

Petitioner's Reply Brief

SUPREME COURT OF FLORIDA

No. 73,214

THE FLORIDA BAR,

Complainant

vs.

T. CARLTON RICHARDSON,

Respondent

Petition for Review of Report of
The Honorable Thomas E. Penick, Jr., Referee

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Dolan v. Cummings, 102 N.Y.S. 31 (19--), 4
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SUMMARY OF ANSWER BRIEF ARGUMENTS

1. That the Respondent unilaterally without the client's consent or knowledge changed the contract method for determining the fee charged from a fixed fee or commission to hourly rates thereby deceiving the clients or misrepresenting the method of fee determination resulting in a "clearly excessive fee" for which discipline is required.

2. That the Respondent exploited the fee arrangement with the clients based primarily on an hourly rate because the billing guideline used were disproportionate to the services rendered, the clients 'were elderly and unsophisticated, and lacked an ability to pay.

3. That the Referee was precluded from inquiring as to the jurisdiction of the probate court and thus was correct in admitting evidence of those proceedings.

4. That the Respondent's challenge to the grievance proceedings on grounds of racial composition is without merit since the Respondent admitted that the all White panel was not prejudiced or based against him and is untimely since appeal should have been made to the designated reviewer.

ISSUES FOR REPLY OR REBUTTAL

1. Whether the charging of a "clearly excessive fee", without more, can be grounds for disciplinary action?
2. Whether the Referee was precluded from inquiring into the jurisdiction of the probate court before admitting evidence from the proceedings?
3. Whether the Respondent's challenge to the grievance committee proceedings was lodged properly with the committee and the Referee and did the Respondent's gratuitous statement that the all White committee was unbiased constitute an admission against interest preventing a challenge to the grievance committee proceedings upon this Review?

REPLY TO ANSWER BRIEF

1. DISCIPLINARY ACTION FOR A "CLEARLY EXCESSIVE
FEE" ALONE IS IMPROPER AND ILLEGAL.

The client fully understood that the method of determining the fee charged was a "base" or minimum fixed fee or commission or hourly rates if the base fee was exceeded. See, Transcript at 224, lines 24-25 [cited "TR 224:24-25"]; TR 225:2-3; 10-13; See also, TR 377:16-382:21. It is hornbook contract law that:

"In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or receiving performance under it. Parties can, by mutual agreement, make their own contracts; they can also, by mutual agreement, remake them. The process of practical interpretation and application, however, is not regarded by the parties as the remaking of the contract; nor do the courts so regard it. Instead it is merely a further expression by the parties of the meaning of that they give and have given to the terms of their contract previously made. ... (C)ourts have held evidence of practical interpretation and construction by the parties is admissible to aid in choosing the meaning to which legal effect will be given." Corbin on Contracts Sec. 558, p. 526 (1952)

The client knew the method of the fee determination and paid seven (7) invoices based upon that understanding; and, furthermore, the Referee accepted the parties interpretation over that offered by the Bar. TR 382:244-388-21. If the Bar's interpretation of the contract method of fee determination were accepted, then the amount upon which the commission is to be based, i.e. the value of estate assets, cannot be ascertained since the Final Account filed in the probate proceedings failed to report rents

collected by the personal representative over the 50 years he managed the property conservatively estimated at \$500-\$1,000 or more per year or \$25,000 to \$50,000, thus the estate value would be \$47,000 (\$22,000 real estate, \$25,000 personalty) to \$72,000 (\$22,000 real estate and \$50,000 personalty). [It would be noted in passing that a co-tenant stands in a fiduciary relationship to the other co-tenants and must account for benefits received in the estate when liquidated. See, Dolan v. Cummings, 102 N.Y.S. 31 (19--); Tiffany Real Property Sec. 287 (1940) If a 10% commission applied then the fixed fee would be \$4,700 to \$7,200 plus costs for the probate work only, plus the \$1,250 for the estate planning, and an undetermined amount for the general services (consumer problems, small scale real estate development, title evaluation of Key West property). Thus the fee charged does not exceed the contract price as interpreted by the Bar and is therefore not excessive.

To establish that a fee is "clearly excessive" a two step process is involved. First, a determination of what is or is not a reasonable fee according to the Bar guidelines and in the opinion of "a lawyer of ordinary prudence". Second, a determination of whether the fee charged exceeded the reasonable fee to such an extent as to be unconscionable or to constitute a misappropriation of client funds. The Bar cannot set an attorney fee by existing fee schedules or retroactively. Such would violate Federal law. (See, Initial Brief at 36). Since the Bar cannot set an attorney's fee, the establishment of a "clearly excessive fee" is prevented. A clearly excessive fee charged by an attorney pursuant to an enforceable fee contract alone cannot

be grounds for disciplinary action, otherwise the Bar runs afoul of anti-trust laws and freedom of contract Constitutional principles. Fee disputes between attorney and client cannot be made subject of Bar disciplinary proceedings unless the dispute involves professional conduct that is inequitable or illegal. The Referee found no inequitable or illegal conduct on the part of the Respondent only that he charged the clients too much based upon their ability to pay.

2. REFEREE'S FACTFINDING WAS FLAWED.

The Bar argues that the evidence from the probate court's proceeding involving the requiring of Respondent to refund money to the Estate of Leula King which was paid by the complaining clients personally under their fee agreement was properly received because the Referee was precluded from inquiry into the jurisdiction of the probate court. An administrative tribunal with quasijudicial powers, as Bar proceedings are [Fla. Bar R. 3-7.5(3)(1)], are not precluded by the doctrine of collateral estoppel to inquire into the jurisdiction of the rendering court:

"Where an action is instituted ... on a judgment..the question of the jurisdiction of the court rendering the judgment over the subject matter and over the person is open to challenge and adjudication in the latter court. (citing authorities)" Milligan v. Wilson, 107 So. 2d 773, 775 (Fla. 2nd DCA, 1958) [Emphasis supplied]

The uncontroverted evidence is that the Respondent received no compensation from the Estate of Leula King was sufficient to show a lack of jurisdiction since probate proceedings are "in rem" by statute. F.S. 731.105 Couple this with the inconsistencies and

errors in the testimony of Judge Alvarez that he considered non-estate factors in determining the amount of refund , i.e. the amount of interest of a loan obtained by Mrs. Perry Jones the personal representative's wife and a disinterested party which was used in part to pay Respondent's fee, and that the amount ordered refunded not only exceeded the amount which the 2nd DCA remanded for error, but the actual amount received by the Respondent by some \$2,000-\$4,000, but also imposed a \$6,500 legal fee upon upon the Respondent as a sanction for defending against the refund order, the Referee was put on notice that the probate proceedings were clearing irregular and the judgment suspect. See, Answer Brief at 13-14. The Referee failed to make such an inquiry, although the request was made, erred and thus the documentary evidence from the probate proceedings should be stricken along with any testimony that relies in anyway on those probate proceedings.

The Bar responds that its expert witness should not be disqualified because the Respondent did not raise the objection at the hearing and because the witness was not in a conflict since a member of the witness' law firm is on the Board of Governors and the law firm may have represented the Florida Bar. The Bar designated its expert witness less than one month prior to the final hearing. The Referee was had been notified by the Supreme Court of the deadline for completing the hearing and thus discovery was limited and the investigation curtailed. While lip service was given to the opportunity to depose the expert prior to the hearing, this effectively could not be done due to the hardship imposed upon the Respondent, a non-resident, solo practitioner,

whose financial resources were being taxed with this multi-jurisdiction defense including at least two hearings prior to the final hearing. The conflict arises because the member of the Board of Governors may be swayed in his decisions regarding Respondent's misconduct by the knowledge that his partner has testified against the Respondent. A Board member has a fiduciary responsibility to act in the best interest of the Bar and that maybe to advocate for the Bar not pursuing its complaint against the Respondent, however, it would be somewhat perplexing if the member's partner is the Bar's sole witness. Thus a conflict arose and either the witness's partner should have abstained in the deliberations on this case or the witness should have been disqualified. The Referee had intimate personal knowledge of the Bar's expert's professional standing and qualified him, even before the Respondent new of his qualification:

"THE COURT: Let me do this. I am eminently familiar with Mr. Jones' curriculum vita and his reputation in the Florida Bar. ... I know this witness' curriculum vita and his reputation in the Florida Bar in the area of probate so I was just trying to save time here for the purposes of the record. ... Do you have any objections to receiving him as an expert witness?

"MR. RICHARDSON: I would like to have a copy of it.*** I was never provided a copy of it.

"THE COURT: Take just a moment and peruse that [biographical data of witness], please, sir. *** Any objection to receiving him as an expert witness?

"MR. RICHARDSON: No, none."
TR 95:7-96:16.

Obviously insufficient time was allowed the Respondent to investi-

gate the witness and thus acceptance and only ent t his qualifi-
cations as an expert in probate not his associations, which the
Respondent was unaware of and could not have discovered upon
reasonable inquiry under the circumstances. The Bar's expert
should be disqualified.

**3. RESPONDENT HAS NOT WAIVED RIGHT TO CHALLENGE
NOR FAILED TO EXHAUST HIS INTERNAL ADMINIS-
TRATIVE REMEDIES REGARDING THE GRIEVANCE COM-
MITTEE'S RACIAL COMPOSITION.**

Respondent filed motions requesting background information
on the panel members and objecting to the all White racial
composition of the panel. Both were denied. The Bar regulations
do not provide for an appeal to the designated reviewer by the
Respondent since the designated reviewer has no authority to
vacate the findings of the grievance committee regarding probable
cause, however, the reviewer can disapprove of the committee's
actions which would be resolved by the Board of Governor's
disciplinary review committee. See, generally, Fla. Bar R. 3-
7.4(a) and (b). The review committee then reports to the Board of
Governors which has the last say and can, among other things,
reverse the probable cause ruling by the panel. The designated
reviewer had before him or her the entire record, including,
Respondent's motions, and did not disapprove of the grievance
committee's findings and therefore, the committee's action stood.
Id.

The Bar's reliance upon the gratuitous statement made
during the course of argument by Respondent that he felt the
panel members were honorable and unbiased as an admission against

his interest and a waiver of the challenge to the panel's composition is misplaced since the statement was not made under oath and was not an admission. The Bar's selection process is flawed when it cannot find one Black lawyer or layman to participate in its grievance proceedings in Hillsborough County which is 12% Black and has hundreds of Black lawyers. Black lawyers tend to be members of small firm and solo practices and, it is common knowledge that, this group is disproportionately represented both as a racial and economic class in the filings of client complaints because of the socio-economic class they represent and in the number of disciplinary proceedings. This racial and economic class within the Bar should not be excluded for they have a perspective that needs to be imputed in the process. Respondent does not argue that the results might be different, only that the deliberative process is deficient when either a racial or socio-economic class is excluded from the decision-making process. The Bar does not belong to White Anglos or Hispanics but to the "rainbow" of its membership, of which Afro-Americans and Afro-Hispanics constitute a large minority nor does the Bar belong to members of large, affluent, majority law firms.


CONCLUSION

The fee charged did not exceed the agreement between the Respondent attorney and his clients, nor was the method of determination by use of the hourly rate exploited. The Referee made no findings that the Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, only that the fee was beyond the means of the clients to pay and therefore "clearly excessive". Fee agreements between an attorney and client cannot be subject of disciplinary action if the fee is considered "clearly excessive" alone since this would involved a determination by the Bar as to what the fee should be which is impermissible under Federal law and violates the attorney's 14th Amendment rights to pursue his profession.

If discipline is imposed for the charging of an excessive fee, there must be a showing of other inequitable (e.g. contract unconscionability, misrepresentation amounting to dishonesty, or misappropriation of client funds) or illegal (e.g. fraud or deceit) conduct by the attorney in the procurement or performance of the legal services agreement. In this case time was expended over a two year period, the objectives of the client were being fulfilled, the client benefited by obtaining a \$2,600+ reimbursement of fees paid, \$300 less would have been paid if the Respondent had handled the sale from the clients to their son (their second attorney sold the real estate in the estate to the clients and took a fee then handled the sale from the clients to their son for a \$300 fee: Respondent planned a direct sale to the son in probate), acquired the estate realty for less than market

value--because of discharge Respondent was unable to claim credits which clients alleged were due them because of taxes paid on the estate realty above the rents collected--and resold it at a profit of some 10% (ten percent), and furthermore, could deduct substantial portion of the fee charged on their taxes as a necessary and proper business expenses since the acquisition of the real estate was for investment and development purposes. Over a two year period the clients were rendered services and paid their invoices, only after consulting with another attorney and some 4 months after discharge of the Respondent was the Bar complaint filed, a complaint they were willing to withdraw if the Respondent had paid them \$3,000 which Respondent refused.

The recommendation of discipline for charging a "clearly excessive fee" is not supported by clear and convincing evidence, involved the use of evidence of a collateral probate proceeding which was patently false and was obtained illegally by a court acting ultra vires and should have been excluded, and is not grounds for discipline alone without a showing of inequitable or illegal conduct that would invalidate the fee contract. This Court should disapprove the recommendation and dismiss the complaint with prejudice.


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CERTIFICATE OF SERVICE

THIS CERTIFIES that a copy of the foregoing Reply Brief was delivered by mail/hand to: THE FLORIDA BAR, c/o B.L. Mahon, Esq., Marriott Hotel, Suite C-49, Tampa Airport, Tampa, FL 33607 on this 12th day of December, 1989.



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