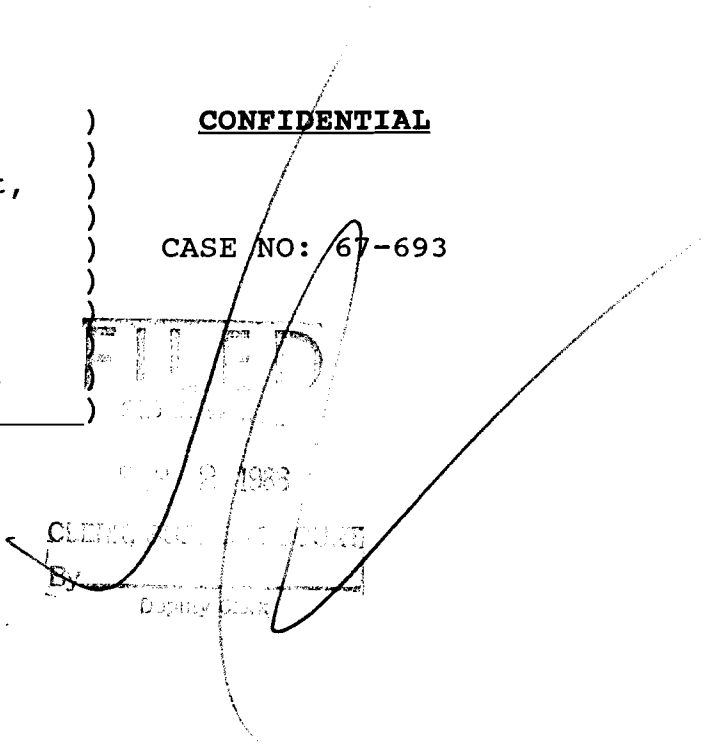
IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, Complainant,	)	**CONFIDENTIAL**
vs.	)	CASE NO: 67-693
ANDREW J. MIRABOLE, Respondent.	)	



RESPONDENT'S INITIAL BRIEF IN SUPPORT OF PETITION FOR REVIEW

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TABLES OF CONTENTS

In this Brief, The Florida Bar will be referred to as the "Bar", the Respondent, ANDREW J. MIRABOLE, will be referred to as "Respondent", and the complaining witness, Bonnie C. Rodriguez, will be referred to as the "Complainant".

TABLE OF CITATIONS

STATEMENT OF THE CASE AND OF THE FACTS

The Statement of the Facts will precede the Statement of the Case since this chronology will be more understandable in this particular situation.

STATEMENT OF THE FACTS

In December of 1983, the Complainant, Bonnie C. Rodriquez, sought Respondent's help in collecting money due on a contract for the installation of air conditioning equipment from an attorney, J. B. Hooper. (TT 21; Bar Exhibit 1)

The Respondent agreed to and did write a demand letter to Attorney Hooper on behalf of the Complainant for which he charged $75.00. (TT 26-27; Bar Exhibit 2)

In response to the demand letter from the Respondent, Attorney Hooper, bypassing Respondent, called the office of the Complainant directly and threatened her with a countersuit, commenting that this attorney (Respondent) should have done his homework before writing the demand letter. (TT27-28) This was, of course, a clear violation DR 7-104.

The matter not being resolved, the Respondent filed suit against Attorney Hooper and set in motion the procedures for establishing a mechanics lien upon the

property of Attorney Hooper. (TT 29-30)

Just before depositions in the Complainant's case against Attorney Hooper, she entered into a written fee agreement with Respondent for $100.00 per hour. (TT 30-31; Bar Exhibit 3)

Shortly thereafter, Attorney Hooper submitted an Offer of Judgment of $2,700.00 which was declined by the Complainant because she was confident in her position and would be otherwise losing $321.00 on the work performed plus $1,600.00 in the fees paid to Respondent. (TT 30-33; Bar Exhibit 4)

Later, however, upon the advice of Respondent, the Complainant agreed to accept the offer but Attorney Hooper declined. (TT 35-36) Then in May of 1984, Complainant received a bill from Respondent for $24,000.00 (TT 36-37; Bar Exhibit 5)

Complainant told Respondent she could not pay the bill and Respondent told her he would have to sue her for the money and, on that note, Complainant obtained the services of Attorney Grover Freeman. (TT 40-41)

Attorney Freeman told Complainant to try to settle with Respondent and to file bankruptcy, but settlement was finally made with Respondent for $4,000.00 and a mutual release was signed avoiding the necessity of an alleged bankruptcy. (TT 44-46; Bar Exhibit 7)

STATEMENT OF THE CASE

On September 25, 1985, the Florida Bar filed its Complaint against Andrew J. Mirabole, the Respondent, charging a violation of Disciplinary Rule 2-106 (A) for charging and attempting to collect a clearly excessive attorney's fee.

The Respondent filed his Answer and Defenses on October 14, 1985 in effect denying the charge and raising ten affirmative defenses. Upon a Motion filed the same day requesting that confidentiality be maintained an order granting the Motion was entered on January 9, 1986.

A waiver of venue by a Referee approved stipulation moved the proceedings to Manatee County as of January 9, 1986, and the proceedings began in Manatee County Courthouse that same day. The transcript of that hearing was filed on June 23, 1986, and a later hearing as to the disciplinary recommendations held on June 17, 1986, was filed on July 14, 1986.

After the hearing on January 9, 1986, a motion to re-open the hearing was served on the 25th of March, A. D., 1986, with the Bar's objections thereto being filed on March 27, 1986. The Motion to Re-Open was based upon surprise in that it was not anticipated that the Bar would induce testimony as to the reasonableness, vel non, of the time expended by Respondent in the litigation. The Motion was

denied by Order of the Referee dated April 8, 1986.

The report of the Referee was filed on June 23, 1986, and the Motion by the Respondent for an Extension of Time to File a Petition for Review was granted up to and including 31 August, 1986.

SUMMARY OF ARGUMENT

There is no question but that the fee contract itself was reasonable. The Bar's position is that the fee ultimately charged was unreasonable. This had to be because of events occurring after the execution of the Fee Contract.

The "clearly excessive" claim of the Bar is just as clearly modified by the fact that the Complainant was driving a recently acquired new El Dorado, Cadillac.

The claim is further modified by evidence that the Complainant herself was in attendance at many of the proceedings where the Respondent's appearance was required and she had a copy of the Contract calling for $100.00 per hour.

Lastly, the Counterclaim of the Defendant lawyer, Hooper, asking punitive damages, had to be defended. Tritely put, had there been no claim by the Complainant but only a defense to a claim of improper workmanship including a claim for punitive damages in Circuit Court, there would have been no "amount of claim" involved with which to compare the ultimate fee.

Under the Bar's theory, the Respondent, under the above circumstances, would not be entitled to charge anything.

ARGUMENT ON THE ISSUES

THE ISSUE FOR REVIEW

> WHETHER THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF VIOLATING DR 2-106, RECOMMENDING HE FINALLY BE FOUND GUILTY AND RECOMMENDING A PUBLIC REPRIMAND BASED UPON THE EVIDENCE AND THE GUIDELINES SET OUT IN DR 2-106 (B).

The Bar's characterization of this case simply as an excessive fee case is somewhat misleading; it is a case where the initial fee contract was quite reasonable but the fee allegedly became excessive during the performance of that contract.

The Bar's case was primarily tried on the theory of a comparison between the fee charged and the amount initially in controversy.

The Bar's main witness on the "excessive" issue was Attorney Grover Freeman. In response to Bar Counsel's questions eliciting his opinion of whether the file he inherited from Respondent showed $25,000.00 worth of work, he responded:

> I felt that the charges that were rendered were excessive for the work that was done. (TT 92)

It should be noted that he did not say "clearly excessive" and the question itself limited his opinion as to what the file he inherited reflected. (TT 92)

Mr. Freeman later conceded that most of the work done was occasioned by opposing Attorney Hooper's antics

after the Counterclaim had been filed. (TT 103-104) Then, on cross examination, we find:

> Q. Am I right in assuming that if all that work were done as Mr. Mirabole and Mr. Napolitano put in the records, that they should be paid for it; should they not?
>
> A. I have a hard time with that.
>
> Q. Is your problem because the work was not done?
>
> A. The problem is the client never could afford to pay it and should not be called upon to.
>
> (TT 115)

Mr. Freeman acknowledged that during Respondent's representation of the Complainant, she had real estate in her own name and was driving a new El Dorado, Cadillac, purchased by her business corporation. (TT 115-116)

A new Cadillac alone is enough to cause the ordinary lawyer not to question the assets of a client.

Mr. Freeman also criticized the $100.00 per hour charge for Respondent's associates, Attorney Napolitano, because Mr. Napolitano only charged his own clients $50.00 and $60.00 per hour. (TT 93-94) This was a bit off the mark because Mr. Napolitano testified he generally charged $75.00 per hour. (TT 53)

In any event, the fee contract was quite clear that the $100.00 per hour rate applied to any lawyer working in Respondent's office. (Bar Exhibit 3)

The evidence simply fails to make a clear and convincing case of charging and attempting to collect a clearly excessive fee. This is especially true since Respondent filed suit to let the Court's decide the reasonableness of his fee. (TT-40-41)

It is Respondent's position that matters having to do with disputes concerning fees between a client and attorney should be left to the civil courts and not be the basis of a charge brought by The Florida Bar. The case of The Florida Bar v. Winn, 208 So.2d 809, concerns a charge brought against Mr. Winn under Rule 11.02 (4), Article XI, Integration Rule of The Florida Bar, which is the same Rule under which Respondent, Mr. Mirabole, is charged. This Rule provided:

> Controversies as to the amount of the fees are not grounds for disciplinary proceedings unless the amount demanded is extortionate or the demand is fraudulent.

This was the Rule in existence in 1968 at the time of the Winn case, supra. Obviously, there is no claim of extortion or fraud against the Respondent.

Rule 11.02(4) was amended to add to the language quoted above the words "clearly excessive". Respondent, therefore, is charged with a violation of this Rule based on an allegation that he charged a clearly excessive fee.

The Professional Code of The Florida Bar, DR 2-106, Fees for Legal Services, (B), states that:

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

As was pointed out by this Court in the case of The Florida Bar v. Moriber, 314 So.2d 145, at page 148:

> Few, if any, areas of attorney discipline are as subject to differing interpretation as the matter of what constitutes an excessive attorney's fee...The answer turns upon multiple factors including the difficulty of the case; the contingencies, if any, upon which the fee is based; the novelty of the legal issues presented; the experience of the attorney; the quality of his work product; and the amount of time spent in preparation and litigation.

Here, The Bar is ignoring the "multiple factors" of facing a litigious attorney filing affirmative defenses and a counterclaim.

Yet another test laid down in Moriber, supra, was that an attorney may still be disciplined where the fees charged are grossly disproportionate to the legal services rendered.

The evidence in this case in no way indicates that the fees charged were grossly disproportionate to the services rendered.

In the case of The Florida Bar v. Quick, 179 So.2d 4, this Court stated:

> ...we have no wish to thwart the discipline of attorneys guilty of impropriety in their professional behavior. It is

> necessary to bear in mind, however, that disciplinary actions while not fully criminal in character, are penal proceedings the result of which may permanently cripple an attorney's reputation and standing in the community. Thus, we adhere to the view we took in The Florida Bar v. Rayman, supra, that the quantum of proof necessary to sustain a referee's finding of guilty is something more than the mere 'preponderance of the evidence' sufficient for a civil action. We have defined that quantum as clear and convincing evidence...

Also, in the Quick case, supra, this court noted that the fee charged accorded with the fee agreement to the extent that the lawyers time charts where accurate and did not reflect a padding of the bills.

Similarly, in the case at bar there was an agreement between the parties clearly understood by the client as to the charges she would be incurring on an hourly basis with Respondent and his firm and the work performed by Respondent and his associate was certainly documented and supported by the evidence.

In overruling the finding of the Referee that the attorney had been guilty of violating Article XI, Rule 11.02(4) this Court in Quick, supra, stated:

> ...After considering the overall import of the testimony adduced below, we are persuaded that the dispute is an inappropriate one for disciplinary action, and should more properly be made the subject of a civil action in the Circuit Court, if any party feels the necessity for redress.

CONCLUSION

We respectfully request the Court to take the same position as it did in Quick, supra, because Respondent, a victim of the machinations of a brother attorney, has been punished enough and should not have his reputation and standing in the community permanently crippled. The findings and recommendations of the Referee should be reversed and the Respondent exonerated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by United States mail upon DIANE VICTOR KUENZEL, ESQUIRE, Bar Counsel, The Florida Bar, Suite C-49, Tampa Marriott Hotel, Tampa, Florida, 33607; and JOHN T. BERRY, ESQUIRE, Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, this the 28th day of August, A. D., 1986.

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