with whom he consulted from participating further in the proceeding must be deemed inadequate as the improper conduct on July 31 must be imputed to the firm as a whole.[4]

Accordingly, I conclude that the only appropriate remedy that will serve both to cure the effects of the impropriety in this case and to maintain respondents' rights to counsel is the disqualification of the Bishop firm and the naming of new counsel. 29 C.F.R. §§18.34(g)(3), 24.5(d).

I do not agree with complainant that the improper conduct in

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this case warrants a default judgment. while, as indicated above, I have found that respondents' counsel over-reached at the July 31-August 1 meeting, I would characterize the situation as an exhibition of imprudence on both sides. That is, although, according to an expurgated letter, dated June 5, 1986, from Garde to Hasan, which is attached to his supplementary affidavit,[5] Garde had advised him "do not discuss anything with anyone from Texas Utilities, except details on copying the documents," that instruction evidently contemplated the delivery of documents to a photocopy center, not a law firm office. It is also apparent from Hasan's affidavits that the change of location somehow caused him to believe he was supposed to answer questions, thus superceding the instructions in Garde's letter. This would not have occurred, in my judgment, had Young not acceded to Watkins's request, had Hasan been given new instructions once the Young/ Watkins agreement had been concluded, or had the

decision to save GAP money by not sending an attorney been altered once it was agreed that the documents were to be delivered to the Worsham offices. In short, though the improper conduct of respondents' counsel is neither absolved nor condoned, I am persuaded that the opportunity for the impropriety would not have arisen had complainant's attorneys acted differently. Under these circumstances and because I believe the impropriety will be remedied by disqualification of respondents' counsel, I conclude that a default judgment is not the proper sanction in this case.

With respect to complainant's demand for "all costs associated with Mr. Hasan's August 13 deposition and Complainant's various motions," I will allow the filing of an itemized petition for partial costs, those reasonably incurred in the preparation of the various motions and affidavits resulting from the events of July 31-August 1, 1986.[6] As to the costs of Kohn's travel to the August 13, 1986, deposition of complainant, however, in view of the phone call complainant made to GAP in the evening of July 31, 1986, it is apparent that Kohn's travel could have been avoided had he or anyone at GAP been in adequate communication with their client between August 1 and 13. Therefore, the motion for costs against respondents is granted in part and denied in part.[7]

ORDER

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It is therefore ordered that:

1. The Bishop law firm is disqualified from further participation in this proceeding and shall not: i) turn over to respondents' new counsel any notes (or copies thereof) prepared by Horin during or after the July 31-August 1, 1986, meeting with complainant; ii) communicate to respondents' new counsel any information regarding the July 31-August 1, 1986, meeting with complainant, including but not limited to any information from debriefing Horin and any information obtained as a result of such debriefing; provided however that the copies of the documents supplied by complainant at said meeting may be turned over.

2. Respondents shall have 20 days to name new counsel, who shall submit, under penalty of perjury, a statement that no matters precluded in paragraph 1 above have been or will be received.

3. Complainant's Motion for Disqualification of Respondents' Counsel is granted. Complainant's Motion for Default Judgment is denied and the Motion for Costs is denied in part and granted in part.

4. The Temporary Protective Order, issued August 21, 1986, continues to be in effect until the naming of new counsel under paragraph 2 above, which may then re-notice complainant for deposition. Respondents' Motion for an Extension of Time to File Prehearing Statement, filed August 29, 1986, is granted; the exchange of information set forth in para. 2 of the July 23, 1986, Pre-Hearing Order shall be filed by both complainant's counsel and respondents' new counsel on December 20, 1986. Complainant having filed no timely response or objections to date, Respondents' Motion for a Protective Order, served September 7, 1986, regarding certain Interrogatories and Request for Documents served by complainant, is granted.[8]

5. The hearing previously scheduled for September 18, 1986, is hereby rescheduled at 9:00 a.m. on January 20-22, 1987, at the same location:

Tax Court
Room 505, 5th Floor
1900 Pacific Avenue, Dallas, TX.

ALFRED LINDEMAN
Administrative Law Judge

Dated:
San Francisco, California

[ENDNOTES]

[1] While counsel suggests in his latest submission, Reply Brief at p. 9, that a hearing would be desired "only if ... there appeared to be an appropriate basis for granting complainant's motion to disqualify respondents' counsel, that is both patently illogical and inconsistent with his repeated statements in the September 8, 1986, conference call, in his September 17, 1986, Motion to Strike Complainant's Response to Order to Show Cause (see para. 5, at p. 5), and in the September 22, 1986 Reply Brief itself (see pp. 2, 5-8, 9), all of which declined a hearing.

[2] Canon 7: A Lawyer Should Represent a Client Zealously Within the Bound of the Law DR 7-104: Communicating With One of Adverse Interest. (A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Canon 9: A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

[3] Complainant's reply brief asserts that the notes must be turned over to complainant's counsel as a remedy in addition to the other sanctions sought. Since I conclude that the impropriety involved in this case will be cured in the fashion indicated in the "sanctions" section below, the notes will not be turned over to complainant. The unopened envelope, however, will be retained in the record of this proceeding. Further, with respect to complainant's contention, Reply Brief at pp. 29-30, that Horin's questioning of Hasan would gain Horin's clients an unfair advantage in certain other ongoing regulatory proceedings in which Horin is counsel of record, it is noted that appropriate measures may be sought in those proceedings.

[4] It would also be unfair to respondents themselves, and to this tribunal, to allow respondents' counsel to remain in the case and permit the possibility, if not likelihood, that a mistrial would have to be declared upon the appearance during the hearing of any fruits of Horin's questioning of complainant.

[5] I agree with respondents' counsel insofar as the inadequacies of complainant's supplementary affidavits are concerned; those shortcomings, however, go to the weight to be given their contents in an administrative proceeding.

[6] A copy of the petition shall be served on Bishop, which shall have ten days from service to file any objections. The petition should include the hours of services rendered, the identity and experience of the person performing them, the usual and customary hourly billing rate of GAP, etc. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, ___ U.S.___ , 106 S.Ct. 3088 (1986).

[7] I also deny complainant's requests to certify for appellate review pursuant to F.R.C.P. Rule 54(b) his motions that have not been granted. *See* 29 C.F.R. § 24.6, 24.7.

[8] *See* 29 C.F.R. §§18.4(c), 18.6(b).