

**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

---

**JOINT MOTION FOR RECONSIDERATION  
OF RESPONDENTS KATHLEEN D. MEZHER AND FRANK ERIC ESPOHL**

---

**JAMES F. BROCKMAN (Bar #0009469)**  
LINDHORST & DREIDAME  
Attorney for Relator Cincinnati Bar Assn.  
312 Walnut St., Suite 3100  
Cincinnati, OH 45202  
(513) 345-5798  
Fax: (513) 421-0212  
[jbrockman@lindhorstlaw.com](mailto:jbrockman@lindhorstlaw.com)

**FRANK E. ESPOHL (Bar #0065957)**  
KATHLEEN MEZHER & ASSOCIATES  
Respondent *pro se*  
8075 Beechmont Ave.  
Cincinnati, OH 45255  
(513) 474-3700  
Fax: (513) 388-4652  
[frank@mezherlaw.com](mailto:frank@mezherlaw.com)

**KATHERINE C. MORGAN (Bar #0068184)**  
Attorney for Relator Cincinnati Bar Assn.  
1 Neumann Way  
MDJ104  
Cincinnati, Ohio 45215  
(513) 243-3740

**THOMAS W. CONDIT (Bar #0041299)**  
Attorney for Respondent  
Kathleen D. Mezher  
P.O. Box 12700  
Cincinnati, OH 45212  
(513) 731-1230  
Fax: (513) 731-7230  
[twcondit@fuse.net](mailto:twcondit@fuse.net)

**RECEIVED**  
Fax: (513) 651-6981  
[Katherine.morgan@ge.com](mailto:Katherine.morgan@ge.com)  
DEC 13 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

**FILED**  
DEC 13 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

**MICHAEL MEZHER, JR.**

**(Bar #008721)**

**Co-Counsel for Respondent**

**KATHLEEN D. MEZHER**

**KATHLEEN MEZHER & ASSOCIATES**

**8075 Beechmont Ave.**

**Cincinnati, OH 45255**

**(513) 474-3700**

**Fax: (513) 388-4652**

**[Michael@Mezherlaw.com](mailto:Michael@Mezherlaw.com)**

Pursuant to S. Ct. Prac. R. 11.2, Respondents Kathleen D. Mezher and Frank Eric Espohl hereby jointly move the Court for Reconsideration of its *Slip Opinion* and *Order* entered in this action on December 3, 2012.

### **SUPPORTING MEMORANDUM**

On December 3, 2012 this Court filed a *Slip Opinion* and entered an *Order* publicly reprimanding Respondents for conduct relating to the billing of a client in February 2011. In doing so, the Court adopted the recommendation of the Board of Commissioners on Grievances and Discipline. Two justices dissented from the majority opinion.

Because this Court's *Slip Opinion* and *Order* were based on erroneous statements of fact and a misapplication of Ohio law governing attorney fee agreements, Respondents respectfully submit that the *Slip Opinion* and *Order* should be reconsidered and vacated.

#### **I. Factual Considerations: Conflating Fact and Fiction.**

The majority opinion correctly states that (i) a free consultation was advertised and provided, (ii) a fee agreement was subsequently signed by the Client, (iii) legal services were then rendered by Mr. Espohl, (iv) the Client(s) discharged the firm three weeks later, and (v) the firm billed the Client(s) for the reasonable value of services rendered prior to discharge.

##### **A. No Billable Event at Initial Meeting.**

However, the majority decision carries an erroneous factual premise that badly misdirects its ultimate reasoning. The factual error is rooted in the false notion that during the initial (February 3) meeting the “[free] consultation...had changed from a free to a billable event....” *Slip Opinion*, Para 16. This same error permeates the Court's opinion, including the conclusion that the firm's website advertisement “was misleading because it omitted a key piece of information - the free consultation ended (and billing began) with the

signing of the fee agreement. *Slip Opinion*, Para 15.

As Respondents attempted to explain during oral argument, no billable event arose on the day of the free consultation and it is simply false to say that “billing began” after the fee agreement was signed. Because the fee agreement was governed by the Clermont County Probate Court guidelines, the Mezher firm would never have billed the Client(s) for any attorney time invested that day or any other day.<sup>1</sup> The Clermont County Probate Court Guideline is a formula that calculates attorney fees based on the value of probate assets that pass through the estate. If the attorney’s fee is within the Court’s guideline, then no supporting time sheets reflecting billable time are required by the Court. The firm’s Probate practice is to stay within the guideline fee and therefore all work performed after the signing of the fee agreement is part of the guideline fee. Consequently, absent a discharge of the firm, such time is never billed to the Client and there is no “billable event” triggered by the signing of the fee agreement.<sup>2</sup>

The “billable event” in this case occurred not with the signing of the fee agreement on February 3, but when the Clients discharged the firm three weeks later, thereby triggering a perfectly lawful *quantum meruit* billing by the firm.

**B. No Evidence of Client Confusion After Fee Agreement Signed.**

The second factual error is rooted in what Respondent Mezher’s counsel referred to during oral argument as an “artificial construct” – the alleged misunderstanding of the Client(s) about the significance of the signing of the fee agreement. Because the Clients

---

<sup>1</sup> The only exception to this would be a future billing in *quantum meruit* after the firm was discharged, a central legal issue that somehow went unmentioned in the Court’s opinion. The ethics of *quantum meruit* billing is revisited below.

<sup>2</sup> Significantly, even the two dissenting justices adopted this factual error. “[Respondents’] only error was to fail to advise their client that billable time had started.” *Slip Opinion* p. 10 (Bold emphasis supplied).

testified (unpersuasively) that they left Respondents' office immediately after signing the fee agreement, there is no factual basis for the Court's (or the Panel's) conclusion that the firm's advertisement was "misleading" to the Clients. Conflating fact and fiction, the Court took Mr. Espohl's version of the two-part February 3 meeting and imputed a misunderstanding to the Client(s) who denied that the second part of the meeting even occurred. See *Slip Opinion*, Para. 21 ("For the sisters, however, all of the events of the February 3 meeting constituted one consultation for which they believed they would not be charged.") This mixing of "fact and fiction" has led the Court to discipline Respondents for Client confusion that has no basis in the record.

What does exist, however, is the testimony of Stephanie Mahaffey establishing that she understood the fee arrangement accurately:

- A. . . . 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. Jessica Burns also understood that "Clermont County would set that fee for us." *Burns Depo.* at p. 8, line 12.

Mrs. Mahaffey also understood the significance of signing the fee agreement:

- 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. 28.

## II. Disregard of Case Law Governing Quantum Meruit Issue.

The Panel adopted Respondents version of the facts and this Court deferred to those factual findings. Those facts make clear that services were rendered after the free consultation concluded and the fee agreement was signed. When the firm was discharged three weeks later, it generated a bill on a quantum meruit basis in full accord with the controlling *Reid* and *Fox* cases.

Yet, for whatever reason, no discussion of the ethics of billing *in quantum meruit* appeared in either the majority opinion or the dissent. Counsel for Respondent Mezher framed this as a “Quantum Meruit case” during Closing Arguments to the hearing panel. *Formal Hearing Transcript* p. 256-57. Both of the Respondents also argued the quantum meruit issue in the Objections briefing to this Court. See Objections Brief of Respondent Mezher at pp. 16-17 and Objections Brief of Respondent Espohl at pp. 9 – 11.

The omission is critical because this Court has effectively denied Respondents the right of *quantum meruit* billing that protects every other attorney in the State of Ohio. As was stated in Respondent Mezher’s Objections brief:

“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.

Mezher Objections Brief at p. 16. Relator conceded at oral argument that quantum meruit billing is permitted

Detached from any explicit obligations contained in the Rules of Professional Conduct and detached from the principles of law contained in *Reid* and *Fox*, the *effective* holding of this case is that Respondents had an obligation to inform the Client(s) of the *possibility* of a future billing in quantum meruit in the event of a discharge. If the Court intended to establish such a landmark principle, it failed to do so with clarity and other Ohio lawyers acting in good faith will henceforth be unwittingly exposed to this same discipline. If the Court did not intend to establish such a principle, then Respondents, and Respondents alone, have been singled out and disciplined for an honest quantum meruit billing.

In any event, except for the likelihood that the Court became misdirected by the false notion of a “billable event” occurring during the initial meeting, it is difficult for Respondents to fathom how this case came to be decided without any discussion of quantum meruit billing.

### **III. Reconsideration of Costs Taxed To Respondents.**

Even should the Court deny Reconsideration or otherwise affirm the disciplinary sanction against one or both of them, Respondents object to and seek Reconsideration of that portion of the Court’s Order taxing the entire \$4,112.22 in costs against them.

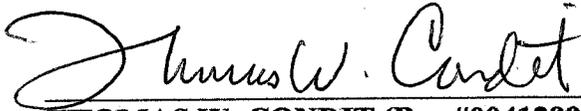
Respondents specifically object to bearing the costs of the video trial depositions of Relator’s three witnesses. The hearing panel permitted Relator’s three witnesses to testify by video over Respondents’ objections merely as an accommodation to the witnesses. As Respondents see it, Relator’s witnesses initiated these proceedings by making false allegations that the panel found unpersuasive. Meanwhile, Relator used the false allegations to prosecute an ethical charge on a theory about free consultations (“inherently misleading”)

that Relator itself has since abandoned and conceded to Respondents. If, indeed, the ever-evolving theory of ethical liability for these Respondents has come to an end with discipline imposed, it has landed far from the original fact allegations of the videotaped witnesses. Relator should be made to bear those unnecessary costs.

### CONCLUSION

For all of the foregoing reasons, the opinion and order of this Court should be reconsidered and vacated.

Respectfully Submitted,



**THOMAS W. CONDIT (Bar #0041299)**  
Attorney for Respondent Kathleen D. Mezher  
P.O. Box 12700  
Cincinnati, Ohio 45212  
Tel: (513) 731-1230  
Fax: (513) 731-7230  
[twcondit@fuse.net](mailto:twcondit@fuse.net)



**FRANK E. ESPOHL (Bar#65957)**  
KATHLEEN MEZHER & ASSOCIATES  
Respondent *pro se*  
8075 Beechmont Ave.  
Cincinnati, OH 45255  
Tel.: (513) 474-3700  
Fax: (513) 388-4652  
[Frank@Mezherlaw.com](mailto:Frank@Mezherlaw.com)



**MICHAEL MEZHER, JR.**  
**(Bar #0087291)**  
Co-Counsel for Respondent KATHLEEN D. MEZHER  
KATHLEEN MEZHER & ASSOCIATES  
8075 Beechmont Ave.  
Cincinnati, OH 45255  
Tel: (513) 474-3700 Fax: (513) 388-4652  
[Michael@Mezherlaw.com](mailto:Michael@Mezherlaw.com)

**CERTIFICATE OF SERVICE**

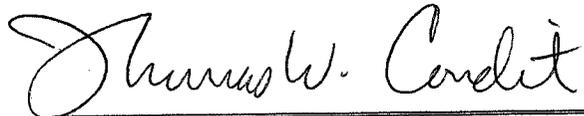
I hereby certify that on this 12th day of December 2012, I have served a true and accurate copy of this Motion For Reconsideration by First Class U.S. Mail upon:

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

and also 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  
1 Neumann Way  
MDJ104  
Cincinnati, Ohio 45215



---

Thomas W. Condit (0041299)  
Attorney for Respondent Kathleen Mezher