ORIGINAL

No. 2012 - 0684

IN THE SUPREME COURT OF OHIO

CINCINNATI BAR ASSOCIATION,
Relator,

vs.

KATHLEEN D. MEZHER AND FRANK E. ESPOHL
Respondents

RELATOR'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION

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Cincinnati Bar Association RELATOR v. Kathleen D. Mezher (#0016982) And Frank E. Espohl (#0065957) RESPONDENTS	: : : : : : : : : : : :	Case No. 2012-0684

RELATOR'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION

INTRODUCTION

On December 3, 2012, this Court publicly reprimanded Kathleen Mezher and Frank Espohl for professional misconduct encompassing failure to communicate the basis of a fee and misleading communication regarding a fee. (*Cincinnati Bar Association v. Mezher and Espohl*, Slip Opinion No. 2012-Ohio-5527). On December 13, 2012, Respondent filed a Motion for Reconsideration of the Court's Opinion and Order entered on December 3, 2012. The Motion was filed pursuant to S. Ct. Prac. R. 11.2. The Court's decision, publicly reprimanding Respondents, was not made in error. For the following reasons, Respondents' Motion for Reconsideration lacks merit and should be denied.

A. Respondents Raise a New Argument That Directly Contradicts Their Prior Position

In an effort to suggest error by this Court, Respondents seek to vacate this Court's decision on the grounds that it is rooted in the false notion that during the February 3 meeting at issue in this case, the "free consultation . . .had changed from a free to a billable event...." (Respondents' Motion 1). According to Respondents, "...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." (Respondents' Motion 2).

Respondents' argument that no billable event arose on the day of the free consultation is a new position in direct contradiction to their prior position. Indeed, throughout the disciplinary process and until their Motion for Reconsideration, Respondents had continually insisted that there *was* indeed a billable event at the initial meeting, a fact they now incredulously deny.

In his Objections dated June 11, 2012, Respondent Espohl stated, "once they signed the fee agreement and we started working on their case, the work we did was not part of the free consultation" and "[w]e charged for work we did after the free initial consultation was over and the Complainants signed the fee agreement and said they wanted to get started working on their mother's Estate." (Espohl Objections 7, 9). In his Trial Brief filed with the hearing panel, Respondent Espohl stated, "[a]fter the Complainants had their free consultation and signed the fee agreement, [I] spent well over an hour working on the Estate." (Espohl Tr. Brief 1). Additionally, at the hearing, he testified, "[A]fter they signed the fee agreement, they said they wanted to start...[c]ertainly my stepping out of the office to do some research on this *created a divider line between the consultation and, you know, starting work.* (Hr'g Tr. 60) (emphasis added).

Respondent Mezher's Objections echoed these facts, which Respondents now label "erroneous." She argued that Respondent Espohl performed billable work after the fee

agreement was signed. (Mezher Objections 7-8). At the hearing, she testified that her firm considers itself retained when clients sign a fee agreement for a probate case. (Hr'g Tr. 36).

It is incongruous for Respondents to suddenly argue that there was no billable event at the initial meeting, and furthermore, to argue that this Court's "decision carries an erroneous factual premise that badly misdirects its ultimate reasoning." (Respondents' Motion 1). Until now, Respondents have taken the opposite position in support of their legal arguments.

Furthermore, Respondents' assertion that the billable event in this case occurred "when the Clients discharged the firm three weeks later, thereby triggering a perfectly lawful quantum meruit billing by the firm" is illogical and suggests a misunderstanding of quantum meruit.[1]

B. Respondents Misunderstand Quantum Meruit and Improperly Present a Reargument

In their Motion for Reconsideration, Respondents state that the Court decided the case without any discussion of "quantum meruit billing." The phrase "quantum meruit billing" does not appear in any prior case law or jurisprudence in Ohio. Quantum meruit is an equitable doctrine inferring "a promise to pay a reasonable amount for the services rendered and even for materials furnished, in the absence of a specific contract." (*Madorsky v. Nolan,* 992 F.Supp. 945, 950 (N.D. Ohio 1998)). Quantum meruit, derived from the natural law of equity, is *not* a method of billing, as Respondents seem to erroneously believe.

Furthermore, Respondents already made quantum meruit-based arguments in their Objections (Espohl Objections 9-10; Mezher Objections 16-17); the reargument in their Motion is thus in violation of S. Ct. Prac. R. 11.2(B). S. Ct. Prac. R. 11.2(B) specifically precludes Respondents from rearguing their case in their Motion for Reconsideration. (*See*, S. Ct. Prac. R.

[1] Additionally, Respondents' assertion of error on the grounds that there was "no evidence of client confusion after the fee agreement was signed" is also without basis. Based on the evidence, the Court's majority decision correctly held that "[f]or the sisters, however, all of the events of the February 3 meeting constituted one consultation for which they believed they would not be charged." (Slip Opinion 8).

11.2 (B) and, e.g., *State ex rel. Gross v. Indus. Comm'n of Ohio,* 115 Ohio St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162 (O'Connor, J., dissenting) (a motion for reconsideration shall not constitute a reargument of the case)). The Court did not address quantum meruit in its Opinion because this was not a "Quantum Meruit case", as Respondents assert. (Motion 4). This case was about client confusion that occurred as a result of misleading communications regarding the basis of a fee.

C. This Court Properly Taxed Costs to Respondents

This Court properly taxed costs in the amount of $4,112.22 to Respondents. The record reflects that the video depositions of Relator's witnesses were taken pursuant to agreement, and that both current and prior counsel for Respondent Mezher was present and had the opportunity to cross-examine the witnesses. (Burns Dep. 3; Mahaffey Dep. 3). Neither of the Respondents objected to the use of the videos at the hearing, and Respondent Mezher's counsel in fact asked that the videos be played as part of her case in chief. (Hr'g Tr. 6, 80-81). Therefore, this Court's assessment of costs is not in error.

CONCLUSION

In their Motion for Reconsideration, Respondents assert a fact that directly contradicts their prior position. They also reargue a point the Court already found unpersuasive. Respondents' briefs throughout the disciplinary proceedings display their own confusion about the billing practices of their own firm. It is no wonder that clients who were admittedly told the initial consultation was "free" were misled when they received a bill that included a charge for what they were told was a free consultation. For the foregoing reasons, Relator respectfully requests that the Respondents' Motion for Reconsideration be denied.

Dated: December 20, 2012

Respectfully Submitted,

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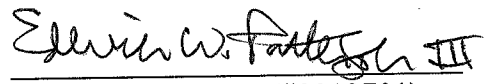
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Relator's Memorandum In Opposition To Respondent's Motion For Reconsideration was mailed by United States mail, first class postage prepaid, this 20th day of December, 2012 to Thomas W. Condit, P.O. Box 12700 Cincinnati, OH 45212, Michael Mezher, Jr., Kathleen Mezher & Associates, LLC, 8075 Beechmont Ave., Cincinnati, OH 45255, Kathleen D. Mezher, Esq., Kathleen Mezher & Associates, LLC, 8075 Beechmont Ave., Cincinnati, OH 45255 and to Frank E. Espohl, Esq., Kathleen Mezher & Associates, LLC, 8075 Beechmont Ave., Cincinnati, OH 45255.



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