IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

ANDREW J. MIRABOLE,

Respondent.

CONFIDENTIAL

CASE NO. 67,693
(TFB No. 13B84114)

THE FLORIDA BAR'S ANSWER BRIEF

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STATEMENT OF THE CASE

This disciplinary proceeding is before this Court upon Respondent's Petition for Review of the Report of the Referee finding Respondent Andrew J. Mirabole in violation of Florida Bar Code of Professional Responsibility Disciplinary Rule 2-106 (A) (charging a clearly excessive fee), as evidenced by the guidelines set out in DR 2-106 (B). The referee recommended that the respondent be brought before The Florida Bar for a public reprimand.

The Petitioner in this Petition for Review is Andrew J. Mirabole and the Respondent is The Florida Bar. In this an Answer Brief, each party will be referred to as they stood before the Referee. Record references in this brief are to portions of the trial transcript (TT) and Respondent Mirabole's Opening Brief (RB).

STATEMENT OF THE FACTS

The Bar accepts the respondent's statement of the facts, with the following exceptions and additions:

Respondent was assisted in this matter by his associate, Mr. Ronald Napolitano. Respondent billed complainant for Mr. Napolitano's time at the rate of $100.00 per hour. Bar Exhibit 3. Mr. Napolitano expended approximately 14 hours on this case prior to the time a fee agreement was entered into between complainant and respondent. Bar Exhibit 3.

Respondent not only told complainant he would have to sue her for the money, he did sue her for the money. Bar Exhibit 6.

Attorney Freeman did not tell complainant to file bankruptcy. Complainant told Mr. Freeman "I'm going to have to file bankruptcy, you know." TT. 44.

SUMMARY OF ARGUMENT

There is adequate precedent to support the imposition of discipline on an attorney who charges a clearly excessive fee. The referee in the instant case determined that respondent was guilty of charging a clearly excessive fee. This determination was made after a careful assessment of all the evidence presented in conjunction with the guidelines set forth in DR 2-106(B).

Complainant consulted respondent for assistance in recovering $3,021,00. Eight months later, complainant's total attorney's fees and costs totalled almost $26,000.00. Respondent relies on the fact that the parties had entered into a valid fee contract and that all of the work he performed was documented. He further relies on the fact that he was called upon to defend a counterclaim, which required many hours of work.

However, the written fee contract was entered into halfway through the attorney/client relationship. Respondent charged complainant $100.00 per hour for the work of his assistant, Mr. Ron Napolitano. Some of this time was expended by Mr. Napolitano to educate himself in the area of mechanic's lien law, as well as for several errands.

The matter did become hotly contested, yet respondent never informed complainant about the rapidly escalating fees

and costs. On May 4, 1984, respondent forwarded the first fee statement to his client in the amount of $23,966.00. He then withdrew from the case and sued the client for the fee. As a result, the client, who then hired other counsel, was forced to the verge of bankruptcy.

The referee's recommendations are clearly supported by the record and should be upheld.

ARGUMENT

I. THE REFEREE'S RECOMMENDATION SHOULD BE APPROVED AS CLEAR AND CONVINCING EVIDENCE WAS PRESENTED TO SUPPORT HIS FINDING THAT RESPONDENT VIOLATED DR 2-106(A), AS EVIDENCED BY THE GUIDELINES IN DR 2-106(B).

Excessive fee cases are somewhat unique in that they turn on a factual argument as opposed to a legal argument. The Florida Bar Code of Professional Responsibility, DR 2-106(B), sets out factors that are to be considered as guides in determining the reasonableness of a fee. The facts of each case are applied to these guidelines, and a determination is made as to whether the fee involved is excessive. The referee in the instant case found the respondent guilty of charging a clearly excessive fee, as evidenced by these guidelines.

This Court has previously held that the charging of an excessive fee is grounds for attorney discipline. The Florida Bar v. Kirtz, 445 So.2d 576 (Fla. 1984); The Florida Bar v. White, 368 So.2d 1294 (Fla. 1979). The following will demonstrate that clear and convincing evidence was presented at trial to support the referee's finding of an excessive fee in this case. The facts and evidence presented at trial will be discussed in conjunction with the guidelines set forth in the Code of Professional Responsibility.

One of the factors to be considered is whether the fee is fixed or contingent. Fla. Code Prof. Resp., DR 2-106(B)(8). Respondent relies on the fact that he and his client, Mrs. Bonnie Rodriquez, entered into an agreement that was clearly

understood by the client as to the charges she would be incurring on an hourly basis. RB. 10. Previously, this Court found that argument to be without merit. The Florida Bar v. Moriber, 314 So.2d 145 (Fla. 1975). In that case, the court stated that even if it were presumed that the client was an experienced and educated party dealing at arm's length with the attorney, the attorney could still be disciplined for overreaching where the fees charged are grossly disproportionate to the services rendered. Id. at 149.

It must be remembered that Mrs. Rodriguez frequently expressed to respondent her concern over the attorney's fees in this matter. The contract that was in issue contained a provision for an award of reasonable attorney fees to the prevailing party and Mrs. Rodriguez was certain she would prevail. TT. 31. The matter soon became hotly contested; however, respondent neither provided her with an hourly breakdown nor informed her of the rapid acceleration of his fee. TT. 33. It is interesting to note that the fee contract upon which respondent relies so heavily provides, "All fees and costs should be paid up to current amount due prior to trial in the case." Bar Exhibit 3. However, respondent failed to send Mrs. Rodriguez a bill or a statement informing her of these rapidly accelerating fees and costs until his final fee statement of approximately $24,000.00, not including fees previously paid by Mrs. Rodriquez. At no time did he explain to her what a "reasonable" fee award in this matter would be.

In the past, when the court was called upon to determine

a reasonable fee, it adhered to the principal that the fee agreement between the prevailing party and the prevailing party's attorney must not control, or the courts would find themselves as instruments of enforcement, as against third parties, of excessive fee contracts. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). Furthermore, Attorney Grover Freeman, who testified on the excessive fee issue, stated that, in his opinion, even though the matter had become a very involved thing, since there was only $3,000.00 in controversy, no judge would award a fee that approximated $26,000.00 to a successful litigant. TT. 95, 113.

Respondent further relies on the fact that the work performed by him and his associate was documented and supported by evidence. In this respect, he analogizes his case to The Florida Bar v. Quick, 179 So.2d 4 (Fla. 1973), where the court determined that the fee charged accorded with the fee agreement to the extent that the lawyer's time charts were accurate and did not reflect a padding of the bills.

The evidence presented at trial showed that respondent began representation in this matter on September 6, 1983. TT. 130. The fee agreement was entered into on January 18, 1984. TT. 147. Bar Exhibit 3. Mrs. Rodriguez did not receive a statement regarding the amount of fees that she had incurred until after May 4, 1984. Bar Exhibit 5. This statement covered the entire period from September, 1983,

until May, 1984. The statement gave an itemized listing of all the hours that respondent and his associate spent on the case.

The first listing on respondent's time sheet is for 1.5 hours for a conference with client and a letter to the opposing party. Mrs. Rodriguez testified that respondent told her the fee for writing the letter was $75.00, which she promptly paid that very day. TT. 27. Seven months later Mrs. Rodriguez received respondent's statement, which in actuality reflected a charge of $150.00 for work done pertaining to that initial consultation.

There are also problems with the fee charged for the hours billed to Mr. Napolitano, respondent's associate. These facts should also be considered in light of the guidelines set forth in DR 2-106(B)(1) and (7). These are:

> The time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; and the experience, reputation, and ability of the lawyer or lawyers performing the services.

Mr. Napolitano testified that he normally charged his own clients $75.00 per hour, while respondent was billing out his time at $100.00 per hour. TT. 53. Respondent contends that the fee agreement was quite clear that that rate would be applied to any attorney in the office. RB 7. It must be remembered that the fee agreement was signed after Mr. Napolitano had already spent twelve hours preparing a mechanic's lien. Mr. Napolitano had never prepared

a mechanic's lien before. Attorney Grover Freeman, who testified on the issue of excessive fees stated, "...given the circumstances of his never having done it before, that charging $100.00 per hour for preparing of a lien was excessive..." TT. 94.

Mr. Freeman also pointed out other instances where he found that $100.00 per hour for Mr. Napolitano's time was excessive. A half hour was charged for Mr. Napolitano to walk to the courthouse to file the lien. This amounted to a fifty dollar charge, which Mr. Freeman felt was not cost efficient. TT. 94. Mr. Freeman summed up his position by stating:

> I think that what was excessive about the fee was the amount of work that went into it, given the economic question that was being litigated without the client apparently being advised of the extreme cost that was mounting day by day. TT. 117.

Mr. Napolitano's time log also reflects charges for several trips to Tampa to have affidavits signed. Bar Exhibit 5. He testified that frequently respondent went with him, and the time would be charged by either one of them. TT. 57. The Third District Court of Appeals recognized that various types of legal work command differing scales of compensation. Dade County v. Oolite Rock Co., 348 So.2d 902 (Fla. 3d DCA 1977). The court adopted the reasoning from Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), which stated:

> It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts

> and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-lawyer work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it. Id. at 717.

The court in Dade County found that the fee that had been awarded was excessive, and the basic factor which made it so was that the work for which it was allowed was not of a kind or type of legal work for which a fee in such amount would be reasonable or justified. Id. at 904.

It is interesting to compare the respondent's charges for Ronald Napolitano's work in relation to respondent's hourly rate. Mr. Napolitano testified he was a salaried employee of the respondent. TT. 50. His salary in 1984 was fifteen or sixteen thousand dollars a year. TT. 52. As Mr. Napolitano did not have many of his own clients, he primarily assisted with respondent's clients. Other than his salary, Mr. Napolitano stated that he did not receive any extra compensation for his work on this case or other cases involving respondent's clients. TT. 58. The respondent expressed concern that a compromise settlement would not compensate Mr. Napolitano who had expended 108 hours on the case. TT. 150. Considering the actual charge for Mr. Napolitano's time, his portion of the fee billed to Mrs. Rodriquez would have amounted to two-thirds of his annual salary.

Other factors to be considered are the amount involved and the results obtained, and the fee customarily charged in the locality for similar legal services. Fla. Code Prof.

Resp. DR 2-106(B)(3) and (4). Mr. Freeman, who took over representation of Mrs. Rodriguez in this matter, testified that he had reviewed the file and spoken with other counsel in the area of commercial law in reference to the fee respondent charged Mrs. Rodriguez. TT. 92. Mr. Freeman concluded that the charges rendered were excessive for the work that was done. TT. 92. He reached this conclusion based on the fees charged for Mr. Napolitano's time, and the potential recovery that could be expected. TT. 95.

Mr. Freeman recognized that the respondent and opposing counsel went at each other almost personally. TT. 105. Discovery was taken that is not normally associated with cases of this magnitude and that the case had gotten out of hand. TT. 94. Mr. Freeman stressed that there comes a point in time when the client needs to be made aware of his options, especially when the case becomes a matter of principle as opposed to a matter of economics. The client should have a clear understanding as to how expensive it is going to be to continue the matter. TT. 105.

Obviously this did not happen. Mrs. Rodriguez sought respondent's help in recovering $3,021.00. Eight months later she received a bill for $23,966.98, which was the first statement she ever received pertaining to fees. The case was eventually settled with no money changing hands. TT. 101.

Another factor to be considered is the nature and length of the professional relationship with the client.

Fla. Code Prof. Resp. DR 2-106(B)(6). Mrs. Rodriguez had been acquainted with the respondent for several years. In fact, she leased an office from him in 1981, which she used to start her own business. TT. 20. She initially sought his professional assistance in the current matter in September, 1983. She went to him because she knew him.

The first time there was any discussion as to the rapidly escalating fee was at the end of April, 1984, when respondent called Mrs. Rodriguez to tell her that the judge would not hear the case until the parties tried to settle the matter. TT. 33. After a discussion of possible settlement options, Mrs. Rodriguez asked the respondent how much she owed him. The respondent told her that since he had known her for such a long time, he would only charge her $5,000.00 for his fee, and $1,500.00 for costs. TT. 34. Mrs. Rodriguez told the respondent to try to arrange a settlement, but the settlement offer was declined by the defendant. Three weeks later and without notice, Mrs. Rodriguez received a bill for $23,966.98 from respondent.

Previously, this Court recognized the impact of attorneys' fees on the credibility of the court system and the legal profession, when it stated:

> There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the

> administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that. It brings the court into disrepute and destroys its power to perform adequately the function of its creation.

Baruch v. Giblin, 122 Fla. 59, 63, 164 So.2d 831, 833 (1935). This Court recently reaffirmed this philosophy, in light of the substantial increase in the number of matters in which courts set attorneys' fees. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985).

The case at bar presents an excellent example of a member of the public whose confidence in the bench and bar has been seriously undermined. Mrs. Rodriguez sought assistance from the respondent in recovering $3,021.00. Sadly enough, that money was owed to her by another attorney. Mrs. Rodriguez never recovered that money.

Instead, she faced an ordeal that was emotionally and financially devastating. She found herself liable to her own attorney for approximately $24,000.00 in fees. She was faced with defending suits against the opposing attorney and her own attorney for the greater portion of those fees. She had to retain yet another attorney to assist her in the suit for fees, as well as continue with the original suit once the respondent had withdrawn. Naturally this entailed more fees. Mrs. Rodriguez soon found herself on the verge of bankruptcy.

The referee assessed the credibility of the testimony and exhibits and as a result, found respondent guilty of

violating DR 2-106(A) and recommended that respondent be brought before The Florida Bar for a public reprimand. The referee's findings are well supported by the record. The referee's findings and recommendations should be upheld unless clearly erroneous. The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978).

CONCLUSION

All evidence presented by the Bar and admitted in these proceedings was properly considered by the referee for its reliability and probative value.

The record in this case reflects by clear and convincing evidence that respondent charged and attempted to collect a clearly excessive fee, as determined by the referee.

A public reprimand is an appropriate penalty in this case.

The Bar asks this Honorable Court to uphold the referee's recommendations that respondent be found guilty of violating Disciplinary Rule 2-106(A), as evidenced by the guidelines set forth in DR 2-106(B), and that respondent receive a public reprimand and be assessed costs in this case.

Respectfully submitted,

By: _____
DIANE VICTOR KUENZEL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U. S. Mail to RICHARD T. EARLE, JR., Co-Counsel for Respondent, 150 Second Avenue North, Suite 1220, St. Petersburg, Florida, 33701; and MICHAEL L. KINNEY, Co-Counsel for Respondent, 208 South MacDill Avenue, Tampa, Florida, 33609, on this 17th day of September, 1986.

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