I. PROCEDURAL HISTORY

This matter was heard following the filing of a petition by the Board of Overseers of the Bar (the Board) dated July 24, 1997, alleging violations of Maine Bar Rules 3.1(a); 3.2(f)(4); 3.3(a); 3.6(e)(2)(iv); 3.7(c)(1) on the part of the Respondent, David L. Brooks, Esq., of North Berwick.

On December 2, 1997, following notice to the Respondent, Panel E of the Grievance Commission conducted a public hearing in accordance with Maine Bar Rule 7.1(e)(2) to determine whether there were grounds for the issuance of a reprimand or whether probable cause existed for the filing of an information concerning the alleged conduct of Mr. Brooks arising out of his representation of Constance Morrison, also of North Berwick, in connection with the foreclosure of a real estate mortgage given to Ms. Morrison. For the reasons set forth herein, we determine that grounds exist for the issuance of a reprimand on account of Respondent’s failure to turn over to Ms. Morrison the client file on a timely basis. We dismiss the balance of the Board’s allegations.

The Board was represented by Geoffrey S. Welsh, assistant bar counsel. The Respondent was represented by Robert E. Mongue, Esq. The record in this matter includes the petition, Mr. Brooks’ response thereto, exhibits offered and admitted into evidence by both parties, as well as the testimony of witnesses David L. Brooks, Esq., Constance Morrison, Bernard L. Watson, Esq., and Michael MacLeod-Ball, Esq.

A. Evidentiary disputes.

The Board offered 31 exhibits, all which were admitted into evidence. Exhibits 22, 23, and 29 were admitted over the objection of the Respondent. Because the Panel’s rulings on these objections are critical to our determination on the merits, they are summarized below.

The Board offered as Exhibit 22 an award of the Fee Arbitration Commission dated January 24, 1997, awarding the Respondent $10,141.51 of a total of $21,403.60 billed by the Respondent to Constance Morrison from 1988 through August of 1991. That award contains the following finding:

"After due deliberation, and based upon all the circumstances and facts adduced at the hearing we find that the amount billed by Respondent was not fair and reasonable in
view of the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the services properly, particularly in the light of the total fees billed to Petitioner by both firms involved in the foreclosure action."

Exhibit 23 is correspondence addressed to the Respondent by Assistant Bar Counsel informing the Respondent that Bar Counsel had docketed a grievance complaint based upon the fee arbitration award. At the hearing, Respondent maintained that exhibits 23 and 24 did not constitute relevant evidence in the proceeding. Bar Counsel urged the panel to regard the fee arbitration award as determinative of a violation of Maine Bar Rule 3.3(a) which provides:

(a) Excessive fees. A lawyer shall not enter into an agreement for, charge, or collect an illegal or excessive fee. A fee is excessive when, after review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

Bar Counsel also advanced the argument at hearing that the finding of the Fee Arbitration Panel barred the Respondent from further contest on the issue of the fee’s non-compliance with Maine Bar Rule 3.3. These exhibits were admitted as relevant, but not as determinative of the issue.

Exhibit 29 constituted Attorney Watson’s summary of Respondent’s billings to Morrison. Exhibit 29 was admitted as such, but not as sufficient, standing alone, to support the opinions offered by Watson with respect to the excessiveness of the fee.

In the course of the hearing, Ms. Morrison also declined to waive the attorney client privilege with respect to communications between herself and Mr. MacLeod-Ball’s firm, Verrill and Dana.

II FINDINGS OF FACT

Respondent is an attorney admitted to and engaged in the practice of law in the State of Maine. Respondent is also a Judge of Probate. In 1988, Constance Morrison (Morrison), sold her restaurant to John Stolacyzk and Roland Bennett. Stolacyzk and Bennet granted a mortgage to Ms. Morrison to secure payment of the deferred purchase price. In 1989, after having been informed of the buyers’ intent to change the use of the premises, Morrison asked Brooks whether grounds existed for her to foreclose on the mortgage. Brooks accepted employment and advised Morrison to commence a civil action to foreclose the mortgage. Exhibit 1. On July 26, 1989, Brooks sent Morrison an engagement letter and fee agreement which she later signed and returned to him on July 29, 1989. Exhibit 2. The engagement letter provides for Morrison to pay to Brooks the greater of
time charges at the rate of $100.00 per hour or a fee calculated as 1½ percent of any amount collected up to $200,000.00, plus 5 percent of anything collected in excess of that sum. Brooks then commenced a civil action to foreclose the mortgage. An attempt to enjoin the mortgagees’ change of use was unsuccessful. Several months later, Brooks requested Morrison’s permission to consult with other attorneys about the case and in June of 1990, Brooks requested that Verrill and Dana evaluate the case. Exhibit 7.


On March 14, 1991, judgement was entered on the complaint in favor of Ms. Morrison for $381,198.69. On July 22, 1991, summary judgment was granted in favor of Ms. Morrison on the counterclaims.

On July 31, 1991, Brooks submitted to the Superior Court his affidavit concerning fees in the Morrison foreclosure which totaled $7,075.00 as of August 21, 1990. Exhibit 11. On February 25, 1991, Brooks informed Morrison that she owed him $11,000.00 for legal fees and demanded payment. By June of 1992, the matter of payment had not been resolved and Respondent filed a civil action in Maine District Court to collect $11,762.09 unpaid for services totaling $21,403.60. Exhibit 14. Respondent explained the discrepancy in amounts by testifying that his affidavit was limited to his services directly related to the foreclosure and not to services performed beyond the scope of the civil action. He explained that the $11,000.00 demand amounted to an offer in compromise, and that the June of 1992 demand was a mathematical calculation of his recorded time multiplied by the agreed upon hourly rate of $100.00, net of amounts paid by Morrison.

On June 15, 1992, following Brooks’ suit against her, Morrison requested that Respondent deliver her file to her. Exhibit 17. Brooks failed to return the file until ordered to do so by the Maine District Court on December 5, 1995. Exhibit 20. In the interim, Respondent advised Morrison that the file was available for her inspection and copying. Exhibit 18. Efforts on the part of Morrison’s substitute counsel to obtain possession of the file included informing Respondent of applicable Maine Bar Rules governing the ownership of client’s files and ethics opinions on the subject. Exhibit 19. Respondent testified that his reluctance to return the file was founded upon his belief that the file constituted evidence in the District Court collection action and that the file was so cumbersome as to make copying, at his expense, impractical. Respondent estimated the size of the file to require approximately two feet of file drawer space. Once ordered to do so, Respondent provided the file to Ms. Morrison’s new counsel. Exhibit 21.
The Fee Arbitration Commission, as noted, entered an award reducing the Respondent’s fees to amounts already paid by Morrison. No process was undertaken by either party to confirm, clarify, or modify the award in the Maine Superior Court.

III. CONCLUSIONS AND DISCUSSION

The Board contends that the Respondent has conducted himself in a manner unworthy of an attorney and should receive disciplinary action for violating the provisions of the Maine Bar Rules referenced above. The Board urges the panel to conclude that Respondent’s fees were excessive and his retention of Ms. Morrison’s file was wrongful. At hearing, Respondent conceded that his failure to return his client’s file upon request violated Maine Bar Rule 3.6(e)(2). Respondent denied the balance of the allegations.

A. Maine Bar Rule 3.6(e)(2)

Pursuant to Maine Bar Rule 3.6(e)(2), a lawyer must promptly deliver to the client any property in the possession of the lawyer which the client is entitled to receive. The rule contains no qualifications. The Professional Ethics Commission (PEC) has issued its opinion that a file maintained by an attorney belongs to the client. PEC Opinion # 120 (1991). An attorney may not condition delivery of the file upon payment of costs. PEC Opinion # 51 (1984). While the Respondent offered to make the file available for copying, he plainly refused to relinquish control of the file and did not address his client’s demand for possession until ordered to do so, three years later. Respondent concedes, with the benefit of hindsight, a literal violation of the applicable rule. Respondent maintains, however, that such a violation is minor and does not warrant discipline.

We disagree. When misconduct subject to sanction under the rules has occurred, this panel has discretion to dismiss this petition with a warning if all of the following factors are present:

1. The misconduct is minor;

2. There is little or no injury to the client, the public, the legal system or the profession; and;

3. There is little likelihood of repetition by the attorney.

The Panel can not overlook the injury to the legal system and to the profession when a lawyer with over 20 years of experience acts inconsistent with a clear directive of the Bar Rules and withholds client property in the face of strenuous protest from his colleagues at the bar, for a period
exceeding three years. See Exhibit 19. Respondent’s excuse that the file contained evidence relevant in the fee collection matter aggravates the offense and illuminates the potential injury done to his client. Respondent was wrong to impose upon his client the expense of judicial process before returning the file. On the basis of the foregoing, the Panel concludes that Respondent’s violation of Maine Bar Rule 3.6(e)(2) warrants discipline.

B. Excessive Fee.

In the course of the hearing, Bar Counsel advanced the proposition that an attorney whose fees are reduced, following hearing, by the Fee Arbitration Commission stands in per se violation of Maine Bar Rule 3.3(a), by virtue of the doctrine of res judicata and/or collateral estoppel. On this issue, the Panel disagrees with Bar Counsel. The doctrine of res judicata is a collection of court made rules designed to insure that the same matter will not be litigated more than once. Connecticut National Bank v. Kendall 617 A.2d 546 (Me. 1992). Its application is justified by concerns for judicial economy, fairness to litigants, and the stability of final judgments. We understand Bar Counsel’s argument to rely on a branch of the doctrine of res judicata otherwise referred to as claim preclusion or the “doctrine of bar.” Claim preclusion bars re-litigation where:

1. The same parties or their privies are involved in both actions;

2. A valid final judgment was entered in the prior action, and;

3. The matters presented for decision in the second action were, or might have been, litigated in the first action.


The use of offensive collateral estoppel or issue preclusion similarly requires the entry of a prior final judgment disposing of the identical issue. The party being estopped must have “had a fair opportunity and incentive to litigate the issue in the prior proceeding.” Mutual Fund Ins. v. Richardson 640 A.2d 205, 208 (Me. 1994)(quoting State Mut. Ins. Co. v. Bragg 589 A.2d 35, 37 [Me. 1991]).

All three requirements are absent in this case. The parties before the Fee Arbitration Commission were Constance Morrison and the Respondent. Ms. Morrison is not a party to this proceeding. Second, no judgment has been entered on the fee arbitration award. The entry of a final judgment denotes observance of all the due process safeguards which attend the administration of a civil action pursuant to the Maine Rules of Civil Procedure and the Maine Rules of Evidence. These
rules are not enforced in fee arbitration proceedings pursuant to Rule 9 of the Maine Bar Rules. The lack of procedural safeguards and the motivation of parties to act expeditiously in arbitration proceedings is highlighted in Exhibit 24, Robert Mongue’s March 21, 1997 response to Bar Counsel, offered by the Board. To insure fairness to the Respondent in this proceeding, this panel should weigh the evidence presented, notwithstanding the ruling of the Fee Arbitration Commission that he should be paid less than he charged.

We also discern a distinction between a fee found to be unreasonable following fee arbitration and an excessive fee violative of the Bar Rules. Rule 3.3(a) defines an excessive fee in terms of reasonableness, but it does not equate the two. In order for a fee to be adjudged excessive, a lawyer of ordinary prudence must “be left with a definite and firm conviction that the fee is in excess of a reasonable fee”. The Fee Arbitration Panel made no finding that the fee was excessive. That panel did not elaborate beyond the quantum of evidence nor did it articulate the standard of proof it applied to the facts before it. The panel did not state, nor was it necessary for the panel to conclude that its decision was based upon a definite and firm conviction that the fee was unreasonable. Its decision is expressed, appropriately, in terms of fairness and reasonableness. We, therefore, conclude that the issue determined by the Fee Arbitration Commission was not identical to the issue here and no prior adjudication bars Respondent’s argument that the fee was not excessive.

The fee arbitration award is, nevertheless, admissible in these proceedings as evidence “of a kind upon which reasonable persons are accustomed to rely in the conduct of serious affairs”. Maine Bar Rule 7.1(e)(2)(c). The award found that the amounts billed by Respondent were not reasonable in terms of time and skill required. The main thrust of the Board’s argument, that Respondent’s fee was excessive, involves the alleged failure of the Respondent to seek early disposition of the foreclosure action by means of a motion for summary judgment.

Militating against that argument (and a “definite” or “firm conviction” of unreasonableness) is the amount of discovery initiated by Respondent to investigate the counterclaims filed against his client. The Panel heard no evidence that the counterclaims were susceptible to early or easy summary disposition. Indeed, the counterclaims remained open for nearly a year following the entry of Verrill and Dana’s appearance. They were disposed of based upon a record developed in the course of discovery conducted by Respondent. In addition, all Respondent’s time is accounted for in detailed billings. Respondent’s efforts were found by the Fee Arbitration Panel to be directed towards the best interests of Ms. Morrison. The bills are faithful to the agreed upon rate. An issue was raised concerning Respondent’s practice to charge in one-quarter hour minimum increments. However, Respondent testified that when he devoted less than one-quarter hour to Ms. Morrison’s case he recorded no time at all. This testimony was uncontradicted. In addition, we note a considerable amount of time devoted by Respondent to collection of the foreclosure judgment.

-6-
We conclude that the Board has failed to meet its burden of proof on the issue of excessiveness. By so ruling, we emphasize the distinction between "reasonableness" in fee arbitration and the determination of a fee as excessive for purposes of imposing discipline. See generally Farmington Dowel Products Co. v. Forster Mfg. Co. 421 F.2d 61, (1st Cir. 1969), 10 A.L.R. Fed. 266, appeal after remand 436 F.2d. 699. The discounting of fees in arbitration does not necessarily render them excessive. Fees are clearly excessive when their calculation departs from the terms of an attorney's contractual undertaking or are disproportionate to the time devoted to the project. Fees may also be excessive when the hourly rate exceeds the rate customarily charged by lawyers of similar experience and skill or when the benefits to the client are clearly outweighed by the fees involved. See Holbrook v. Andersen Corp. 756 F.Supp 34(D.Me. 1991).

We find the evidence insufficient to support a definite and firm conviction that the fee charged by Respondent was excessive in the light of the agreed upon hourly rate, the judgment ultimately obtained for Ms. Morrison and the time reasonably devoted by Respondent to his undertaking.

IV. DISPOSITION

On the allegation that Respondent wrongfully withheld possession of his client's file and thereby conducted himself in a manner unworthy of an attorney, the Panel concludes that Respondent's conduct violated Maine Bar Rules 3.1(a) and 3.6(e)(2)(iv). Accordingly, the Respondent is hereby reprimanded for failure to relinquish possession of his client's file immediately upon request.

As to the balance of the petition, the same is dismissed.

Respectfully submitted,

Dated January 23, 1998

Stephen G. Morrell, Esq., Chair

Dated January 20, 1998

Donald A. Fowler, Esq.

Dated ________________________

Lois Wagner

-7-
We conclude that the Board has failed to meet its burden of proof on the issue of excessiveness. By so ruling, we emphasize the distinction between "reasonableness" in fee arbitration and the determination of a fee as excessive for purposes of imposing discipline. See generally Farmington Dowel Products Co. v. Forster Mfg. Co. 421 F.2d 61, (1st Cir. 1969), 10 A.L.R. Fed. 266, appeal after remand 436 F.2d. 699. The discounting of fees in arbitration does not necessarily render them excessive. Fees are clearly excessive when their calculation departs from the terms of an attorney's contractual undertaking or are disproportionate to the time devoted to the project. Fees may also be excessive when the hourly rate exceeds the rate customarily charged by lawyers of similar experience and skill or when the benefits to the client are clearly outweighed by the fees involved. See Holbrook v. Andersen Corp. 756 F.Supp 34(D.Me. 1991).

We find the evidence insufficient to support a definite and firm conviction that the fee charged by Respondent was excessive in the light of the agreed upon hourly rate, the judgment ultimately obtained for Ms. Morrison and the time reasonably devoted by Respondent to his undertaking.

IV. DISPOSITION

On the allegation that Respondent wrongfully withheld possession of his client's file and thereby conducted himself in a manner unworthy of an attorney, the Panel concludes that Respondent's conduct violated Maine Bar Rules 3.1(a) and 3.6(e)(2)(iv). Accordingly, the Respondent is hereby reprimanded for failure to relinquish possession of his client's file immediately upon request.

As to the balance of the petition, the same is dismissed.

Respectfully submitted,

Dated ________________________________

Stephen G. Morrell, Esq., Chair

Dated ________________________________

Donald A. Fowler, Esq.

Dated 17 January 1998

Lois Wagner