IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,	)	
	)	
Complainant,	)	
	)	CASE NO. 74,292
vs	)	TFB Nos. 88-11,260(6D)
	)	89-10,228(6D)
JAMES C. McKENZIE,	)	
	)	
Respondent.	)	
	)	

PETITION FOR REVIEW

RESPONDENT'S INITIAL BRIEF

JAMES C. McKENZIE, Respondent
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GLOSSARY OF ABBREVIATIONS

T.T. . . . . refers to trial transcript

p.l. . . . . refers to page and line

Res. Ex. . . refers to Respondent's Exhibit

Res. Comp. Ex. . refers to Respondent's Composite Exhibit

STATEMENT OF THE CASE AND OF THE FACTS

By the Referee's Report dated April 12, 1990, she found respondent violated, under COUNT I, DR 2-106(A) "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."

She also found respondent violated DR 6-101(A)(2) "A lawyer shall not handle a legal matter without preparation adequate in the circumstances." How she decided this when there was no proof adduced as to anything done wrong in handling this matter, is beyond respondent.

As to COUNT II, she found no conflict existed as had been charged by the Florida Bar, but suspended respondent for 3 years on COUNT I.

As to COUNT I the facts are that the widow of JACK FISHER came to respondent's office on or about September 10, 1979 with his 7 page will and 13 page trust agreement. (Res. Ex.2 and 3) She wanted his will probated. She stated that all assets (some $400,000.00) were all in his name and wanted to know what it would cost to probate the estate and to make the trust active.(T.T.p.48,l.2-21) Since there were 3 other executors besides herself named,(children of the widow and the deceased), she and one of her daughters discussed the fee to do so and it came out to some $13,000.00 to probate this estate.(T.T.p.9,l.18-21,p.48,l.17-21)

Having no other readily ascertainable figures to use, respondent showing the widow and her daughter the old Clearwater Fee schedule (which broke the figures down by various percentages) said that he'd do said probate for that sum, some $13,000.00 as was figured at that time. They paid respondent $1,000.00 at that time to start probate.(T.T.p.48,l.22-25)

After getting the four people named in the will as co-personal representatives, respondent wrote all four a letter November 12, 1979 enclosing a copy of said Letters of Administration, and because no one in Clearwater knew where the assets were kept, to inquire of them where the various assets were, so respondent could inspect them. (Res.Ex.4) It was also explained that respondent would do this probate based upon the figures in the old Clearwater Bar schedule. This later appeared agreed upon because of this letter, there being no negative response indicated, and other matters including the fees stated on the Federal Inheritance Tax Form.

The Bar's own expert witness stated a fair figure to probate this matter would be 3% of the gross value of this estate,(which later turned out to be $458,000.00) or a total of $13,740.00.(T.T.p.16,l.2-6) Respondent's expert witness KENNETH A. SUNNE, whose deposition was taken February 22, 1990 was admitted into evidence, (p.4,l.6-14)

he stated: "I still work on a percentage basis, which is kind of a throw back from the old bar schedules, which we're not allowed to use anymore, but I work on a percentage basis.* * *If it's an estate that's less than $300,00.00 I usually charge (5%) five percent as a fee." Both experts testified that respondent's earned fee of $3,871.50 was not excessive.(T.T.p.34,l.4-8 and p.7,l.10-14 of the deposition).

The purpose of the letter of November 12, 1979 was because respondent needed to find out where the assets were and how held so that an inventory could be filed which was due 60 days after filing. The widow ROSE FISHER didn't know where the certificate and other evidences of ownership were, but one day sometime later, respondent's office received a call stating what the assets were. So respondent had an Inventory typed up based upon the call made to his office, but because when it appeared on his desk it didn't say where one asset was located, respondent called back the number of the call and wrote in where it was and wrote in where it was located in ink.(T.T.p.50,l.1-25,p.51,l.1-9) This Inventory, after sending it out for signatures, was duly filed February 1, 1980.(Res.Ex.5)

It is believed that all the indicias of ownership was in New York in the hands of one of the executors.(T.T.p.50, l.14-19).

Respondent didn't learn until about the time of preparation of Form 706, the Federal Inheritance Tax Form, which had to be filed within 10 months of the date of death,(by June 10, 1980) that all but about $1,500.00 was held jointly with ROSE FISHER, the widow. After paying the amount owed on the Form 706, respondent wrote the executors September 4, 1980 asking for $3,000.00 fees, which was duly paid.(Res.Ex.7) It was settled October 20, 1980.(Res.Ex.6)

Shortly after receiving a letter from FRED FISHER which inquired about the fees and other matters on November 6, 1980(letter introduced by the Bar, its number unknown) respondent wrote back to him in an attempt to explain what the schedule was as to percentages and to indicate that if all they wanted to do was to ignore the trust, respondent could do so, having as a purpose that a new figure could be negotiated on attorneys fees. He didn't respond to respondent's letter of November 6, 1980, so respondent called him a while later offering a reduced flat fee to do the rest of the work if the trust was ignored. Instead of affirmatively responding, he said he wanted to think it over, but instead of doing anything more, respondent got a letter in December, 1980 discharging him.(T.T.p.53,l.1-25,p.54,l.1-2)

In the Petition for Discharge)Res.Ex.10) filed by another attorney dated July 16, 1981, respondent was invited to file a

claim within 30 days as to compensation to be paid, but respondent did not do.

Subsequently, respondent was sued by the excutors of the estate for malpractice, claiming the Form 706 was negligently prepared by respondent resulting in an over-payment, but there was no claim as to attorneys fees. (T.T.p.55,l.1-10) Respondent counterclaimed therein for what he felt was his agreement for fees, though knowing that all he would be entitled to as fees in probate for a discharged attorney, would only be on quantum meruit as we all know.

In that case all executors denied there was any agreement as to fees(Res.Comp.Ex.8), in deposition taken of them.(Mis-identified in trial transcript as respondent's Exhbit 9). By(Res.Ex.9) voluntary dismissal of their action, there was no payment by respondent in exchange for such voluntary dismissal of their malpractice case against the respondent.(T.T.p.57,l.5-6,p.58,l.20-21). Even so ROSE FISHER said in her deposition taken January 8, 1985 in the malpractice case(Res.Comp.Ex.8) when inquiry was made as to the existence of an agreement for fees:"I don't want to know anything."(p.1,l.3)

That the reason the executors changed lawyers is painfully evident. Their new lawyer must have represented to them that the Form 706 was improperly filed, that the

executors wouldn't have to pay respondent's attorneys fees and the $458,000.00 wouldn't have to go into the trust.

That this was proven by respondent's Exhibit 11, a Petition for Administration of the Estate of ROSE FISHER who died May 22, 1987 who had only $25,000.00, the other $450,000.00 must have gone elsewhere before she died.

Another matter of note in the Referee's Report bears some discussion, where she seemingly castigates respondent for being "less than truthful," testimony being "shocking and incredible." This occurred during respondent's testimony concerning Bar's Exhibit 6(about some interrogatories sent respondent in the malpractice case), which respondent admitted he signed the document, that he didn't deny the accuracy of it, that the document speaks for itself, but did deny that it was his handwriting thereon.(T.T.p.74, 1.7-25 and p.74,1.1-20). The Referee decided respondent was lying, and until respondent found the letter (reproduced on the following page herein), was it perfectly explained what had happened. Apparently respondent received the letter and the interrogatories from his attorney, wrote his answers on a separate sheet of paper so that his attorney could check his answers, and signed the interrogatories in blank and

sent them back to his attorney. Did the Referee here magnify this minor matter out of proportion for other reasons? Is this why she suspended respondent for 3 years because she thought respondent was lying?

Although respondent has filed a timely motion for rehearing based on this letter and respondent's note thereon with the Referee, it's to be noted that this file has already been sent to this court. Also in respondent's motion for rehearing the Referee's Report should have indicated she was accepting the Bar's "Amended Statement of Costs of March 23, 1990 of $1,439.20 not the original of some $2,000.00, because the Referee's Report only approved the Bar's "Statement of Costs." Respondent does not at this time know the disposition of motion for rehearing because this is being dictated and typed prior thereto.

Also found on the following pages are copy of Judge Fleischer's letter to respondent, and copy of respondent's reply letter to her in which she declined to hear respondent's motion. All of this occurring after this matter has been typed. In the slang of the day, by declining to hear respondent's motion amounts to a "cop out" by her, and in a real sense a vindication of respondent and an admission by her that she was wrong; otherwise she simply could have drawn up an order denying said motion.

SUMMARY OF ARGUMENT

Though respondent believed he had an agreement for fees based upon percentages of the gross estate while under the impression that the assets in JACK FISHER'S Estate were all owned solely by him, not only from his widow's representation but by the trust itself which was called the JACK FISHER TRUST OF 1977; the agreement for fees was not excessive when it was attempted to be made originally. When later events showed the assets were jointly held, respondent did attempt to renogotiate the fee down if the trust was not to include the assets. Respondent never made any claim in the estate for anymore fees than he had already earned. It was the Bar's claim that since the assets were jointly held, only about $1,500.00 of the assets were probatable, making the fees as originally agreed upon excessive.

There is no claim that the "minimum fee schedule" in place at the time of GOLDFARB v VIRGINIA STATE BAR ASS'N., 421 U.s.778,95 Su.Ct.2004(1975) did not make this agreed fee excessive, because all GOLDFARB did was to render such schedules unenforcible under anti-trust laws. Parties could still contract under any agreement made between them.

The 3 year suspension is excessive and punitive beyond all reason, amounting in effect to being worse than some

disbarments. Did she give respondent 3 years because she thought respondent was untruthful?

Laches should be applied to this matter which took place in September, 1979 until respondent was discharged in December, 1980, as respondent so pleaded in his Answer. With files torn up with the malpractice case, lost papers, inability to prove phone calls made, even the matter of the testimony on interrogatores in the malpractice case after finding the letter explaining the handwritten answers therein, was done over 6 years before this trial and found buried under a mass of other papers and found only by happenstance. Even respondent's attorney's file in the malpractice case was destroyed when this matter came up, making it nearly impossible to gain any information except by the court file.

There has never been a definition in all the cases as to what constitues "a lawyer shall not make an agreement for, charge or collect a clearly illegal or excessive fee." Clearly the amount collected here was not excessive and the only other matters, i.e. the "agreement" when made was not knowingly excessive, it only because so when the assets were discovered as joint and hence non-probatable and as far as "charging" is concerned respondent only defended himself in the malpractice case by alleging the agreement, all of these

matters while the executors were represented by other counsel who knew after an attorney is discharged all he can recover is on a quantum meruit basis.

ARGUMENT

There is no Statute of Limitations in Bar Ethic cases as pointed out in THE FLORIDA BAR v McCAIN, 361 So.2d 700, the court there did state on page 705 of its opinion:

> "Whenever a lawyer feels that an unreasonable time has passed since the alleged misconduct for which the bar brings charges, this Court will be open to address that problem. After all, The Florida Bar acts for and is an agency of this Court. When the child falters the parent shall correct."

It was also said on page 705 of this opinion:

> "Surely a judicial officer who leaves the bench and returns to the active practice of law must be free to do so without the fear that some alleged impropriety occurring many years before the date of leaving the bench may be brought up to haunt him in the practice of law."

Is this kindly language in favor of Judge McCAIN any less applicable to lawyers who may be brought to account by the bar over matters brought some 30, 20, 10 years after the allged impropriety occurred? Here the alleged matter was in 1979 and the bar did not bring its action until June, 1989, a full 10 years. Limitations in most civil and criminal cases would have long ago outlawed this matter, The basic reason behind laches and statute of

limitation is to bar stale claims. Is a lawyer considered a second class citizen? Neither fish nor fowl?

Furthermore, there never seems to be any clear cut definition of bar disciplinary rules on conduct, they all seem based on if a referee finds a respondent guilty of a particular charge. Here respondent did not "charge" and excessive fee, charging an excessive fee is when a lawyer, without explaining or without agreement as to his fees does a minor job and then sends an exhorbitant bill.

As to costs, they should be as the Amended Statement of Costs as filed March 23, 1990 of $1,439.20 by the bar.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I sent copy hereof to David R. Ristoff, c/o The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, FL 33607 by U.S. Mail this 1st day of May, 1990.

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