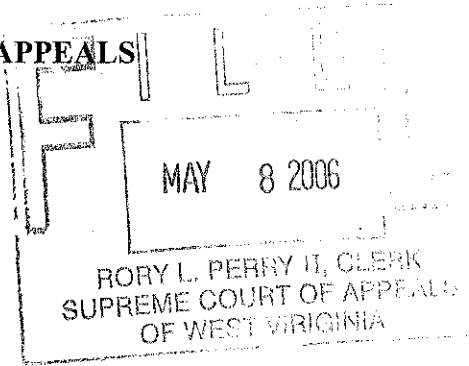


**BEFORE THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Complainant,

vs.

No. 317⁹4

**JOHN PATRICK BALL, a member of
The West Virginia State Bar,**

Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

Lawrence J. Lewis [Bar No. 2199]
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RESPONDENT'S CONDUCT

This matter is before the Court pursuant to Stipulated Findings of Fact and Conclusions of Law wherein Respondent has admitted that he violated duties owed to his clients, to his profession and to the public. His violations include conflicts of interest and unreasonable fees. Moreover, at the time of the infractions, he had substantial experience as a practicing lawyer, engaged in a pattern of misconduct, and had a self-serving motive. While he has asserted he is not "a greedy person" (11/10/05 hearing tr., p.46), one is nevertheless hard pressed to find another term to describe his conduct.

Respondent seeks to explain his actions through the fact that there existed a longstanding close personal relationship between Ms. Michael and Respondent's mother, and that the sisters enjoyed a special kinship with Respondent and his family. This relationship does not in any way justify or mitigate his actions. In fact, it was the nature of the relationship with the sisters that enabled Respondent to benefit so unjustly. Such conduct cannot generally occur if the clients are strangers or more distant in their relationship with the lawyer. The same situation existed with Respondent's close neighbor, Earle Elmore. It is difficult to understand how Respondent's knowledge that the sisters intensely disliked lawyers, and that he thought of them as "dear friends and family, people that needed help," mitigate the conflicts of interest and excessive fees in this matter.

Moreover, the fact that Ms. Michaels may have insisted on a 7.5% executor fee in the wills is not mitigating. It is clear from the record and Respondent admits that Ms. Michael believed Ms. Davis would die first and Ms. Michael would be the beneficiary of the 7.5% fee, not Respondent. While Respondent asserts he was unaware of the extent of the assets involved when he drafted the wills, he nevertheless understood the estates would be worth at least two or three million dollars each

(Respondent's Deposition of 1/12/04, p. 17), which is quite substantial in size. In any event, he was under no legal obligation to extract the full 7.5% from either estate as an executor fee and he was ethically bound under Rule 1.5(a) to charge a reasonable fee. Other than the size of the estates, there was nothing peculiar about handling them (Respondent's Deposition of 1/12/04, p. 61) and Respondent recognized that, as a general rule of thumb, five percent is a limit for an executor fee. (Respondent's Deposition of 1/12/04, p. 62).¹

Respondent further argues that after Ms. Michael died, he took more responsibility for caring for Ms. Davis. Even if this is true, the record indicates he was paid for the services rendered to Ms. Davis regarding her health care and the management of her affairs (Ex. 17). The services rendered her during her life for which he was paid do not mitigate his conduct herein.

Finally, Respondent argues that the Office of Disciplinary Counsel did not consider this an undue influence case and he maintains his violations were not intentional. It should be clear that the Office of Disciplinary Counsel does not believe it was required to either allege or prove undue influence to establish its case. Rule 1.8(c) of the Rules of Professional Conduct *mandates* that a lawyer shall not prepare an instrument making a substantial testamentary gift for a spouse from an unrelated client. Undue influence is not a criteria. Rules 1.7(b) and 1.5(a) of the Rules of Professional Conduct likewise contain mandatory language. Rule 1.7(b) provides that a lawyer shall not represent a client if it is materially limited by his responsibility to a third person or by his own interests, and Rule 1.5(a) requires that his fee shall be reasonable. The burden of proof is on the

¹West Virginia Code §44-4-12 (1997) simply states an executor is entitled to "reasonable compensation." The Court decisions under this section (and its predecessor) hold there is no narrow or rigid basis for determining what is reasonable compensation in all cases. Tyler v. Reynolds, 120 W.Va. 232, 197 S.E. 735 (1938). A rule of thumb of five percent of gross receipts has been recognized for a number of years. However, it may be reduced or increased under peculiar circumstances. Estate of Lapinsky v. Sparacino, 148 W.Va. 38, 32 S.E.2d 765 (1963); Black v. Black, 171 W.Va. 307, 298 S.E.2d 843 (1982).

attorney, not the Office of Disciplinary Counsel, to prove reasonableness of a fee. Committee on Legal Ethics v. Tatterson, 177 W.Va. 556, 352 S.E.2d 107 (1986). None of the relevant rules require the Office of Disciplinary Counsel to allege or prove undue influence.

The suggestion by Respondent that his conduct was not intentional is without merit. Respondent clearly intended to prepare the wills for the sisters with the terms and conditions contained therein, including the executor fees, and later repeated the conduct with regard to Mr. Elmore's will. He clearly intended to transport Ms. Davis to the bank and make possible the substitution of his children as beneficiaries of her annuity. He willingly collected 7.5% executor fees. He was an experienced lawyer at the time. He is charged with knowing the requirements of the Rules of Professional Conduct. The Office of Disciplinary Counsel clearly has stated on the record that it considers his conduct egregious. To suggest that the Office of Disciplinary Counsel does not consider it to be intentional is wholly without merit. In any event, before the Court are stipulated facts and recommended sanctions. The only issue for consideration is the adequacy of the recommended sanctions.

SANCTIONS

With regard to lawyer disciplinary matters, rather than establishing a uniform standard of disciplinary action, the Court considers the facts and circumstances in each case. Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989). A primary purpose of the disciplinary procedure is not punishment, but rather the protection of the public and its reassurance as to the reliability and integrity of attorneys. Committee on Legal Ethics v. Ikner, 190 W.Va. 433, 438 S.E.2d 613 (1993).

With this in mind, a major motivation of the Office of Disciplinary Counsel was to fashion a sanction that ensured that Respondent would remain out of the practice of law for the maximum

amount of time permitted under our Rules, and thus protect and reassure the public and also to exact some immediate correction for Respondent's conduct without attaching it to the contingency of Respondent returning to active practice.

This procedure is controlled by the Rules of Lawyer Disciplinary Procedure, and pursuant to Rule 3.25, a Respondent can consent to disbarment at any time during the proceedings by delivering to the Lawyer Disciplinary Board an appropriate affidavit. The Board is mandated to file the same with the Supreme Court, which in turn "shall enter an order disbarring the lawyer by consent." There are no provisions in Rule 3.25 to consider restitution as a part of the disbarment order. A Respondent, if he/she so desires, can avoid any issue of restitution simply by using this Rule. (Restitution, however, could still be addressed on a petition for reinstatement in connection with the issue of rehabilitation.) As indicated in the Lawyer Disciplinary Board's initial brief, the reinstatement procedures set forth by Rules 3.32 and 3.33 also contemplate considering matters of restitution during reinstatement procedures and, historically, restitution has been imposed as a condition to continue in active practice or as a condition for reinstatement. The recommended sanction before the Court, however, is tantamount to both disbarment and provides for immediate restitution.

The permissible sanctions which the Hearing Panel Subcommittee may recommend to the Supreme Court are set forth in Rule 3.15 of the Rules of Lawyer Disciplinary Procedure. Clearly, a lawyer may be sanctioned for misconduct in connection with a contract with a third party. Among other things, his future practice can be limited (or even excluded) and restitution ordered. However, there appears to be no authority upon which the Hearing Panel can recommend that the contract be set aside or declared null and void. For whatever reason, the third party in this matter has elected

not to pursue any litigation.² The Hearing Panel cannot substitute its judgment for that of the third party.

The issue surrounding restitution is not whether it can be enforced by contempt. The issue is when should payment of restitution be enforced. In this regard, the Rules with which the Lawyer Disciplinary Board must operate are not clear. The Rules and the case law seem to indicate that restitution is a matter for consideration upon reinstatement.

CONCLUSION

Accordingly, the egregious conduct of the Respondent is adequately addressed by the proposed sanctions. He is required to remain out of practice for the maximum time allowed under the Rules (five years); he must meet the strictest standards under the Rules for reinstatement; he must forego approximately \$1.4 million dollars; and he must pay an additional half million dollars on reinstatement.

Office of Disciplinary Counsel

By counsel



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² A spokesman for the West Virginia University Foundation verified to the Office of Disciplinary Counsel in an interview that the oversight agreement was prepared in house by its lawyers and that it was comfortable with the agreement.

CERTIFICATE OF SERVICE

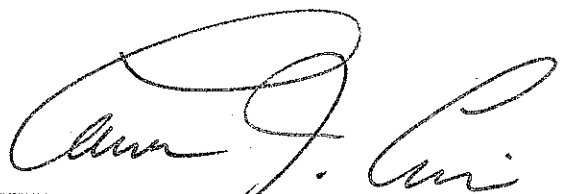
This is to certify that I, **Lawrence J. Lewis**, Chief Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 8th day of May, 2006, served a true copy of the foregoing "**REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD**" upon William C. Brewer, Esquire, Morgan Palmer Griffith, Esquire and Patrick D. Deem, Esquire, counsel for Respondent, John P. Ball, Esquire, and upon Allan N. Karlin, Esquire, by mailing the same, United States Mail with sufficient postage, to the following addresses:

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Morgan Palmer Griffith, Esquire
Post Office Box 1588
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Lawrence J. Lewis