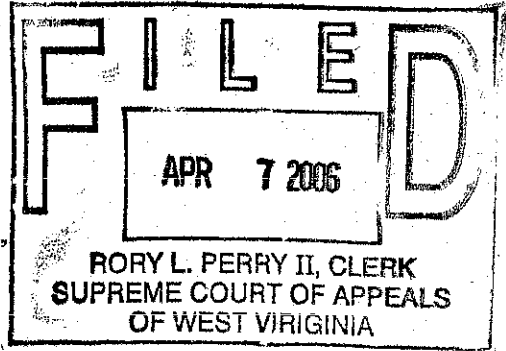


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Docket No. 31794



Lawyer Disciplinary Board,

Petitioner,

v.

John Patrick Ball,
a member of the
West Virginia Bar,

Respondent,

Monongalia County
Bar Association,

Intervenor.

**BRIEF OF THE MONONGALIA
COUNTY BAR ASSOCIATION**

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TABLE OF CONTENTS

I. INTRODUCTION 3

II. STATEMENT OF FACTS 4

III. ARGUMENT 4

 A. Introduction 4

 B. The Misconduct at Issue as Set Forth in the Report of the
 Hearing Panel Subcommittee Is Extremely Egregious 7

 C. This Court Should Order Complete Restitution on the
 Facts of this Case 12

 D. This Court Can Enforce an Order of Restitution 14

IV. CONCLUSION 18

TABLE OF AUTHORITIES

CASES

<i>Bar Assoc. of Greater Cleveland v. Rubinstein</i> 525 N.E.2d 759 (Ohio 1988)	<u>16</u>
<i>Black v. Black</i> 171 W. Va. 307, 315, 298 S.E.2d 843, 851 (1982)	<u>8</u>
<i>Clark v. Druckman</i> ___ W.Va. ___, 624 S.E.2d 864, 871 (2005)	<u>15</u>
<i>Committee on Legal Ethics of West Virginia State Bar v. Ikner</i> 190 W.Va. 433, 436, 438 S.E.2d 613, 616 (1993)	<u>5</u>
<i>Committee on Legal Ethics v. Gallaher</i> 180 W.Va. 332, 337, 376 S.E.2d 346, 351 (1988)	<u>12</u>
<i>Estate of Lapinsky v. Sparacino</i> 148 W. Va. 38, 132 S.E.2d 765 (1963)	<u>8, 9</u>
<i>In Matter of Copren</i> 2005 WL 2173951 (Cal. Bar Ct. 2005)	<u>16</u>
<i>In re Babilis</i> 951 P.2d 207, 216-217 (Utah 1997)	<u>15</u>
<i>In re Burton</i> 614 A.2d 46, 47 (D.C. 1992)	<u>16</u>
<i>In re Resignation of Guth</i> 687 N.E.2d 432 (Ohio 1997)	<u>16</u>
<i>In re Richardson</i> 759 A.2d 649, 651 (D.C. 2000)	<u>16</u>
<i>In re Teitler</i> 595 N.Y.S. 2d 805, 806 (N.Y. App. Div.1993)	<u>16</u>
<i>Lader v. Finnerty</i> 658 N.Y.S.2d 191	<u>16</u>
<i>Lawyer Disciplinary Bd. v. Dues</i> ___ W.Va. ___, 624 S.E.2d 125	<u>12</u>

<i>Lawyer Disciplinary Bd. v. Friend</i> 200 W.Va. 368, 373, 489 S.E.2d 750 (1997)	<u>4</u>
<i>Lawyer Disciplinary Bd. v. Friend</i> 200 W.Va. 368, 489 S.E.2d 750 (1997)	<u>12</u>
<i>Lawyer Disciplinary Bd. v. Friend</i> 200 W.Va. 368, 489 S.E.2d 750 (1997)	<u>12</u>
<i>Lawyer Disciplinary Bd. v. Lusk</i> 212 W. Va. 456, 574 S.E.2d 788 (2002)	<u>12</u>
<i>Lawyer Disciplinary Bd. v. Turgeon</i> 210 W.Va. 181, 183, 557 S.E.2d 235, 237 (2000)	<u>5</u>
<i>Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.</i> 639 So. 2d 606, 608-09 (Fla. 1994)	<u>15</u>
<i>Lydon v. California Bar</i> 756 P.2d 217, 220 (Cal. 1988)	<u>16</u>
<i>Office of Disciplinary Counsel v. Cunningham</i> 202 W. Va. 186, 503 S.E.2d 275 (1998)	<u>16</u>
<i>Office of Lawyer Disciplinary Counsel v. Albers</i> 214 W.Va. 11, 13, 585 S.E.2d 11, 13 (2003)	<u>5</u>
<i>Office of Lawyer Disciplinary Counsel v. Alberss</i> 214 W.Va. 11, 13, 585 S.E.2d 11, 13 (2003)	<u>15</u>
<i>State ex rel. Frieson v. Isner</i> 168 W.Va. 758, 285 S.E.2d 641 (1981)	<u>17</u>

RULES

Rules of Professional Conduct	<u>6, 8, 10, 12, 11, 16</u>
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OTHER AUTHORITIES

Constitution of the State of West Virginia	<u>17</u>
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Docket No. 31794

John Patrick Ball, a member

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Respondent,

Monongalia County Bar Association,

Intervenor.

BRIEF OF THE MONONGALIA COUNTY BAR ASSOCIATION**I. INTRODUCTION**

The Monongalia County Bar Association ("Bar Association"), after reviewing the Report of the Hearing Panel Subcommittee in this matter and after discussion and debate, duly passed a resolution expressing its disagreement with and concern about the stipulated discipline adopted by the Hearing Panel Subcommittee. Specifically, the Bar Association resolved "that the proposed remedy is inadequate to redress Ball's excessive executor and trustee fees, family gifts, fees negotiated with the West Virginia University Foundation ("Foundation"), and that it contains no admonishment or prohibition regarding Mr. Ball's continuation in acting as executor, trustee or fiduciary" for the estates that are the subject matter of the charges.¹ In support of that resolution, the Bar Association now submits this Brief.

¹Resolution of the Monongalia County Bar Association as quoted in the Bar Association's Motion to Intervene for Purpose of Filing Objection at pages 2-3.

The egregious misconduct of the Respondent, including both multiple violations of well-recognized Rules and grossly excessive fees, involved an abuse of the attorney client relationship and the intentional disregard of well-recognized rules. This misconduct, which has been well publicized, has brought discredit to the Respondent and, unfortunately, also promotes the worst stereotypes of the legal profession.

However, there is an even greater problem when one member of the Bar engages in such misconduct and the Bar fails to address the severity of what has occurred. As this Court has recognized, misconduct by a member of the Bar is "hardly conducive to preserving the integrity of the legal profession and maintaining mutual respect and confidence between the members of the Bar and the society they serve." *Lawyer Disciplinary Bd. v. Friend*, 200 W.Va. 368, 373, 489 S.E.2d 750 (1997). If the legal community, in this case represented by the Lawyer Disciplinary Board and this Court, fails to adequately and fairly address the Respondent's misconduct and his success in profiting from that misconduct, the integrity of the profession will suffer in the eyes of the public. Unfortunately, the Bar Association has concluded that the recommendation of the Hearing Panel Subcommittee, if adopted by this Court, will have precisely that effect.

II. STATEMENT OF FACTS

The facts to be considered in this matter are those set forth in the Report of the Hearing Panel Subcommittee.

III. ARGUMENT

A. Introduction

Under the rules applicable to lawyer disciplinary proceeding, this Court has the authority to accept, modify or reject the recommendation of a Hearing Panel Subcommittee of the Lawyer

Disciplinary Board. In the present case, the Court should exercise its authority by rejecting the recommendation of the Hearing Panel Subcommittee and remanding the matter to the Hearing Panel Subcommittee for a hearing on the merits of the charges with directives as to the scope of sanctions available in a case of this type and of the means of enforcing those sanctions.

The recommendation, contained in the Hearing Panel Subcommittee's Report, should be rejected because it is inconsistent with the purpose of lawyer disciplinary proceedings. The primary purpose of the ethics or lawyer disciplinary proceedings is the protection of the public and the reassurance of the public as to the reliability and integrity of attorneys. *Office of Lawyer Disciplinary Counsel v. Albers*, 214 W.Va. 11, 13, 585 S.E.2d 11, 13 (2003); *Committee on Legal Ethics of West Virginia State Bar v. Ikner*, 190 W.Va. 433, 436, 438 S.E.2d 613, 616 (1993). Unfortunately, the recommendation in the present case fails to *reassure the public as to the reliability and integrity of attorneys.* To the contrary, the recommendation sends a message to the public that an attorney can violate ethical standards, engage in unethical conduct that directly benefits himself and his family, charge grossly unreasonable fees and retain the benefits of his unethical conduct.

Furthermore, lawyer discipline serves as "both instruction on the standards for ethical conduct and as a deterrence against similar misconduct to other attorneys." *Lawyer Disciplinary Bd. v. Turgeon*, 210 W.Va. 181, 183, 557 S.E.2d 235, 237 (2000). Moreover, appropriate discipline seeks to adequately punish a lawyer for misconduct. Syl. Pt. 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987). The recommendation of the Hearing Panel Subcommittee in this cases is inconsistent with all of the purposes of the disciplinary system.

The Bar Association recognizes and understands the dilemma which the Office of Disciplinary Counsel and the Hearing Panel Subcommittee faced in attempting to reach a resolution in this matter. The Bar Association also recognizes the action of the Chief Disciplinary Counsel and of the Hearing Panel Subcommittee were *not* motivated by a sense that the recommendation was just, but rather by the mistaken perception that their power and authority to enforce sanctions that included meaningful restitution was constrained. Apparently, the Hearing Panel Subcommittee recognized that it had the authority to recommend restitution pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure, but it concluded that it lacked any mechanism to enforce restitution other than through restrictions on a lawyer's license or as a condition for reinstatement. Report, p. 12 (stating that the "enforcement of restitution is accomplished through appropriate restrictions on a lawyer's license and right to practice, or as a condition for reinstatement"). As a result, it decided to recommend an agreed disposition of the pending charges that permits the Respondent to retain the funds and other property that he and his family received from the estates at issue even though those funds and property were obtained, in whole or in substantial part, by conduct that blatantly violated Rule 1.5, Rule 1.7 and Rule 1.8 of the Rules of Professional Conduct. Further, while it reduced the Respondent's future payments from the Foundation, it allowed him to continue to receive a portion of those payments. In light of the severity of Respondent's misconduct, it is difficult to understand why the Hearing Panel Subcommittee accepted an agreement that not only limits restitution to an unlikely event, *i.e.*, a request for reinstatement five years into the future which, given the Respondent's age and circumstances, is a most unlikely event, but also permits the Respondent to continue to receive payments resulting from the conduct at issue for years into the future.

Moreover, while the Hearing Panel Subcommittee discusses the money it has preserved for the Foundation and its beneficiaries by the agreement to reduce the future payments from 1% of the market value of the funds created by the wills of Vivian Davis Michael and Gloria G. Davis to .25%,² the real question is why the Respondent should continue to receive any payments at all. The Bar Association urges this Court to reject the notion that it lacks the power and authority to prohibit the Respondent from receiving any future payments from the Foundation. As discussed below, if this Court ordered that, as a part of the sanctions in this matter, the Respondent should be barred from receiving future payments, the Foundation is likely to honor that order and, even if it chose to ignore it, this Court is not without authority to issue an order under its inherent powers.

B. The Misconduct at Issue as Set Forth in the Report of the Hearing Panel Subcommittee Is Extremely Egregious

The Bar Association recognizes that the Respondent has a right to a full hearing before the Court reaches any final conclusions regarding his alleged misconduct. Nonetheless, the stipulations set forth in the Report of the Hearing Panel Subcommittee demonstrate either a reckless or intentional disregard of ethical standards by an experienced attorney who has profited, and under the proposed disposition, will continue to profit by willful violations of the Rules of Professional Conduct.³ This is not the case of a young and inexperienced attorney who might fail to appreciate the severity of his misconduct. To the contrary, this is an experienced attorney who certainly knew and understood that his conduct violated the Rules of Professional Conduct.

²Report, p. 13.

³Although the original charges involved three separate estates, this Brief only addresses the issues related to the estates of Vivian Davis Michael and Gladys G. Davis.

This is also a case where the amount of the money obtained as a result of ethical violations is grossly excessive and where there do not appear to be any third parties with both the standing to challenge the Respondent's misconduct through a civil action and/or the willingness to do so. In most cases, the issue currently facing the Court would not occur because there would be someone, an heir or a beneficiary of a bequest, who could and most probably would challenge the attorney's conduct through a civil action seeking restitution from the Respondent to the estate. In the present case, however, there do not appear to be any close relatives of the decedents with an interest in or standing to do so and the Foundation apparently does not believe that it can bring a legal action on behalf of the beneficiaries of the decedents' bequest or, for whatever other reasons, has chosen not to do so.⁴

An analysis of the monies obtained by the Respondent is one measure of the seriousness of his offenses.⁵ As noted in the Report, the fees charged for various activities were unreasonable, to say the least, and violated Rule 1.5. Report, p. 7, 23. The wills included provisions authorizing the Respondent to be paid 7.5% of the value of the estate as his fee for serving as executor. Under any test, this was a grossly excessive fee that was not justified by either the facts or the law.⁶ The Report

⁴In fact, it is in cases precisely like the present one where an attorney is most likely to engage in such conduct. He recognizes that there will be no heirs to challenge his role in drafting a will and taking other action that benefits him and his family at the expense of the estate.

⁵The analysis presented in this Brief simplifies some of the issues and focuses on probate assets.

⁶In Syl. Pt. 1, *Estate of Lapinsky v. Sparacino*, 148 W. Va. 38, 132 S.E.2d 765 (1963) this Court noted that a fee of 5% for administering an estate is a reasonable fee. However, this Court also noted that the recognition that a 5% fee is reasonable "is not inflexible and proper compensation may be more or less, depending upon the circumstances of the particular case." *Id.* See also *Black v. Black*, 171 W. Va. 307, 315, 298 S.E.2d 843, 851 (1982). As evident from the fee schedules of financial institutions, discussed *infra*, one of the circumstances to be considered is the size of the estate. The Court's reference in *Lapinsky* to a fixed 5% rate was never intended to be applied to estates of the size of those in this case. Moreover, nothing in the Report of the Hearing Panel Subcommittee suggests that there was any unusual work for the executor that

outlines the work done by the Respondent for the estates. Report, p. 6, ¶ 21. Nothing in the description of Respondent's work suggests that the estates involved any unusual or complicated work. To the contrary, the stipulated findings note that "No unusual difficulties were encountered." *Id.* Yet, the Respondent's fee for minimal work on two estates totaled \$1,579,088.00.

By comparison, the legal and financial community recognizes that the fee for settling an estate should vary with the size of an estate. This results from the fact that the an executor's work does not necessarily increase proportionately as the size of the estate increases. For example, financial institutions generally have fee schedules which reduce the fee, as a percentage of the estate, as the size of the estate increases. The fee schedule for United Bank, applicable to estate settlements, is 5% of the first \$500,000.00; 4% of the next \$500,000.00; 3% of the next \$1,000,000.00 and 2% of the excess over \$2,000,000.00. Exhibit A. Under this schedule, the Respondent would have earned an executor fee (excluding fees generated by income from the estate) of approximately \$236,044.00 for the Estate of Vivian Davis Michael and \$264,907.00 for the Estate of Gladys G. Davis for a total of \$500,951.00. Instead, under the 7.5% fee in the wills, he received fees (excluding fees generated by income from the estate) of \$753,916.00 and \$825,172.00 for a total of \$1,579,088.00.⁷ Thus, if one compares the Respondent's fee as executor with the United Bank

would justify a 5% fee, let alone the 7.5% fee charged by the Respondent.

⁷Under the fee schedules of the Huntington National Bank, Exhibit B, and BB&T, Exhibit C, the Respondent would have received even less. For Huntington National Bank, the fee schedule is 3% for the first \$500,000.00 and 2% of the value of the estate's probate assets in excess of \$500,000.00. For BB&T, the fee schedule is 4½% on the first \$1,000,000.00, 3½% on the next \$1,000,000.00, 2% on the next \$1,000,000.00 and 1½% on estate assets over \$3,000,000.00.

fee schedule, the Respondent's fee was approximately \$1,078,137.00 more than the Bank would have charged.⁸

In addition to the excessive fee for the estate assets, the Respondent has received fees, from 1998 through 2001, for serving as "trustee" of the trust established under the will of Gladys B. Davis, totaling \$318,000.00. Report, pp. 6-7, n. 1. Since Ms. Davis died in 2001, the funds have been turned over to the Foundation. Yet, despite the fact that the Foundation now administers the funds, the Report notes that the Respondent continued to collect payments for services that the Report describes as "ministerial." According to the Report, the Respondent has collected \$336,889.61 from January 2002 through January 2004. *Id.*, pp. 9-10, ¶ 29.

The Respondent, an experienced attorney, was certainly aware of the cases discussing a 5% fee. Moreover, he was certainly aware that the executor's fee, as a percentage of the assets of the estate, should be reduced as the value of the estate increases. Yet, instead of the decreasing the fee below 5% in light of the value of the estates, the Respondent wrote wills in which he created, for himself, fees that were actually more than those approved by this Court for much smaller estates.

The foregoing fees do not include the value of the annuity which went to the Respondent's children when the Respondent helped Ms. Davis change the beneficiary of the annuity to the Respondent's children in violation of Rule 1.7. Report, p. 5, ¶ 16. At the time of Ms. Davis' death, the annuity was valued at \$487,783.13. *Id.*, pp.4-5, ¶¶ 12-15. Nor does it include the value of the property (\$44,300.00) that, in a will written by the Respondent, was bequeathed to Respondent's wife in violation of Rule 1.8 or the executor fees on income earned by the estates in the amount of \$44,270.00. Report, p. 3, ¶ 7; p. 6, ¶ 22.

⁸This does not include the excessive fees charged on the income of the estate. Report, p. 6, ¶ 22.

The sheer size of the financial gain to the Respondent and his family resulting from the Respondent's misconduct is shocking. Yet, at most, the recommendation requires a \$500,000.00 payment if, and only if, the Respondent decides to seek reinstatement in five years, an event that seems unlikely in light of the Respondent's age and personal situation. Even if the Respondent does seek reinstatement and pays \$500,000.00, he will still emerge from this proceeding retaining well over \$1,000,000.00 from his unethical conduct, to say nothing of the annuities he helped provide to his children. In addition, the Foundation payments, which apparently stopped in January 2004, will be reinstated, although at a lower level with, presumably, a retroactive payment to the date of his last payment in January 2004.

The Respondent's misconduct is equally egregious when measured by the nature of the Rules that were violated. In addition to blatantly violating Rule 1.5 regarding reasonable fees, the Respondent audaciously violated the bright line rule set out in Rule 1.8 which prohibits a lawyer from preparing an instrument that gives the lawyer or a person related to the lawyer "any substantial gift from a client, including a testamentary gift." And the image of the Respondent driving his client, Ms. Davis, to the bank so she could sign over a large annuity to his own children is one that brings little credit to the Respondent in particular or the legal community in general. It is difficult to imagine that an attorney of the Respondent's experience did not know that he was acting in direct violation of a well known prohibition on writing wills that benefit the lawyer or his family. The Respondent certainly knew that, if the clients in question really wanted to bestow such tremendous largess on him and his family, he had to refer them to another attorney for independent representation and advice. This duty, under Rule 1.7 and Rule 1.8 was certainly known to the Respondent. Although the Respondent should be given the opportunity to explain his actions at a hearing on the charges, given

the experience and knowledge of the Respondent there is a strong inference that his decision to ignore the Rule of Professional Conduct was wilful.

Given the nature of the misconduct at issue and the financial windfall to the Respondent and his family, the recommendation of the Hearing Panel Subcommittee not only leaves a wrongdoer with a substantial profit from his wrongdoing, but also undermines the public's perception of the integrity of the West Virginia legal community and the institutions designed to regulate attorney misconduct.

C. This Court Should Order Complete Restitution on the Facts of this Case

While the lawyer disciplinary procedures are not generally a substitute for a civil action, this Court has recognized that restitution may be an appropriate provision in an order in an ethics proceeding. As stated by this Court in *Committee on Legal Ethics v. Gallaher*, 180 W.Va. 332, 337, 376 S.E.2d 346, 351 (1988), the power to order restitution as a sanction for an ethics violation flows from the inherent power of the Court. Moreover, as the Hearing Panel Subcommittee recognized, the Rules of Lawyer Disciplinary Procedure expressly authorize restitution as one of the sanctions available in a lawyer disciplinary proceeding.⁹ Report, p. 12. This Court has relied on its power to order restitution on more than one occasion in the past. See, e.g., *Lawyer Disciplinary Bd. v. Dues*, ___ W.Va., ___, 624 S.E.2d 125 (ordering restitution to former clients in an amount that totals \$13,000.00); *Lawyer Disciplinary Bd. v. Lusk*, 212 W. Va. 456, 574 S.E.2d 788 (2002) (ordering restitution to three clients); *Lawyer Disciplinary Bd. v. Friend*, 200 W.Va. 368, 489 S.E.2d 750 (1997) (ordering restitution in the amount of \$118,000.00); *Committee on Legal Ethics v. Gallaher*, *supra* (ordering restitution to client of balance of excessive contingent fee, reducing fee from 50% to 33 1/3%).

⁹Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

This Court has not previously considered restitution at the level appropriate in this case. However, the sheer amount of the money obtained through ethical violations in the present case, the audacity of the violations and the lack of an heir who has challenged the misconduct distinguishes this case from all other precedents and increases the importance of sanctions in this lawyer disciplinary case that are proportional to the wrongdoing involved. As a result, there is no reason to accept a recommendation that limits the amount of restitution to \$500,000.00. There is simply no reason to limit an order of restitution because the fruits of the attorney's wrongdoing are measured in millions instead of in thousands. Certainly, the rule is not "the more one profits from an ethical violation, the more one gets to keep." Thus, the Hearing Panel Subcommittee should still determine the full amount of restitution to which the beneficiaries of the bequest are entitled.¹⁰ In the present case, restitution should require the Respondent to pay all monies that he obtained in violation of the Rules of Professional Conduct to the Foundation to be used for the purposes intended by the testators.¹¹ The exact amount of that restitution is a matter to be left to the Hearing Panel Subcommittee when it hears all of the evidence after this matter is remanded for further proceedings.

¹⁰ At present the only issue to be decided should be whether full restitution is the appropriate sanction in this case. As discussed *infra*, the contempt power is clearly available to enforce restitution. The question as to whether it should be used to enforce restitution in a particular case can obviously only be decided on a case by case basis at the time the contempt petition is brought.

¹¹ The Bar Association recognizes that the Respondent may claim that his clients wanted him and his family to have all the money and property that they received. However, this misses the point. Lawyers are frequently placed in a position of trust and often, after years of representing a client, one may find that the client desires to reward the attorney in his or her will. Ethical attorneys, however, understand that they cannot abuse such trust and loyalty for personal profit and that the Rules of Professional Conduct lay down clear guidelines for how they must behave in such instances. Allowing the Respondent to profit from his violation of those Rules is insulting to the vast majority of West Virginia attorneys who, recognizing their ethical obligations, avoid the temptation to cross ethical lines and, in so doing, refrain from the misconduct at issue in this case. Moreover, even if one treats the excessive fees and/or other bequests in this case as a gift, the Respondent certainly knew that, under Rule 1.8, he was prohibited from participating in the preparation of such wills.

D. This Court Can Enforce an Order of Restitution

Since restitution can be awarded, the only issue is whether an order of this Court which includes restitution can be enforced in a case where the attorney's license to practice law has been suspended or annulled and the attorney does not apply for reinstatement. The answer to that question is affirmative.

The Hearing Panel Subcommittee erred in rejecting that conclusion because it mistakenly relied on a case from Florida. In *The Florida Bar v. Della-Donna*, the Florida court concluded restitution in a disciplinary matter should not be a substitute for private litigation and limited the enforcement of restitution in Florida disciplinary actions to cases where it could be enforced as a restriction on the privilege of practicing law. 583 So.2d 307, 312 (Fla. 1989). Report, pp. 12-13. While that may be the law in Florida, there is no logical reason for such a limitation on the power of this Court to enforce its own orders.¹²

The Hearing Panel Subcommittee's conclusion also ignored both the power of this Court to enforce its orders and the important public interests vindicated through the lawyer disciplinary procedure. Restitution in a lawyer disciplinary proceeding is not just a sanction placed upon an attorney; it also helps assure the public that the legal system will act to maintain the high standards of the profession and to insure that lawyers will not profit from their own wrongdoing. For example, the Supreme Court of Utah ordered an attorney disbarred for misappropriating funds from an estate and, as part of the remedy, ordered full restitution even though the attorney had already settled with

¹² Moreover, the language in the Florida opinion, suggesting that a disciplinary matter is not a substitute for private litigation, makes sense if it means that a disciplinary matter should not become a substitute for disputed legal malpractice. However, this Court, as discussed above, has long recognized that a disciplinary proceeding can be a forum for ordering restitution in an appropriate case.

the client. *In re Babilis*, 951 P.2d 207, 216-217 (Utah 1997). The Utah court recognized that the purpose of a disciplinary proceeding is broader than the interests of the individual attorney and client:

the Bar is not merely vindicating the Kernses' personal interests when it demands restitution of ill-gotten property. The Bar is promoting the purposes of the Rules of Lawyer Discipline and the Standards for Imposing Lawyer Sanctions, which are "to ensure and maintain the high standard of professional conduct required of those who undertake the discharge of professional responsibilities as lawyers, and to protect the public and the administration of justice."

Id. at 216. Thus, unlike the Florida court, the Utah Supreme Court of Appeals recognized that restitution serves a purpose beyond making a client whole; it is sometimes essential to fulfill broader public purposes. As noted above, this Court has also recognized the role of disciplinary proceeding in reassuring the public as to the reliability and integrity of attorneys. *Office of Lawyer Disciplinary Counsel v. Alberss*, 214 W.Va. 11, 13, 585 S.E.2d 11, 13 (2003).

As discussed *supra*, this Court has the inherent power to "supervise, regulate and control the practice of law" and, pursuant to that power, "may order such other actions as it deems appropriate. . . ." Syl. Pt. 1, *Office of Lawyer Disciplinary Counsel v. Albers, supra*. Given the breadth of this Court's powers, it is hard to conceive that it is impotent to enforce an order of restitution through contempt or, for that matter, through such other relief as it may fashion. Moreover, in another context, this Court has recognized that a West Virginia trial court has the inherent power to "to do those things necessary to enforce its orders." *Clark v. Druckman*, ___ W.Va. ___, 624 S.E.2d 864, 871 (2005) (quoting *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So. 2d 606, 608-09 (Fla. 1994)).

The Rules of Lawyer Disciplinary Procedure expressly recognize that this Court's contempt power is available as a sanction for a willful failure to pay costs assessed in a lawyer disciplinary

proceeding.¹³ There is no reason why the same contempt power would not be available to enforce a willful failure to pay restitution or to otherwise comply with the economic terms of a order of this Court in a lawyer disciplinary proceeding. In fact, this Court has previously recognized the fact that the contempt power is available to sanction an attorney who fails to comply with the terms of an attorney disciplinary matter. *Syl. Pt. 2, Lawyer Disciplinary Board v. Sigwart*, 216 W. Va. 212, 605 S.E.2d 587 (2004) (“When this Court acts within its jurisdiction, its orders shall be promptly obeyed, or contempt is a proper sanction.”); *Office of Disciplinary Counsel v. Cunningham*, 202 W. Va. 186, 503 S.E.2d 275 (1998) (granting petition to hold attorney in contempt of order suspending license to practice law). Although the contempt power has not been exercised in the context of a failure to pay restitution, there is no inherent reason why it could not be exercised to enforce restitution or other aspects of a final order in a judicial disciplinary proceeding.¹⁴

In addition to restitution, there is no reason that the Court could not issue an order prohibiting the Respondent from accepting any further payments from the Foundation. This would probably not present any difficulties in enforcement because the Foundation is unlikely to continue paying the

¹³Rule 3.15.

¹⁴Other courts have used the contempt power to enforce disciplinary orders. *See, e.g., In re Richardson*, 759 A.2d 649, 651 (D.C. 2000) (upholding the power of its superior courts in initiating and finding attorneys in criminal contempt for ignoring initial disciplinary sanctions by practicing law despite being suspended); *In re Burton*, 614 A.2d 46, 47 (D.C. 1992) (affirming district court's finding of criminal contempt for practicing law despite disbarment); *Bar Assoc. of Greater Cleveland v. Rubinstein*, 525 N.E.2d 759 (Ohio 1988) (fining attorney \$10,000.00 for contempt for violating court's order to cease practicing law); *In Matter of Copren*, 2005 WL 2173951 (Cal. Bar Ct. 2005); *Lydon v. California Bar*, 756 P.2d 217, 220 (Cal. 1988) (stating that willful violations of a rule associated with disbarment can be punished through the contempt power of the court); *In re Resignation of Guth*, 687 N.E.2d 432 (Ohio 1997) (holding an attorney in contempt for violating a suspension order); *In re Teitler*, 595 N.Y.S. 2d 805, 806 (N.Y. App. Div. 1993); *Lader v. Finnerty*, 658 N.Y.S.2d 191 (citing to New York cases where the court has found attorneys in contempt of court for violating disciplinary court orders, and discussing the power of New York courts to find attorneys in contempt).

Respondent if this Court enters such an order. In fact, it appears that the Foundation has been withholding payments since January 2004 pending the outcome of this lawyer disciplinary proceeding. There is no reason to believe that it would not honor any order from this Court that addressed future payments from the Foundation to the Respondent.

Nor would the Foundation be in legal jeopardy if it stopped paying the Respondent pursuant to a final order of this Court in a disciplinary case. Such an order is binding on the Respondent attorney and the principles of *res judicata* and/or collateral estoppel should apply. Thus, for example, if this Court entered an order prohibiting the Respondent from receiving any more payments from the Foundation, the Foundation would be protected from any lawsuit by the Respondent when it refused to resume payments to him.

Moreover, the Supreme Court of Appeals, under the Constitution of the State of West Virginia and the Court's supervisory powers, has the exclusive power to regulate and control the practice of law in West Virginia. W.Va. Const. Art. VIII, § 3. See also *State ex rel. Frieson v. Isner*, 168 W.Va. 758, 285 S.E.2d 641 (1981). Thus, in addition to the power of contempt, there is no apparent reason why this Court could not exercise its constitutional power to enforce restitution orders in whatever other manner it deems appropriate upon petition from the Office of Disciplinary Counsel and/or in response to a petition for intervention by an interested party such as the Foundation.

The Hearing Panel Subcommittee rejected the approach recommended herein because it concluded that "[d]isciplinary counsel cannot and should not obtained and enforce judgments on behalf of a third party." Report, p. 12. The Bar Association respectfully disagrees. Although the disciplinary process should not generally become a substitute for litigation involving legal malpractice or breach of an attorney's fiduciary duty, it can and should pursue full restitution in an appropriate

case. This is particularly true in a case, like the present case, where the wronged entity is an estate without any apparent heirs.

IV. CONCLUSION

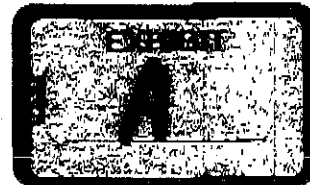
The recommendation of the Hearing Panel Subcommittee fails to address the severity of the Respondent's ethical violations. It allows the Respondent to continue to receive payments from the Foundation and fails to require full restitution. Moreover, it only requires restitution in the unlikely event that the Respondent seeks reinstatement.

Apparently the Hearing Panel Subcommittee underestimated the power and authority of this Court to address fairly and fully the wrongdoing at issue and failed to recognize the message that its recommendation would send both to the Bar and to the public at large. As a result, this Court should reject that recommendation in an opinion that addresses the important issues raised by this case, that articulates the range of sanctions that are appropriate and the means available to enforce those sanctions, and that remands the matter to the Lawyer Disciplinary Board for a full hearing on the charges.

RESPECTFULLY SUBMITTED.
INTERVENOR,
MONONGALIA COUNTY BAR ASSOCIATION.

Allan N. Karlin by Jane E. Peck
ALLAN N. KARLIN #7213
WV BAR # 1953
ALLAN N. KARLIN & ASSOCIATES
174 CHANCERY ROW
MORGANTOWN, WV 26505
(304) 296-8266

For Monongalia County Bar Association



WEALTH MANAGEMENT GROUP

United Bank's Wealth Management Group provides a complete range of trust and investment management services for individuals, families and businesses. We have over 160 years of experience and oversight of more than \$4.0 billion in client assets.

Our success and longevity in trust and investment services is based upon sound, conservative wealth management principals. We employ disciplined asset allocation strategies, supported by statistical models, enabling us to optimize clients' risk-adjusted investment performance.

Additionally, we provide expertise necessary to assist with generational wealth preservation and tax efficiency through comprehensive estate planning and in-house account administration. We pride ourselves on providing the highest level of client service.

Standard Fee Schedules

Fiduciary Services

Value of Assets	Annual Fiduciary Fee
First \$1.0 Million	1.10%
Next \$1.0 Million	.60%
Excess over \$2.0 Million	.50%

Minimum annual fee of \$2,500

Investment Agency & Retirement Services

Value of Assets	Annual Fiduciary Fee
First \$1.0 Million	1.00%
Next \$1.0 Million	.50%
Excess over \$2.0 Million	.40%

Minimum annual fee of \$2,500

Custody

Retirement and Taxable Accounts

Value of Assets	Annual Custody Fee
First \$1.0 Million	.35%
Next \$1.0 Million	.20%
Excess over \$2.0 Million	.10%

Minimum annual fee of \$1,000

Irrevocable Life Insurance Trust

Services Provided	Annual Fiduciary Fee
Acceptance	\$200
Fiduciary Services	\$1,000
Dues at funding	

Estate Settlement

Value of Assets	Estate Settlement Fee
First \$500,000	5.00%
Next \$500,000	4.00%
Next \$1.0 Million	3.00%
Excess over \$2.0 Million	2.00%

Minimum fee of \$5,000
1.0% on non-probate assets
Jurisdiction may determine final fee

Custody - Special Assets

Retirement and Taxable Accounts

Value of Assets	Annual Custody Fees
First \$1.0 Million	.70%
Next \$1.0 Million	.40%
Excess over \$2.0 Million	.20%

Minimum annual fee of \$2,500

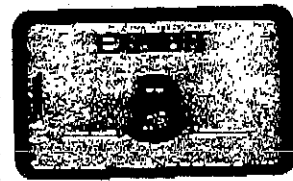
Special assets include but are not limited to private notes, mortgage notes, partnership holdings, real estate, oil & gas interests, mineral rights, etc.

Tax Preparation for Trusts

A Certified Public Accountant, approved by the Trustee, will prepare the trust tax return at reasonable cost. A separate tax preparation fee of \$50 per quarter will be charged to the trust in addition to any trustee fees.



Additional fees, in accordance with published schedules, will apply for real estate sales and management, oil, gas, and coal services, bill paying, filing of medical insurance claims, payroll processing, and distributions. When special or unusual services are required, outside of the published fee schedule, our fee will include reasonable additional compensation and/or out-of-pocket expenses based upon the nature of service and the extent of the duties and responsibilities assumed. A processing fee of 0.50% of market value will apply upon the closing of any accounts. Effective March 2006.



**HUNTINGTON NATIONAL BANK
PRIVATE FINANCIAL GROUP
TRUST DIVISION**

**ESTATE SETTLEMENT:
EXECUTOR, CO-EXECUTOR, ADMINISTRATOR,
CO-ADMINISTRATOR AND AGENT SERVICES AND FEES**

Charges are calculated on the appraised value of the estate

On Principal:

Probate Assets:		
First	\$500,000	3%
Over	\$500,000	2%
Non-Probate Assets:		

There are at times certain assets which do not become part of a decedent's probate estate, such as jointly-owned property, life insurance, and powers of appointment. In those instances, wherein the bank is required to perform services pertaining to such assets, an additional fee not to exceed 2% of the market value may be assessed.

On Income:

Based on the gross annual income, including annuities, Social Security, and pension benefits paid to the account:

5% of income annually

Minimums:

\$3,000 Annually

Computer Fee:

\$150 Annually

Standard Estate Agent Services

1. Inventorying and safekeeping of estate assets
2. Management of estate assets
3. Filing of appraisal with Fiduciary Supervisor/Commissioner.
4. Sorting of accounts with debtors and creditors.
5. Collection of income.
6. Overseeing the filing of Fiduciary Income Tax Returns (Accounting services billed separately).
7. Overseeing the filing of a final personal income tax return (Accounting services billed separately).
8. Overseeing the filing of Federal Estate and State Estate Tax returns (Accounting services billed separately).
9. Obtaining of all federal and state tax releases.
10. Distributing assets
11. Filing of final accounting with Fiduciary Supervisor/Commissioner.

The above charges do not include expenses chargeable directly to the estate, such as legal, accounting or other professional counsel fees, bank real estate or realtor sales commissions, and out-of-pocket expenses. Estates with unusual circumstances may justify either a higher or lower fee.

The current hourly rate will apply when services beyond the standard estate administration services are required. Our experience has shown that the Bank's work and responsibilities are not significantly reduced when its services with one or more co-administrators. Consequently, the above charges are not split or reduced when the bank acts as co-administrator. Fee Schedules Are Subject to Change.

Principal/Executor or Administrator

Fees include all of the following Huntington quality services

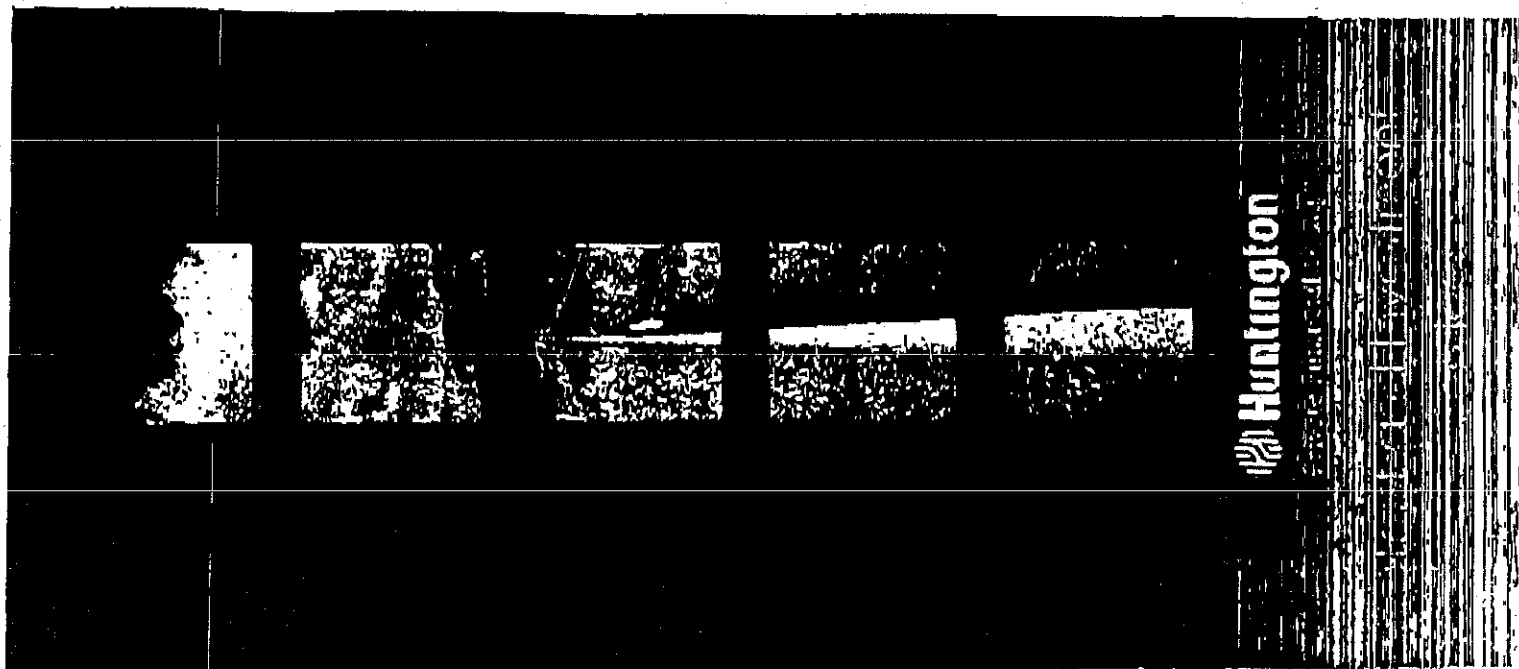
- ▶ Qualified and experienced Portfolio and Relationship Managers
- ▶ Local, personalized service
- ▶ Customized investment objective
- ▶ Asset allocation
- ▶ Ongoing investment review and periodic meetings
- ▶ Preparation of fiduciary tax returns
- ▶ Annual tax information letter
- ▶ Cost basis and capital adjustments as required
- ▶ Securities transactions executed at institutional rates
- ▶ Periodic account statements
- ▶ Portfolio Today Internet account access
- ▶ Income collection
- ▶ Daily pricing of equities
- ▶ Invest cash balances daily
- ▶ Remittance of income
- ▶ Processing of stock splits and corporate mergers and reorganizations
- ▶ Voting of all proxies
- ▶ Custody of assets

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KAY CASTO & CHENEY

3:20PM

03-26-05 03-29-2005



Huntington

Private Wealth Group

Huntington Private Wealth Group

Huntington

Private Wealth Group

Huntington Private Wealth Group

Schedule of Fees

Trustee and Investment Management fees are earned by The Huntington National Bank based upon a percentage of the market value of the account. Fees are calculated on the following graduated schedule:

Market Value	Fee
1% of assets on the first \$1 million	1% million
.75% on the next \$1 million	1% million
.50% on the next \$1 million	1% million
.40% on balance	balance

Annual minimum fee of \$1,000.00 will be charged regardless of account balance.

For clients who need additional statements, remittances or wire services, per item charges will be made as follows:

Statements (exceeding 12 per year)	\$10 each
Remittances (exceeding 24 per year)	15 each
Wire transfer	75 each

Plus:

Standard Trust Tax Preparation:

Investment Management Account	\$85
Revocable Trust	\$180
Irrevocable Trust	\$250

Termination Fees

For Irrevocable Trusts only, distributions to anyone other than the Grantor from principal of the trust account, including transfers to a successor trustee, will be subject to a 1% fee of the fair market value of the assets transferred or distributed.

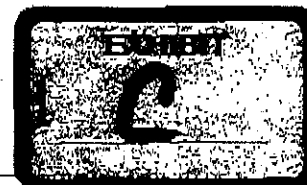
Accounts closing within 12 months of opening will be charged a full year's fee based on current market value.

Statement of Policy



BB&T WEALTH MANAGEMENT

Schedule of Fees BB&T Estate Settlement Services



For normal services, as executor, administrator or agent for the executor, the following charges apply:

Principal Fee

Assets includable in the Probate Estate will be subject to a charge on principal as follows:

4¼% on the first	\$1,000,000
3¼% on the next	\$1,000,000
2% on the next	\$1,000,000
1½% on all over	\$3,000,000

Assets passing outside the Probate Estate will be subject to a charge of 1%.

- No fees will be charged for the principal residence passing to a surviving spouse.

Income Fee

- 5% of gross income.
- 10% of disbursements made with respect to real property.

Minimum Fee \$7,500

Note: The preparation of the Federal Estate Tax and State Death Tax Returns is included in the normal estate settlement services and is not subject to an additional charge.

Allocation of Fee to Management Expenses

The bank will make a reasonable allocation of its fee to "management expenses" pursuant to Treasury Regulations § 20.2056(b)-(4)(d) when it is appropriate to do so to minimize taxes.

Cash Management and Investment Fees

Available cash may be invested in mutual funds, including those advised by BB&T or its affiliates. When BB&T mutual funds are utilized, BB&T receives separate compensation for services it provides to the BB&T mutual funds. These are separate and apart from the fees payable under this fee schedule. These fees and other operation expenses are described in the funds prospectus. Available cash in the Account may also be invested in deposit accounts at BB&T or other banks.

Extraordinary Services

The foregoing schedule of compensation is for the normal services required in the administration of an estate. Where special services are required, appropriate additional charges will be made based upon the nature of the work involved, the extent of our duties and the responsibilities assumed. Some examples of unusual services might include:

- responsibilities in the management or disposition of closely held business interests;
- extended litigation involving the estate;
- tax matters requiring extended negotiations or litigation;
- services in connection with sales, leasing and management of real estate, farmland and timber.

The administration of an estate normally lasts from one to two years. In those rare instances where unusual circumstances require administration to continue beyond two years, our trustee's fee shall be applicable.

Credit for Personal Trust Fees Paid

The bank will credit all fees paid on personal trust services up to 25% of the estate settlement charge. The discount will not apply where extraordinary services are involved or where the will does not provide proper statutory powers and provide BB&T's standard fee language.

Other Professionals

To ensure quality results, attorneys, accountants, appraisers and other professionals may be utilized and their fees will be in addition to the fees of the Corporate Fiduciary.

Co-Fiduciaries

The bank welcomes the opportunity to serve as co-executor. The bank's fees are not increased as a result of serving as co-fiduciary.

Effective May 1, 2005

CERTIFICATE OF SERVICE

I, ALLAN N. KARLIN, do hereby certify that service of the within and foregoing "Brief of the Monongalia County Bar Association" was made upon the parties hereinbelow listed by facsimile addressed as follows:

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all of which was done on the 7th day of April 2006.

ALLAN N. KARLIN by Janet P. [Signature] # 7213
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WV BAR # 1953
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