

ORIGINAL

IN THE SUPREME COURT OF OHIO

CINCINNATI BAR ASSOCIATION	:	Case No. 2012-0684
	:	
Relator	:	Panel No. 11-078
	:	
v.	:	
	:	
KATHLEEN D. MEZHER & FRANK ERIC ESPOHL	:	On Objections To The Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances And Discipline of the Supreme Court of Ohio
	:	
Respondents	:	

**RESPONDENT KATHLEEN D. MEZHER'S OBJECTIONS
TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND
RECOMMENDATION OF THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE**

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III. STATEMENT OF THE FACTS

A. **Procedural History.**

On July 29, 2011 Relator Cincinnati Bar Association filed a Complaint against Respondents Kathleen D. Mezher and Frank Espohl alleging that both of them had violated Sections 1.5(b) and 7.1 of the Ohio Rules of Professional Conduct. As to Respondent Mezher, paragraph 8 of the Complaint falsely alleged:

Kathleen Mezher, on behalf of Mezher & Associates, LLC, advised that the firm's position was that once a client signs a fee agreement, the firm can charge for services, including the initial "free" consultation, if the firm is subsequently discharged.

On December 12, 2012, Relator filed an Amended Complaint excluding that false allegation. Also on December 12, 2012, undersigned counsel for Respondent Mezher entered an appearance as co-counsel for Respondent Mezher only. Prior to that day, Respondents Mezher and Espohl were both represented solely by Cincinnati Attorney John Burlew, who passed away suddenly late December, 2011. After the passing of Mr. Burlew, Attorney Condit moved forward representing Respondent Mezher only with Respondent Espohl proceeding pro se.

Respondents filed timely answers to both the original Complaint and the Amended Complaint.

On March 13, 2012 the matter was tried to a three-member panel in Columbus, Ohio. Over Respondents earlier objections, Relator's witnesses (including the Complainant) were permitted to appear at the trial via video depositions taken in December 13, 2011. Respondents Mezher and Espohl both testified on their own behalf and they also presented testimony from Michael Mezher and Blake Nelson.

On April 19, 2012, the Board filed the *Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio* (hereinafter "Final Report"). The Final Report found that Respondent Mezher had violated Rule 7.1 but it recommended the dismissal of the charge alleging a violation of Rule 1.5(b). The Final Report found that Respondent Espohl had violated Rule 1.5(b) but it recommended the dismissal of the charge alleging a violation of Rule 7.1. The Final Report recommended that Respondent Mezher and Respondent Espohl each be publicly reprimanded with costs of the proceedings taxed to the Respondents.

On May 1, 2012, The Supreme Court of Ohio entered an *Order To Show Cause*. On May 10, 2012, the parties filed a *Stipulation to Extend Time to Show Cause* extending Respondents' time for filing their objections to June 11, 2012.

B. Evidence in Support of Respondent Mezher's Objections.¹

1. Relevant Background Information about Respondent Kathleen Mezher, Respondent Frank Espohl, and the Mezher Law Firm.

Respondent Kathleen Mezher was admitted to the practice of law in the State of Ohio on December 17, 1984. *Final Report*, ¶7. In 1987 Respondent Mezher founded Kathleen Mezher and Associates ("the Mezher firm") and has maintained it as her private practice up to the present time. (Tr. 24-25: Kathleen Mezher). The Mezher firm's main office is on the east side of Cincinnati and it now has four satellite offices in the Greater Cincinnati area. (Tr. at 105: Michael Mezher).

¹ All citations to the pages of the hearing transcript will be in the form of "Tr. at ____" with cites to specific lines provided in some instances. To assist the Court and the parties, citations to the hearing testimony will also identify the name of the witness. Citations to the deposition transcripts of Relator's witnesses will be in the form of "Burns Depo. at ____" or "Mahaffey Depo. at ____."

Respondent Kathleen Mezher married Michael Mezher in 1984. They have four children, two of whom are entering the legal profession. Mr. Mezher has a BS in computer science and an MBA from the University of Dayton. (Tr. at 101-102: Michael Mezher). Mr. Mezher has been associated with the firm since 1999, becoming involved at that time due to the growth of the firm. He has no actual title, but he handles all of the back office operations such as billing, accounting, handling the employee pension plan and dealing with vendors. Mr. Mezher's contact with clients has declined through the years and he has very little client contact now. (Tr. at 103-04: Michael Mezher).

Respondent Frank Espohl was admitted to the practice of law in the State of Ohio on May 13, 1996. Final Report ¶8. Mr. Espohl has worked for the Mezher firm since that time. (Tr. at 53: Espohl).

Blake Nelson has worked as a paralegal for the Mezher firm for sixteen years. She does "a little bit of everything: Answer the telephone, schedule appointments, assisting client phone calls, questions, typing pleadings as necessary, writing letters, filing." (Tr. at 90-91: Nelson). Nelson describes Respondent Espohl as being "honest to a fault....an extremely honest individual." (*Id.* at 98) Respondent Kathleen Mezher confirms that. (Tr. at 200)

2. The Mezher Firm's Established Practice of Giving Free Consultations to Prospective Clients.

The Mezher firm has advertised "free consultations" in the telephone book since 1987 and on the firm's website since it was started "several years ago." (Tr. at 25, 31: Kathleen Mezher). There is no time limit placed on free consultations (*Id.* at 31) and it is within the discretion of the attorney to "wrap up" a free consultation at an appropriate time based on the attorney's training. (*Id.* at 32-34; Tr. at 54: Espohl). From the day Respondent Espohl began

working for the Mezher law firm, the firm has given free consultations to clients. (Tr. at 53: Espohl) He estimates that in his 16 years with the Mezher law firm he has personally given free consultations in the “high hundreds” and has never charged for one. (Tr. at 74-75: Espohl)

Paralegal Blake Nelson has client contact “[a]ll day every day” and “answer[s] the phones all day long.” (Tr. at 91: Nelson). This includes scheduling free consultations. (*Id.* at 94-95). Nelson is also familiar with the Mezher firm’s billing practices. At the end of the month when billing statements go out, she reviews the bills and she sometimes even folds them, stuffs the envelopes and mails them. *Id.* at 93-94. In all of her time handling client phone calls, she has never heard a client complain of being billed for a free consultation. Nor is Nelson aware of anyone ever being billed for a free consultation. *Id.*

Mr. Mezher, who handles the computer billing, confirms: “We don’t charge for free consultations in the office. We never charged this. I have not seen even one instance that we charged for it.” (Tr. at 138, lines 1-4: Michael Mezher)

To corroborate the point at trial, Respondents Mezher and Espohl presented a binder full of documents designated as Respondents’ Joint Exhibit I. Respondent Espohl described the Joint Exhibit and its relevance to the practice of the Mezher firm:

A. This is copies [of] the front of all the consultation sheets in 2011 for people who came to our office and had a free consultation and then decided not to hire us...I compiled it and ran copies and then redacted the last names, phone numbers, and other identifiers.

Q. And the correct number is 482 of those for the year 2011?

A. Yes.

Q. And what is the firm’s practice as far as billing people for free consultations when you’re not hired?

A. We don't.

Q. Have you had experience with people discharging the firm shortly after a free consultation?

A. Yes.

Q. How frequently has that happened?

A. A few times a year.

Q. What is the firm's practice when that happens?

A. We don't bill people for that free consultation.

Q. What is the practice as far as billing for other work done?

A. That we do.

(Tr. p. 168, line 3 to p. 169, line 6: Espohl).

Respondent Espohl then explained the Mezher firm's method of billing after the firm is discharged under a probate fee or contingency fee arrangement:

A. That's quantum meruit based on the lodestar method. We go back through the file and make an itemization of what we did and how much time we spent doing it and multiply that by the \$250 normal hourly rate to get the lodestar Quantum Meruit.

(Tr. at 169, lines 15-20: Espohl).

3. The Free Consultation on February 3, 2011: Respondent Espohl Meets with the Daughters of Deceased Client Nora Burns.

On February 3, 2011, Respondent Espohl met with Jessica Burns, her sister Stephanie Mahaffey and her brother-in-law Brian Mahaffey. Burns (who was the Complainant in this matter) and Stephanie Mahaffey were daughters of the recently deceased Nora Burns, a client of the Mezher law firm. Prior to the February 3 appointment, Respondent Espohl learned from paralegal Blake Nelson that the Mezher firm had drawn up a trust for Nora Burns several years

earlier.² Anticipating some complexities and significant assets in the trust, Mr. Espohl asked Michael Mezher to join the meeting. (Tr. at 52-53: Espohl; Tr. at 105-07: Michael Mezher).

During the first 30 minutes of the meeting, Respondent Espohl and Mr. Mezher gave the free consultation. They explained the probate process, discussed some basic issues regarding the Nora Burns Estate, and explained the applicable fee guidelines for the Clermont County Probate Court. (Tr. at 154-56: Espohl; Tr. at 107-08: Michael Mezher). Respondent Espohl did not tell Burns and Mahaffey after they signed the fee agreement that he would begin charging them for his work because under the probate fee agreement the client gets charged according to court guidelines at the end of the estate. Tr. 61 (Espohl).

After the 30 minute consultation, Burns and Mahaffey decided to hire the firm and signed the Probate Fee Agreement. (Relator's Exhibit 4) "I did sign this agreement at the end of the meeting...I asked my sister if I should sign it, and she stated if this allowed them to act on my behalf in court, then I should." (Burns Depo. pp. 21 – 22)

Stephanie Mahaffey explained her understanding of the probate fee:

- A. We were never explained what the fees were. We were told by Mr. Mezher that the fees are dictated by Probate, and that it was out of the firm's hands as far as how much we would be charged. It was determined by Probate and they wouldn't know until they knew the value of the estate.

(Mahaffey Depo. p. 25, lines 19-24). Burns also understood that "Clermont County would set that fee for us." (Burns Depo. at p. 8, line 12)

Stephanie Mahaffey accurately understood the meaning of a free consultation:

- Q. ...When you read the website, you apparently thought that what – did

² Respondent Mezher had prepared Nora Burns' "trust and power of attorney, living will, did an estate plan type of package." (Tr. 210: Kathleen Mezher)

you think there was a limitation on the consultation at all? What did you think that meant?

A. I basically viewed it as an interview for an attorney. I mean, I guess, you know, come into the office, here's what we would do with the stuff. Whether you get a warm fuzzy feeling. Okay. Let's move forward type consultation.

Q. All right. And apparently you went in, at some point you decided the consultation was satisfactory, you were going to hire the firm, Mr. Espohl; correct?

A. Yes. We did at the end.

* * * * *

Q. Okay. So your understanding of the agreement is, if it had lasted all day, regardless of what happened, that that was all a consultation till the moment you signed the document; was that your understanding?

A. My understanding is that, yes, we were there for a consultation, and that then **once we signed, they would begin working on the file.**

(Stephanie Mahaffey Depo. at p. 27, line 19 to p. 28, line 24) (Bold emphasis supplied) This is consistent with Respondent Espohl's view of office policy. "Normally, signing a fee agreement would be the end of the free consultation." (Tr. at 56: Espohl)

4. **Work Performed by Respondent Espohl on February 3, 2011 After the Free Consultation.**

After Burns signed the Fee Agreement, she and her sister had many other questions about their mother's estate and wanted to get started right away. Respondent Espohl agreed:

After they signed the fee agreement, they said they wanted to start and I said that sounded legitimate. I said we would start. I stepped out of the office and I took 20, 25 minutes to review the trust. It was 17 pages long. The will was about another four or five pages. I also looked up the deeds to the two pieces of real estate and I then came back and we went over a lot more details of the estate.

(Tr. at 60, lines 8-16; Tr. at 158: Espohl)

Mr. Mezher remained in the consultation room with the clients as a courtesy and was able to answer certain questions about financial matters but deferred other legal questions for Mr. Espohl's return. Mr. Mezher estimated that after Mr. Espohl returned to the room, they spent "conservatively" another 30 to 45 minutes with the clients (Tr. at 110-11; Michael Mezher) Mr. Espohl's estimate puts the additional time at 40 to 50 minutes. (Tr. at 158; Espohl)

The clients had a lot of questions about the two pieces of real estate and particularly the Burns residence, because Jessica Burns was still living there. Both Respondent Espohl and Mr. Mezher sensed a tension between the sisters on that point. (Tr. at 107; Michael Mezher; Tr. at 158; Espohl) The subject matter of other discussions after Burns signed the fee agreement included whether certain assets would be probate or non-probate, issues surrounding stock in a closely held corporation, a buy/sell agreement and issues regarding estate taxes. Because the clients had brought only a few documents to the meeting and were vague about other information, there was a lot of repetition and Respondent Espohl created a list of other documents that the clients needed to produce. (Tr. 159-64; Espohl) "That's why this ran for a long time and that's why there wasn't a whole lot of note taking. I had a lot of questions fired at me repetitively and maybe not so much substantive information being given to me." (Id. at 162, lines 4 to 8). As to the attorney time later billed to the clients:

Quite frankly, I was being very conservative in saying it was an hour of work after they signed the fee agreement because while they were there I spent 20, 30 minutes reading the will, reading the trust, and looking up deeds. I came back and talked another 30, 40 minutes, and then they left. And after they left, I spent another 15 minutes or so making sure that I had not missed anything.

(Tr. at 164; Espohl)

A few days later Respondent Espohl briefed paralegal Melissa McElfresh on the case and

instructed her to send a letter to the Clients reminding them to produce additional documents as discussed at the initial meeting. (*Id.* at 166) McElfresh mailed that letter out to the clients on February 7, 2011. Relator's Exhibit 6.

5. The Mezher Firm Bills the Clients in Quantum Meruit after Being Discharged.

Approximately three weeks later, one of the clients left a message at the Mezher firm and Mr. Mezher returned the call. One of the sisters wanted to discharge the firm and declined to identify their new attorney, when Mr. Mezher inquired to forward the file. The clients asked to pick up the file the next day and pay the fee. Mr. Mezher told her that he did not know the fee until he spoke with Respondent Espohl, but agreed to meet them at 10:00 am the next day (Saturday). Meanwhile, he obtained from Mr. Espohl his hours for a billing statement and printed a bill for the clients (Relator's Exhibit 5; Tr. at 112-14, 122; Michael Mezher; Tr. at 67-67; Espohl)

The bill included a charge of \$250 for the "attorney conference" on February 3 but it was silent as to the 30 minute free consultation.³ (Tr. 68-69; Espohl) None of the time billed was for the time spent in free consultation or for time spent with the clients prior to the signing of the fee agreement. (*Id.* at 71; Tr. at 117-18, 137; Michael Mezher)

Jessica Burns came to the office with a friend to pick up the file on Saturday morning. She spoke to Mr. Mezher that morning, was unhappy about the bill (claiming that she was being charged for the free consultation) but ultimately allowed a friend to pay it with a credit card and left with the file. (Tr. 115-16; Michael Mezher; Burns Depo. at 12-13, 15) Significantly, Burns

³ Mr. Mezher explained that omission. The computer software used for billing clients will not show a line for a zero balance. (Tr. 117; Michael Mezher) As counsel for Respondent Mezher argued during Closing Arguments, "Listing on a bill the fact that you're not charged with something, surely this ethical question doesn't turn on that. Tr. at 252, lines 19-21.

did not oppose paying for work performed by the Mezher firm subsequent to the February 3 attorney conference, but she opposed paying for the February 3 conference “[b]ecause it was free.” *Burns Depo.* pp. 27, lines 10 - 20.

6. The Limited Role of Respondent Kathleen Mezher.

Respondent Kathleen Mezher had no contact of any kind with the Clients until she attended their video trial depositions in December 2011. (*Burns Depo.* at pp. 7-10; *Mahaffey Depo.* at 29) “I did not know them. I did not meet them. I knew their mother.” (*Tr.* at 44: Kathleen Mezher) Nor did Respondent Mezher play any role in the preparation of the invoice to which the clients objected. (*Id.* at 26)

Respondent Espohl always told Respondent Kathleen Mezher that he had given the clients a free consultation that day. (*Tr.* at 78: Espohl) Respondent Mezher had no reason to disbelieve him or her husband about the amount of time they spent with the clients at the initial meeting. (*Tr.* at 211: Kathleen Mezher) While reviewing the uniqueness of the facts underlying this case, Respondent Mezher corroborated the Mezher firm’s policy, and her own commitment, to providing free consultations to prospective clients:

Probate and wills was probably our simplest of all the fee contracts. We have never had an issue with a probate case before that I can recall in our history where somebody came in like this, started their case and we believed we were engaged, took some steps, did some work, sent them a letter, and had no reason to believe we weren’t going to continue with the case. Then get a phone call discharging us, prepare a statement for time spent working on the case, not for the free consultation. Oxymoron. I will not, have not, never have charged for a free consultation.

I don’t believe any bill is going to go out of my office charging someone for a consultation that we’ve advertised as free. There have been thousands and thousands of people we have seen for free. They never get a bill. I don’t charge them and I never said I’d charge them for a free consultation either.

(Tr. p. 197, line 5, to p. 198, line 1)⁴

7. The Clients' Alternative Version of the Facts.

Jessica Burns and Stephanie Mahaffey both testified that their February 3 meeting with Respondent Espohl and Mr. Mezher lasted only 30 minutes, that Mr. Espohl never left the room, that Mr. Mezher did almost all of the talking, and that they left the office promptly after signing the Probate Fee Agreement. (Burns Depo. at pp. 7-10, 19, 22; Mahaffey Depo. at pp. 10, 12-13)

The discrepancy between the Burns/Mahaffey version and the Espohl/Mezher version is quite startling. If the discrepancy can be explained by mere faulty memory of the clients (as opposed to deliberate dishonesty, which the panel did not find and Respondent Mezher does not want to believe), the best explanation may be that both Burns and Mahaffey were still grieving the death of their mother at the time of the February 3 meeting and for some time thereafter, (Burns Depo. at 29; Mahaffey Depo. at 27) leaving them with less-than-reliable memories.

8. The Most Persuasive Version of the Facts.

Faced with these significantly conflicting versions of the facts, the Board found the version presented by Respondent Espohl and Mr. Mezher to be the most "reasonable" version.

(Final Report, ¶15.)

⁴ This last sentence is a rebuke to Relator for the false allegation that appeared in the original Complaint but was deleted from the Amended Complaint. Respondent Mezher has serious doubts whether Relator could have secured the probable cause finding required under Gov. Bar R. 6(D) absent the false allegation.

IV. ARGUMENT IN SUPPORT OF OBJECTIONS

Relator must prove by clear and convincing evidence the facts necessary to establish a violation of a Disciplinary Rule. Gov.Bar R. V(6)(J); *Disciplinary Counsel v. Jackson* (1998), 81 Ohio St.3d 308, 310, 691 N.E.2d 262. “Clear and convincing evidence” is “more than a “preponderance of the evidence,” but not to the extent of such certainty as required by “beyond a reasonable doubt” in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Disciplinary Counsel vs. Bunstine*, 123 Ohio St. 3d 298, 2009-Ohio-5286.

This Court ordinarily defers to a panel’s credibility determinations in its independent review of professional discipline cases unless the record weighs heavily against those findings. *Cincinnati Bar Assn. v. Statzer*, 101 Ohio St.3d 14, 2003-Ohio-6649.

OBJECTION #1

The Board had no basis for finding that the term “free consultation” as stated on Respondent’s website is inherently misleading.

“Based upon clear and convincing evidence, the panel concludes that Respondent Mezher, by her actions, violated Prof. Cond. R. 7.1.” Final Report, ¶27. Rule 7.1 states:

Rule 7.1 Communications concerning a lawyer’s services.

A lawyer shall not make or use a false, misleading, or non verifiable communication about the lawyer or the lawyer’s services.

The Board’s conclusion was premised, at most, on two findings of fact: The website for Mezher and Associates (www.mezherlaw.com) advertises a free consultation for individuals interested in hiring the firm (¶10) and Respondent Mezher had approved the website information, which, without further explanation of the Firm’s policies, was **inherently**

misleading (§12) (Bold emphasis supplied). The Board’s finding/conclusion on that point is unsustainable and objectionable, for multiple reasons.

First, the “finding” sounds more like a conclusion of law than a finding of fact, and there is no testimony or other evidence in this case to suggest that anyone was confused or misled by the term “free consultation.” Respondents Mezher and Espohl know what it means – they do not charge for free consultations. The clients understood what it means – they did not expect to be charged for a free consultation. Moreover, while Relator argued and the Board discussed some variables that could arise from a free consultations (e.g., time limitations for a free consultation or possible confusion arising about billable time after a fee agreement is signed and/or after a discharge), none of those were *actual* controversies in this case. Rather, the Respondents and the clients in this case disagree about the *actual* length of their February 3 meeting and whether one particular hour of work was *actually* performed for the clients after a fee agreement was signed. On these facts, the Board’s finding of fact that the term “free consultation” is “inherently misleading” is unsupported by any evidence, let alone clear and convincing evidence.

Second, to the extent the Board’s “finding” is more akin to a conclusion of law, the Final Report cites no relevant case law and provides no legal analysis to support it.⁵ Respondent Mezher’s research has revealed no Ohio cases attempting to define the phrase “inherently misleading” or applying that label to such an unambiguous phrase as “free consultation.” To “inhere” is “to exist as a permanent, inseparable, or essential attribute or quality of a thing; to be

⁵ The Final Report (pp. 6-7) cited four cases but only for the purpose of supporting a public reprimand as the appropriate sanction in this case. None of those cases support the idea that “free consultation” is an inherently misleading communication.

intrinsic to something.” *Black’s Law Dictionary*, Deluxe Ninth Edition (2009). To be “inherent” is to be “an inseparable quality or part of a thing or person”. *Ballentine’s Law Dictionary*, Third Edition (1969). These definitions are consistent with the Board’s making a finding “*without further explanation* of the Firm’s policies....” (italics provided for emphasis). In plain English, the finding of the Board means that any legal advertisement offering a “free consultation” is a *per se* ethical violation independent of any other firm policy, lawyer conduct, or dealings with a client. If allowed to stand, this “finding” in the Final Report will send immediate unpleasant ripples throughout the legal profession and require hundreds, if not thousands, of attorneys in Ohio to revise their websites and amend ads in phone directories, newspapers and on television/radio.

Third, should that occur, Respondent Mezher would identify closely (but not completely) with the attorneys who were disciplined in *Disciplinary Counsel v. Shane* (1998), 81 Ohio St.3d 494, for using a phrase in their ads that was commonly used in lawyer ads throughout the state:

Here we have found a violation of the duty not to mislead. However, respondents appear not to have violated this duty deliberately, but partly by their negligence in failing to be aware of the change in the Disciplinary Rules while they were running the offending television advertisements. Moreover, we take notice, as did the board, that there are “hundreds of yellow pages ads in every city in Ohio containing the words ‘no recovery, no fee,’” indicating that numerous other lawyers were and are under the impression that such advertising conforms with the Disciplinary Rules.

Id. at 497. 6

Respondent Mezher has more protection than the attorneys in *Shane*, however, thanks to

6 Compounding the mystery about what makes a communication “inherently misleading,” this Court stated in *Shane* that those commercials “while not inaccurate, were self-laudatory and inherently misleading.” *Id.* at 496. Ohio’s attorneys would be well-served by a detailed explanation from this Court of how something can be, at the same time, “accurate” and “inherently misleading.”

a 2005 opinion from the very Board that now condemns her conduct. In 2005, when Respondent Mezher and many other attorneys in Ohio were already advertising “free consultations,” the Board of Commissioners issued an opinion clearly approving the use of that phrase. “Because DR 2-101(E)(1) permits advertisement of fee information regarding an initial consultation, a lawyer may state in an advertisement whether an initial consultation is free.” *Supreme Court of Ohio, Office of Secretary, Opinion 2005-9 12/2/05 (Appendix p.0011)*. Recognizing the newly enacted Ohio Rules of Professional Conduct (February 1, 2007), Respondent Mezher submits that (unlike *Shane*) nothing in the superseding rules give attorneys any notice that the use of the term “free consultation” is misleading or otherwise unethical. Consequently, the *Shane* result should not govern here.

OBJECTION #2

The Board had no other factual or legal basis for imputing a violation of Rule 7.1 to Respondent Mezher based on policies of the Mezher law firm.

If Respondent’s website (“free consultation”) was not inherently misleading, any violation of Rule 7.1 would necessarily have to be based on some other policy, action or inaction attributable to Respondent Mezher. Indeed, the allegations in both the initial Complaint and the Amended Complaint tie the “free consultation” ad to extraneous attorney conduct and/or law firm policy. There is no evidence of any conduct by Respondent Mezher to support any such conclusions.

First, it is undisputed that Respondent Mezher had no personal contact with the clients and therefore no opportunity to mislead them aside from the content of her website directed to the general public.

Second, there was no allegation or finding against Respondent Mezher that triggers a

supervisory liability theory. Rule 5.1 addresses the responsibilities of partners, managers and supervisory lawyers, and imposes liability only in cases where the supervisor knows of, or ratifies wrongful conduct. Significantly, Rule 5.1, *Official Comment 7*, states in relevant part:

Apart from this rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate....

If Respondent Espohl failed to communicate that the free consultation had concluded, creating confusion for the clients, that in and of itself does not make the Mezher Firm ad for a “free consultation” misleading and does not create an ethical violation for Respondent Mezher.

Third, there is no evidence (based on the Board’s finding that Respondent Espohl’s version of the facts was the most reasonable version) that Mr. Espohl executed any firm policy other than to issue a bill in quantum meruit for work performed after a fee agreement was signed but before discharge. Not only is the quantum meruit billing (or the failure to advise a prospective client about that future possibility) not a misleading practice, but it has been explicitly approved by this Court as a basis for recovering fees.

“A client has an absolute right to discharge an attorney or law firm at any time, with or without cause, subject to the obligation to compensate the attorney or firm for services rendered prior to the discharge.” *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry* (1994), 68 Ohio St.3d 570, 629 N.E.2d 431 (Syllabus, paragraph 1). The purpose of this rule is to strike the proper balance between the client’s right to discharge one attorney and substitute another one, and the first attorney’s right to be paid for services rendered prior to discharge. *Id.* This rule even imposes a *quantum meruit* clause on fee agreements between attorneys and clients when the written fee agreement does not contain a *quantum meruit* clause. *Id.*; see also *Fox & Associates Co., L.P.A. v. Purdon* (1989), 44 Ohio St.3d 69, 541 N.E.2d 448.

Moreover, one of the official comments to Prof. Cond. R 1.16 reinforces the permissibility of a *quantum meruit* recovery. “A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer’s services. Where future dispute about the discharge may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.” Rule 1.16, *Official Comment 4*. Advisable, not required. Hindsight is cheap, and the policy and practice of the Mezher firm, as implemented by Respondent Espohl and Michael Mezher after the termination decision, cannot be a basis for attorney discipline. The Board has erred by concluding otherwise.

By all appearances (because the connection between Board’s findings of fact and the Board’s conclusions is not clear), the Board has found a violation based upon a version of the facts that **no one** contends to be true. Not even the clients contended that they were misled by, or somehow misunderstood, the meaning and nature of a “free consultation.” Nor do they contend that they were surprised when they were billed for the last 60 minutes of a 90 minute “free consultation.” Rather, they deny that the last 60 minutes of the meeting ever took place, thereby accusing the Mezher firm of a “bait and switch” when it charged the clients \$250 for a 30 minute free consultation.⁷ The clients have not claimed confusion over the conversion to a *quantum meruit* billing; indeed, Burns did not oppose paying for work done after February 3. Rather, her complaint (and Relator’s theory during opening statement at trial) was that she was billed for work that was never performed. The Board decision effectively evades this clash and

⁷ Curiously, as undersigned counsel noted during closing arguments (Tr. 255-56), if the clients were telling the truth about the duration of the February 3 consultation they did not even complain that Mr. Espohl had billed his *quantum meruit* work at a rate of \$500 per hour (\$250 for 30 minutes of time). Maybe this fact influenced the Board’s determination as to which version of the facts was most reasonable.

even muddies it up by using the words “meeting” and consultation” interchangeably. See *Final Report*, ¶11, ¶14 & ¶16 Far better clarity is achieved by acknowledging that (according to Mr. Espohl) there was a 90 minute meeting, but that only the initial 30 minutes was the consultation (terminated by the signing of the fee agreement).

In any event, this dispute has nothing whatsoever to do with “confusion” from a website. With the Board having deemed Mr. Espohl’s version of the facts as the most “reasonable” version, the “confusion” fiction dissipates into thin air and the *quantum meruit* fee imposed by the Mezher firm can only be seen as compatible with the *Reid* holding and with the Ohio Rules of Professional conduct.

OBJECTION #3

The Doctrine of Promissory Estoppel should protect Respondent Mezher from a Disciplinary Sanction for conduct previously approved in a Board Opinion.

The Board should be estopped from sanctioning attorneys whose conduct is consistent with relevant opinions previously published by the Board. As noted above at the conclusion of Objection #1, the Board of Commissioners issued an opinion clearly approving the use of the phrase “free consultation” in *Supreme Court of Ohio, Office of Secretary, Opinion 2005-9 12/2/05 (Appendix p.0011)*. It is more than disturbing that the State’s highest disciplinary Board for attorneys can issue public opinions approving some particular attorney conduct as a general principle, only to take a contrary position about that same conduct when an attorney who acted in good faith is brought before the Board by a disgruntled (or dishonest) client.

In *Pilot Oil Corp., v. Ohio Dept. of Transp.* (1995), 102 Ohio App.3d 278, the Court held that where (1) the state uses its discretion in the interpretation of a law or rule; (2) the state’s interpretation is not violative of legislation passed by the General Assembly of Ohio; and (3) the

elements of promissory estoppel are otherwise met, promissory estoppel may be employed to bar the state from asserting a contrary interpretation where the state had full opportunity to make an informed decision and, in fact, did make an informed decision. *Id.* at 283.

All of those elements fit this case. In *Hartman v. City of Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, this Court defined the doctrine of promissory estoppel as follows:

{¶ 23} Promissory estoppel has been defined by the Restatement of Contracts, 2d as “[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” Restatement of the Law 2d, Contracts (1981) 242, Section 90.

Of course, the promissory estoppel theory was not argued below because the application of the “inherently misleading” label to an ad for a “free consultation” had not been alleged or argued by Relator at any stage of the proceedings. To the extent that any element of the promissory estoppel defense appears in the record with less than full force, it is because of the due process problems articulated in Objection #4 below.

OBJECTION #4

It was a Violation of Due Process for the Board to find Respondent Mezher’s website to be “inherently misleading” when nothing under Ohio law gave notice that it was a violation, identical ads were common practice throughout Ohio, and the theory itself was neither pled by the Board nor argued at the hearing.

Because disciplinary proceedings are potentially punitive, the United States Supreme Court has termed them “adversary proceedings of a quasi-criminal nature.” *In re Ruffalo*, 390 U.S. 544, 551 (1968). Consequently, certain due process rights attach.

Now that the smoke from the trial has cleared, this case appears as a due process fiasco,

beginning with the false allegation in Relator's Complaint and ending with the Board's finding of a violation based on a theory that was never pled or argued by Relator at any phase up through the conclusion of the trial. In retrospect, the problem may have even been compounded by the Board's decision allowing Relator's three trial witnesses to appear via pre-recorded video depositions in December (for what became a March hearing), removing any possibility that the witnesses could be effectively cross examined by counsel or questioned by the Panel about any late developing issues. Even the Amended Complaint – stripped nearly bare of any mention of conduct by Respondent Mezher – still linked its allegations about the Mezher firm's website to *extraneous* attorney conduct and thereby served to decoy Mezher and her counsel away from any notion that the website was "inherently misleading."⁸

Relator's counsel did not mention the "inherently misleading" theory at all during Opening Statements (Tr. at pp. 12-16) or during Closing Arguments (Tr. at pp. 236 to 247). Even during Respondent Mezher's time for closing argument, the Panel was fixated on a link between the website and attorney conduct:

Mr. Condit, the issue...is whether she properly had disclaimers on the website about free consultations. Secondary is the practices that were in place in the firm regarding these three triggers that could turn a free consultation into a fee generating exercise. Let's focus on those two things. Those are the issues that really trouble this panel.

(Tr. at 249)⁹

⁸ Paragraph 8 of the First Amended Complaint alleges the Rule 7.1 violation as follows: "Rule 7.1 for making a false and/or misleading communication about the lawyer's services by advertising a "free consultation" **and subsequently charging** for what the client reasonably understood to be the "free consultation." (Bold emphasis supplied)

⁹ It is unclear exactly what standard the Board is imposing for "disclaimers in ads," but Respondent Mezher submits that no ad or website can reasonably be expected to advise the public in a coherent way of all of the possible contingencies and permutations that could develop

In *Disciplinary Counsel v. Simecek* (1998), 83 Ohio St.3d 320, this Court discussed and applied some of the due process issues that were present and decided in *Ruffalo*:

The panel's and board's actions are similar to those proscribed by the United States Supreme Court in *In re Ruffalo* (1968), 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117. In that case, a lawyer disciplinary board added an additional misconduct charge after it heard the testimony against an attorney. The Supreme Court of the United States said that in a disciplinary proceeding, as lawyer "is entitled to procedural due process, which includes fair notice of the charge." Id. at 550 * * * The court said that "[t]he charge must be known before the proceedings commence. They become a trap when, after they are under way, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh." Id. at 551 * * * The court held, "The absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." Id. at 552 * * * On similar facts, we so hold in this case

Simecek at 322.

In a word, Respondent has been blindsided without notice by a novel standard imposed on her website by a Board decision that deviated from any theory of liability asserted by Relator in its pleadings or at trial. Such an approach to attorney discipline is but one step removed from an ex post facto law. "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bowie v. City of Columbia*, 378 U.S. 347, 353-54 (1964).

Respondent objects to an attorney discipline proceeding that involved a moving target

under an attorney fee arrangement. Such an ad (which in the Yellow Pages would run for ten pages and read like an insurance contract) would make John Q. Public's head spin. Moreover, the more an ad gets "lawyered" to cover all of the contingencies and permutations of fee arrangements, the more likely the prospective client becomes misled or confused from the ad itself. At some point, it must be acknowledged that the burden is on the attorney to explain things properly at the conference table, because no ad can possibly do it

and left her guessing to the very end what she did wrong, and why. She further objects to being reprimanded based upon a Board decision holding her to an undefined standard for law firm websites, and about which she was never given notice until she received the Board's decision.

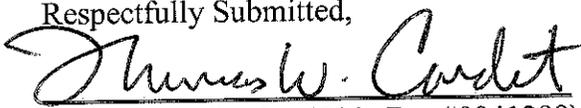
V. CONCLUSION

The term "Free Consultation" is not an inherently misleading communication, and poor communication (if any) between a law firm employee and a client in an isolated instance does not make it so. Moreover, the Ohio Rules of Professional Conduct allow a law firm to charge a client in quantum meruit for work actually performed prior to discharge.

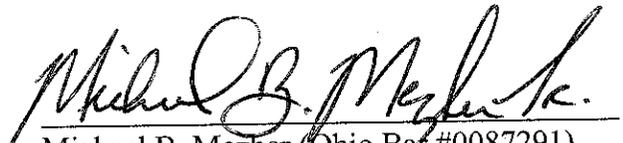
There is no clear and convincing evidence in this case that the clients were charged for a free consultation, and there is unrebutted evidence that the Clients did not object to paying for work performed between the time they signed the fee agreement and the time they terminated Respondents' representation three weeks later.

Moreover, based upon the arguments of estoppel and due process asserted above, the recommendations of the Panel (Board) should be rejected and the Complaint against Respondent Kathleen Mezher should be dismissed.

Respectfully Submitted,



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VI. CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June 2012, I have served a true and accurate copy of Respondent Kathleen D. Mezher's Objections by hand delivery upon:

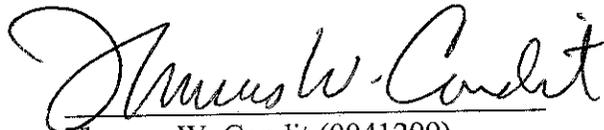
Frank E. Espohl, Esq. (pro se)
8075 Beechmont Avenue
Cincinnati, Ohio 45255

Richard A. Dove, Secretary
Board of Commissioners on Grievances
and Discipline
65 S. Front Street, 5th Floor
Columbus, Ohio 43215-3431

and also by First Class U.S. Mail upon counsel for Relator Cincinnati Bar Association at the following addresses:

James F. Brockman, Esq.
Lindhorst & Dreidame
312 Walnut St., Suite 3100
Cincinnati, Ohio 45202

Ms. Katherine C. Morgan
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Attorney for Respondent Kathleen Mezher

APPENDIX

Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline	0001
Ohio Rule of Professional Conduct 7.1	0009
Supreme Court of Ohio, Office of Secretary, Opinion 2005-9 (12/2/2005)	0011

**BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO**

In Re:	:	
Complaint against	:	Case No. 11-078
Kathleen Donohoe Mezher Attorney Reg. No. 0016982	:	Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Frank Eric Espohl Attorney Reg. No. 0065957	:	
Respondents	:	
Cincinnati Bar Association	:	
Relator	:	

OVERVIEW

{¶1} This matter was heard on March 13, 2012, in Columbus, Ohio before a panel consisting of members John H. Siegenthaler, Patrick L. Sink, and Bernard K. Bauer, chair. None of the panel members was from the district from which the complaint arose or served as a member of the probable cause panel in this matter.

{¶2} Relator was represented by James F. Brockman and Katherine C. Morgan. Respondent, Kathleen D. Mezher, was represented by Thomas W. Condit, and was present at the hearing. Respondent, Frank E. Espohl, represented himself and was present at the hearing.

{¶3} Relator proceeded upon its complaint that alleged Respondents committed misconduct in their advertising of a free initial consultation regarding their services when, in fact, a fee of \$250 was charged and collected respecting an initial consultation on February 3, 2011, thereby violating Prof. Cond. R. 1.5(b) and Prof. Cond. R. 7.1.

000001

{¶4} For the reasons that follow, the panel recommends Respondent Mezher be found to have violated Prof. Cond. R. 7.1 and, based upon such conclusion, recommends that Respondent Mezher receive a public reprimand.

{¶5} Further, for reasons that follow, the panel recommends Respondent Espohl be found to have violated Prof. Cond. R. 1.5(b) and, based upon such conclusion, recommends that Respondent Espohl receive a public reprimand.

FINDINGS OF FACT

{¶6} Based upon the stipulations of the parties, the testimony and the exhibits, the panel makes the following findings based upon clear and convincing evidence.

{¶7} Respondent Mezher was admitted to the practice of law in the State of Ohio on December 17, 1984, and is subject to the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

{¶8} Respondent Espohl was admitted to the practice of law in the State of Ohio on May 13, 1996, and is subject to the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

{¶9} For a number of years and up to the date of the hearing, Respondents practiced together in the Law Offices of Kathleen Mezher & Associates, L.L.C. ("Mezher & Associates"), with Respondent Mezher being the owner and Respondent Espohl being an associate. Stipulations, ¶3.

{¶10} The website for Mezher & Associates (www.mezherlaw.com) advertises a free consultation for individuals interested in hiring the firm. Stipulations, ¶4.

{¶11} The website does not disclose any limitations on the free consultation nor do any written policies of Mezher & Associates place any limitations on the free consultations. However, the firm policy adopted by Respondent Mezher, as the owner, was that no fees were to

be charged for the free consultation, but the free consultation ended when the individual either hired or left the meeting without engaging the firm. A fee agreement signed at some point during an initial consultation results in the first part of the consultation being free while the attorney time spent after the signing, although during that initial consultation, is billed to the client. This policy was conveyed by Respondent Mezher to the associates in the firm. Hearing Tr. 34-36; 56.

{¶12} Respondent Mezher had approved the website information, which, without further explanation of the firm's policies, was inherently misleading.

{¶13} In February of 2011, Stephanie Mahaffey contacted Mezher & Associates to schedule a free consultation about the handling of her mother's estate. Mezher & Associates had prepared her mother's will and a trust.

{¶14} On February 3, 2011, Mahaffey, her husband, and her sister, Jessica Burns went to the main office of Mezher & Associates located on Beechmont Avenue in Cincinnati for an initial consultation and met with Mike Mezher, the husband of Respondent Mezher a non-attorney office manager of the firm, and Respondent Espohl.

{¶15} The participants in the meeting have different recollections of what transpired. However, the most reasonable explanation of what transpired was offered by Respondent Espohl and corroborated by Mike Mezher. Hearing Tr. 60-62; 105-111.

{¶16} The initial portion of the meeting lasted 20 to 30 minutes and consisted of Respondent Espohl reviewing the will and trust that were brought in by the prospective clients. Additionally, Respondent Espohl answered some questions asked by the prospective clients. Mike Mezher sat in on the meeting because the potential estate consisted of stocks, bonds, and an interest in a closely held corporation. There was some tension between the sisters during the

meeting regarding the real estate since one of the sisters was living with the mother at the time of her death.

{¶17} The initial portion of the meeting concluded with the signing of a probate fee agreement. Relator's Ex. 4.

{¶18} After the fee agreement was signed, Respondent Espohl left the room for about 20 minutes to research real estate issues on his computer. Espohl then returned to the meeting with the clients and spent an additional 30 to 35 minutes with them answering questions and advising them about additional information that would be needed.

{¶19} At the time of the meeting, Respondent Espohl did not advise the sisters that the "free consultation" ended when they signed the fee agreement.

{¶20} There likely would not have been a dispute had the undertaking agreed to on February 3, 2011, been completed, as the fees would have been governed by the fee agreement. However, after that meeting, the sisters decided that they did not want Mezher & Associates to represent them in concluding their mother's affairs.

{¶21} Burns contacted Mezher & Associates, advised Mike Mezher that the firm was being discharged and requested return of the file.

{¶22} Mike Mezher advised Respondent Espohl that the firm was being discharged and asked him to prepare a bill for his time spent on the file. The invoice which Respondent Espohl prepared totaled \$375, including a charge of \$250 for the February 3, 2011 meeting. The invoice did not show any portion of the initial consultation as being free. Relator's Ex. 5.

{¶23} On February 26, 2011, Burns and a friend went to the offices of Mezher & Associates to pick up the file. When Burns reviewed the invoice, she challenged the charge for

the February 3, 2011 meeting, which she and her sister believed was to be a free consultation, and spoke with Mike Mezher about the matter.

{¶24} Mike Mezher apparently refused to turn over the file until the invoiced charges were paid. Burns' friend paid the bill to retrieve the file.

{¶25} Respondent Mezher refunded the disputed \$250 charge "about a week" before the hearing. Hearing Tr. 224.

CONCLUSIONS OF LAW

{¶26} Relator alleges that Respondent Mezher violated the following: Prof. Cond. R. 1.5(b) [any change in the basis or rate of a fee shall be promptly communicated to a client] and Prof. Cond. R. 7.1 [a lawyer shall not make or use a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services].

{¶27} Based upon clear and convincing evidence, the panel concludes that Respondent Mezher, by her actions, violated Prof. Cond. R. 7.1.

{¶28} However, based upon the evidence submitted, the panel cannot conclude that Respondent Mezher violated Prof. Cond. R. 1.5(b) and recommends that such allegation of misconduct be dismissed.

{¶29} Relator alleges that Respondent Espohl violated Prof. Cond. R. 1.5(b) and Prof. Cond. R. 7.1.

{¶30} Based upon clear and convincing evidence, the panel concludes that Respondent Espohl, by his actions, violated Prof. Cond. R. 1.5(b).

{¶31} However, based upon the evidence submitted, the panel cannot conclude that Respondent Espohl violated Prof. Cond. R. 7.1 and recommends that such allegation of misconduct be dismissed.

AGGRAVATION AND MITIGATION

{¶32} Based upon the evidence presented the only aggravating matter offered in this case as to either Respondent was the failure to make timely restitution.

{¶33} In mitigation as to Respondent Mezher, there is an absence of a prior disciplinary record and there is an absence of a dishonest or selfish motive. Further, Respondent Mezher exhibited a cooperative attitude toward the proceedings and demonstrated active participation in both the legal community and the community at large. Finally, Respondent Mezher has taken steps to attempt to rectify the problems associated with her website and has reviewed and modified her various fee agreements.

{¶34} In mitigation as to Respondent Espohl, there is an absence of a prior disciplinary record and there is an absence of a dishonest or selfish motive. Further, Respondent Espohl exhibited a cooperative attitude toward the proceedings and demonstrated active good character and reputation.

RECOMMENDED SANCTION

{¶35} Relator has recommended that each Respondent receive a public reprimand.

{¶36} Respondents have moved the panel to dismiss all of the violations charged or, in the alternative, impose a sanction of a public reprimand.

{¶37} Respondent Mezher approved the contents of her firm's website that were inherently misleading, as it was in the Burns matter, and developed and trained her associates in her firm's policy regarding when a free consultation ceased being a free consultation.

{¶38} In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 105 S.Ct. 2265 (1985), the Court held that a public reprimand was affirmed as it related to Zauderer's failure to disclose that notwithstanding the fact that no attorney fee would be owed in

the event the contingent Dalkon Shield case was lost, costs and expenses associated with the undertaking would still be owed by the client. This was determined to be inherently misleading to members of the public.

{¶39} Similarly, a public reprimand was the appropriate sanction in *Medina County Bar Assn. v. Grieselhuber*, 78 Ohio St.3d 373, 1997-Ohio-58 and *Disciplinary Counsel v. Shane*, 81 Ohio St.3d 494, 1998-Ohio-609.

{¶40} Finally, in *In re Pacior*, 770 N.E.2d 273 (Ind. 2002), the Indiana Supreme Court imposed a reprimand and admonishment for advertising a free initial consultation and later charging the client for their initial meeting.

{¶41} Respondent Espohl was aware of the advertising and the firm's policy regarding when fees were to be charged and failed to advise the sisters that they could be charged for any time spent after the fee agreement was signed, thereby causing the confusion that led to this case.

{¶42} For these reasons, the panel recommends that Respondent Mezher receive a public reprimand and that Respondent Espohl receive a public reprimand.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 6(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on April 13, 2012. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendations of the panel and recommends that Respondents, Kathleen Donohoe Mezher and Frank Eric Espohl, each be publicly reprimanded. The Board further recommends that the cost of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on
Grievances and Discipline of the Supreme Court of Ohio,
I hereby certify the foregoing Findings of Fact, Conclusions
of Law, and Recommendation as those of the Board.**



**RICHARD A. DOVE, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio**

RULE 7.1

COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make or use a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431
(614) 387-9370 (888) 664-8345 FAX: (614) 387-9379
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OFFICE OF SECRETARY

OPINION 2005-9

Issued December 2, 2005

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: A lawyer may not advertise legal services with coupons for free consultation or dollars off the cost of legal services. Advertising legal services with fee coupons is a characterization of the fees as “discount” or “special” and does not comply with DR 2-101(A)(5). Although a lawyer may not use fee coupons, a lawyer may advertise information regarding fees and charges as set forth in DR 2-101(E)(1), if presented in compliance with DR 2-101(B). Because DR 2-101(E)(1)(a) permits advertisement of fee information regarding an initial consultation, a lawyer may state in an advertisement whether an initial consultation is free. Prohibiting the use of fee coupons in lawyer advertising does not interfere with a lawyer’s exercise of independent professional judgment in setting fees for legal services at a rate that is reasonable and not excessive under the factors set forth in DR 2-106(B).

OPINION: This opinion addresses a question regarding advertisement of legal services.

Is it proper for a lawyer’s advertisement to include a coupon for dollars off the cost of legal services or a coupon for a free initial consultation?

DR 2-101(A)(5) of the Ohio Code of Professional Responsibility explicitly prohibits the characterization of fees and rates as “discount” or “special.”

DR 2-101(A) A lawyer shall not, on his or her own behalf or that of a partner, associate, or other lawyer affiliated with the lawyer or the lawyer’s firm, use, or participate in the use of, any form of public communication, including direct mail solicitation, that:

(5) Contains characterizations of rates or fees chargeable by the lawyer or law firm, such as “cut-rate,” “lowest,” “giveaway,” “below cost,” “discount,” and “special;” however, use of characterizations of rates or fees such as “reasonable” and “moderate” is acceptable.

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A coupon for dollars off legal services or a coupon for a free consultation is a characterization of a lawyer's rates and fees as "discount" or "special." Because Ohio's DR 2-101(A)(5) explicitly prohibits the characterization of fees and rates as "discount" or "special" it is improper for a lawyer's advertisement to include a coupon for dollars off legal services or a coupon for a free consultation.

Across the nation, opinions differ as to the use of coupons in legal advertising. Some advisory committees view lawyers' advertisements with coupons for discounts on legal services as improper. See, Bar Assn. Nassau County, Op. 83-2 (1983); Maryland State Bar Assn. Op. 86-18 (undated). Some advisory committees view coupons for discounts on legal services as proper. See, Alabama State Bar, Op. 87-134 (1987); Connecticut Bar Assn. Op. 94-23 (1994); State Bar of Michigan, Op. CI-704 (1981); Philadelphia Bar Assn. Op. 92-12 (1992); South Carolina Bar, Op. 96-27 (1997). Some committees view coupons for free initial consultation as proper. See Cincinnati Bar Assn, Op. 91-92-02 (undated); State Bar of Texas, Op. 452 (1987) (may use if advertisement is in compliance with provisions on advertising and solicitation).

But, Ohio lawyers are bound by Ohio's disciplinary rules. Ohio's rule prohibits the characterization of fees and rates as "discount" or "special."

Thus, this Board advises that a lawyer may not advertise legal services with coupons for free consultation or dollars off the cost of legal services. Advertising legal services with fee coupons is a characterization of the fees as "discount" or "special" and does not comply with DR 2-101(A)(5). Although a lawyer may not use fee coupons, a lawyer may advertise information regarding fees and charges as set forth in DR 2-101(E)(1), if presented in compliance with DR 2-101(B). Because DR 2-101(E)(1)(a) permits advertisement of fee information regarding an initial consultation, a lawyer may state in an advertisement whether an initial consultation is free. Prohibiting the use of fee coupons in lawyer advertising does not interfere with a lawyer's exercise of independent professional judgment in setting fees for legal services at a rate that is reasonable and not excessive under the factors set forth in DR 2-106(B).

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.