

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Docket No. 31794

Lawyer Disciplinary Board

Petitioner,

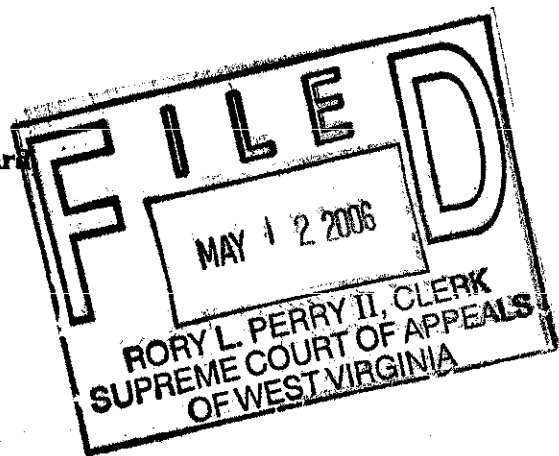
v.

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

Respondent,

**Monongalia County
Bar Association,**

Intervenor.



**REPLY OF THE MONONGALIA
COUNTY BAR ASSOCIATION
TO
BRIEF OF RESPONDENT**

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**REPLY OF THE MONONGALIA COUNTY BAR ASSOCIATION TO
BRIEF OF RESPONDENT**

Respondent recognizes that a primary purpose of the disciplinary process includes "the reassurance of the public as to the reliability and integrity of attorneys. . . ." *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 651, 226 S.E.2d 427, 429 (1976). Respondent's Brief, 11. Nonetheless, Respondent appears oblivious to how much his conduct has damaged and continues to damage the public perception of the legal profession. While the Respondent insists that he is remorseful, noting that he has agreed to forgo \$1,458,000.00 in payments from the Foundation over the next 13.5 years, he neglects to point out that, over that same period of time, he will collect \$486,000.00 from the Foundation in addition to the gifts and "fees" that he and his family have already received.¹ Respondent's insistence on continuing to collect substantial and unjustified payments from the Foundation hardly assures the public of the "reliability and integrity of attorneys." And if the Hearing Panel Subcommittee's recommendation is adopted, allowing the Respondent to continue to profit from his misconduct, what conclusion is the public likely to draw?

Respondent urges approval of the Hearing Panel Subcommittee's recommendation, noting that he cannot be readmitted to the Bar without paying restitution in the amount of \$500,000.00. Respondent's Brief, 12. Yet, who is likely to believe that, given his age, the Respondent will ever petition for reinstatement or offer to pay \$500,000.00 to the

¹The ODC and Respondent calculate that the Respondent will give up 3/4 of the 1% per year payment from the Foundation. That leaves the Respondent with 1/4 of the 1% per year payment. Based on the calculations in the briefs of the ODC and Respondent, Respondent will receive \$486,000.00 over the next 13.5 years.

Foundation. Nor does Respondent mention the fact that \$500,000.00 is only a fraction of the total assets that he and his family have already obtained as a result of his unethical conduct. Assuming, *arguendo*, that restitution can only be enforced as a condition of reinstatement, why is restitution limited to \$500,000.00 in light of the money and property that the Respondent obtained for himself and his family in violation of the Rules of Professional Conduct.

From Respondent's Statement of Facts, it appears as though Respondent expects this Court, the Bar and the public to overlook how much he and his family profited from his ethical violations because he earned whatever he received as a result of his longstanding and trusting relationship with his clients. Yet, the Rules of Professional Conduct do not permit an attorney to ignore his ethical obligations because he has known his wealthy clients for many years or because he contends that they refused to see any lawyer other than him. As noted in *State v. Gulbankian*, 196 N.W.2d 730 (Wis. 1972), one of the cases cited by Respondent, transactions, such as those in the present case, impair the credibility of the legal profession even under the best of circumstances:

Sometimes the long-standing friendship and confidential relationship between a client and an attorney serves as an effective opportunity in the eyes of others for exerting an undue influence by the attorney upon the testator. Such strength of implication might not arise between an attorney and a client who is relatively a stranger. An attorney must be as careful *to avoid the appearance of evil* as he is to avoid evil itself.

572 N.E.2d at 603; emphasis added.

Moreover, this Court should not readily accept the Respondent's self-serving testimony about the intent of his clients. An attorney who helps his clients bestow gifts and money on himself and his family is hardly a credible witness on the issue of his deceased clients' intent. Nor can one be confident the attorney's own self-interest does not bias both his judgment and the advice he gives his clients when he prepares client documents that directly benefit him and/or his immediate family.²

Respondent explains the excessive executor fee by claiming that Ms. Michael wanted at least 5%, after taxes, which Ms. Michael "a former mathematics teacher," "calculated in her head to offset the taxes and came to a 7.5% fee."³ Respondent's Brief, 5. In weighing the credibility of the Respondent's story about the origin of the 7.5% fee, it is worth recalling that another client of the Respondent, Earle L. Elmore, also appointed the Respondent executor and also set Respondent's fees at 7.5%.⁴ Was Mr. Elmore also a former mathematics teacher who calculated the 7.5% in his head to offset the taxes? Was the

²On the other hand, had the Respondent followed the Rules of Professional Conduct, and directed his clients to retain an independent attorney, the sisters would have expressed their intentions to an independent attorney and there would be no need for this Court to rely on the Respondent's self-interested testimony concerning his clients' intent.

³Respondent also argues, in a footnote, that he never had an opportunity to address the reasonableness of a 5% fee before the Lawyer Disciplinary Board. Respondent's Brief, 23. However, it will have ample opportunity to address this issue if this matter is remanded for a hearing.

⁴Mr. Elmore's will, like those of Ms. Davis and Ms. Michael, also included a 1% per year fee for future services related to the endowment. It is hard to avoid the conclusion that the Respondent played a more active role in selection of fees than his sworn statement to the Office of Disciplinary Counsel suggests.

similarity in the Elmore, Davis and Michael wills simply a coincidence that had nothing to do with the fact that they all had the same lawyer, *i.e.*, the Respondent?

Respondent contends that, "if there was a 'victim' in this case it would be the [WVU] Foundation" and that the Foundation "has no objection to the original executor fees, the overseers fees, or the now pending proposed discipline." Respondent's Brief, 10, 28. Even if this assertion is true, the West Virginia University Foundation does not have any mandate to decide questions of legal ethics, to forgive the Respondent's violations of the Rules of Professional Conduct or to decide the appropriate sanctions. Moreover, contrary to Respondent's suggestion, the Foundation is not the real victim of the Respondent's misconduct. The real victims are the students who were intended to benefit from the bequests, not the Foundation that administers the funds. Under the proposed disposition, the Respondent will continue to receive over \$30,000 per year, money that would otherwise be available for scholarships for these students.⁵

Nor can the Foundation be considered a neutral party. The Foundation certainly appreciated the Respondent's role in working with his clients to bequeath their assets to the Foundation. Under the circumstances, it is hardly surprising that the Foundation failed to challenge the Respondent's past conduct or failed to contest the Respondent's demand for an annual fee of 1% of the gross assets for his "continuing services," whatever those services might be.

⁵While \$30,000 per year might not seem large in light of the total of the bequests, the actual money available each year is based on the earnings of the funds, not the principal.

Respondent contends that the Court should rely on the fact that "there has been no showing that the wills or the Respondent's actions were in any way contrary to the testator's wishes." Respondent's Brief, 28. Yet, as noted above, the evidence of the testators' wishes relies, in large part, upon the Respondent's self-serving testimony because the Respondent chose to work with the sisters himself instead of directing the sisters to independent counsel once they made their intent to reward him or his family known to him.⁶

Respondent insists that the "violations with which ODC charged him were not intentional." Respondent's Brief, 8. In evaluating Respondent's allegation that his misconduct was not intentional, the Court should review how the respondent chose, time after time, to violate the Rules of Professional Conduct:

- When the Respondent drafted the wills leaving property to his wife and an automobile to himself, he certainly knew he was violating Rule 1.8, but this knowledge did not stop him from drafting the will.
- When the Respondent drafted the wills, making himself substitute executor in both wills, he knew that he would qualify as executor under one or the other will (whichever sister died last) with a 7.5% fee, but this did not stop him from drafting wills that allowed him, as substitute executor, to receive a 7.5% fee.
- Later, when the Respondent became executor of the Michael estate, he could have recognized his ethical duties under Rule 1.5 and renounced the excessive 7.5% fee, but despite his awareness of Rule 1.5 and his

⁶The Monongalia County Bar Association urges the Court to consider the additional damage to the legal profession and to the public's respect for the profession if a lawyer can justify his unethical conduct by relying on the defense of "I only did what my deceased client desired." A lawyer's opportunity for personal gain in violation of the Rules of Professional Conduct does not become acceptable because the client allegedly acquiesced in the attorney's conduct.

knowledge of the fees charged by others, he knowingly chose to collect the 7.5% fee.⁷

- Still later, when the Respondent became executor of the Davis estate, he once again had a choice to accept or reject the excessive 7.5% fee and, once again, he chose to collect the 7.5% fee.
- When the Respondent took Gladys Davis to the bank so she could make his children the beneficiaries of her annuity, he must have realized that he was involved in a conflict under the Rule 1.7 Rules of Professional Conduct, but he nonetheless escorted his client to the bank to help her transfer an annuity worth hundreds of thousands of dollars to his children.
- Realizing the incredible fees he obtained as substitute executor, he could have renounced the additional 1% per annum either when he first began administering the trust or, at the latest, when he turned the funds over to the Foundation, but, each time, he opted to continue to collect the 1% fee and he even insisted on continuing to receive the 1% fee after he turned the funds over to the Foundation.
- Even after a complaint was filed against him by the Lawyer Disciplinary Board, the Respondent chose not to repay any of the funds he received as a result of his misconduct and, in negotiating a resolution of this case, he insisted on continuing to collect a portion of the future annual payments from the Foundation.

Given this history, it is difficult to imagine how one could infer that the Respondent's conduct was anything other than intentional.

Respondent cites an article from the Brooklyn Journal of Law and Policy for the proposition that restitution cannot be independently enforced by the client. Respondent's Brief, 24. Harkness, Donna S., *Packaged and Sold: Subjecting Elder Law Practice to*

⁷At a minimum, the Respondent knew that 7.5% was in excess of the customary fee. According to the Respondent's Brief, Ms. Michael told him that she wanted "at least" a 5% fee "which respondent agreed was customary." Respondent's Brief, 5.

Consumer Protection Laws, 11 J.L. & Pol'y, 525, 560 (2003). While the quoted language does appear in an article about protecting the elderly, the language only means that a client cannot *independently* enforce an order of restitution entered in a disciplinary case.⁸ It does not mean that the Office of Disciplinary Counsel ("ODC") or the Supreme Court of Appeals lack the power to enforce such an order.

Respondent states that *In re Babilis*, 951 P.2d 207, 216-217 (Utah 1997), offers the Bar Association "little solace." However, *Babilis* is helpful to the resolution of this case. The decision by the Utah Supreme Court stands for the proposition that a disciplinary organization can award restitution. The opinion expressly stated that even a settlement between a client and his attorney *would not bind the disciplinary body in its decision regarding the appropriate amount of restitution*:

The disciplinary court refused to award restitution, apparently because it decided that the issue had been litigated and resolved by a settlement between the Kernses and Babilis. However, that constitutes neither *res judicata* nor collateral estoppel as to the sanctions requested by the Bar.

951 P.2d at 217. The Utah Court went on to explain that a settlement agreement between client and counsel is not binding on the disciplinary body because the Bar, in its disciplinary capacity, "is not merely vindicating the Kernses' [client's] personal interests when it demands restitution of ill-gotten property." *Id.* Rather, as the Court noted "[t]he 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

⁸Moreover, the author cited little authority for this general proposition.

conduct required of those who undertake the discharge of professional responsibilities as lawyers, and to protect the public and the administration of justice.” *Id.*, emphasis added.

Lest there be any chance that it could be misunderstood on this issue, the Utah Court concluded:

Because enforcement of attorney discipline matters implicates public interests that transcend the personal interests of the Kernses, the Bar is not acting on behalf of the Kernses but is acting to enforce sanctions in its own right. Therefore, any prior agreement between Babilis and the Kernses cannot bind the Bar or prevent it from demanding appropriate sanctions.

Id., emphasis added.⁹ The Court then ordered the matter remanded for an order of restitution:

Because no factual findings have been made on the issue of restitution, we remand for the purpose of making those findings and awarding an appropriate restitution designed to fully compensate the Kernses for the deprecations visited upon them.

Id. Thus, *Babilis* stands for the proposition that restitution is a matter of public interest, not just a private right of the wronged client.

While Respondent relies on a variety of other cases to support its contention that the discipline recommended by the Hearing Panel Subcommittee is appropriate, those cases are either distinguishable from the present case or represent a view about lawyer discipline that is inconsistent with the approach of this Court. For example, Respondent relies on *West*

⁹Respondent also claims that the issue of restitution was “foreclosed” by prior decisions of the Supreme Court of Utah relying on *In re Disciplinary Action of McCune*, 717 P.2d 701 (Utah 1986). Respondent’s Brief, 24-25. However, no Utah precedent stopped the Court from ordering restitution and nothing in *In re Disciplinary Action of McCune* prevented it from doing so. While footnote 3 in *In re Disciplinary Action of McCune* states that “[a] number of courts, including this one, have ordered payment of restitution to a client as a condition to reinstatement in the Bar,” the case neither discussed nor ruled out the possibility of ordering restitution independent of reinstatement.

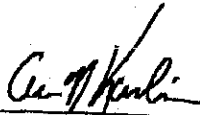
Virginia Lawyer Disciplinary Board v. Sullivan, Supreme Ct. No. 22870 (November 13, 1996). However, while Sullivan's misconduct was serious, there was no evidence that Sullivan profited from his wrongdoing to the extent the Respondent profited in the present case. Similarly, *State v. Gulbankian*, 196 N.W.2d 730 (Wis. 1972), a case that is more than thirty years old, involves a will that left a bequest to the attorney's sister, facts that are hardly analogous to the extensive misconduct evident in the charges against the Respondent. Neither *In re McCann*, 669 A.2d 49 (Del. 1995), nor *People v. Berge*, 620 P.2d 23 (Colo. 1980), another dated case, involve the degree of misconduct or the extent of personal profit that characterize the Respondent's conduct. Moreover, none of these cases, including *In re Discipline of Martin*, 506 N.W.2d 101 (S.D. 1993), and *Kalled's Case*, 135 N.H. 557, 607 A.2d 613 (1992), discusses, let alone rejects, whether a court has the power to order and enforce restitution independent of reinstatement, one of the issues raised by this case.¹⁰

In conclusion, the issues of excessive fees and self-serving representation are matters of substantial concern to the Bar and to the public. Although the Respondent has cited a number of cases, it has failed to demonstrate that there are any limitations on this Court's power to order an end to the Respondent's receipt of payments from the Foundation or to direct the Respondent to provide restitution to the Foundation for the assets received by himself and his family. Finally, this Court's decision should send a message that attorneys

¹⁰ *In re Smith*, 572 N.E.2d 1280 (Ind. 1991) did involve egregious misconduct, but that misconduct occurred in the early 1980s, before Rule 1.8 was adopted, and the decision does not represent current standards for disciplinary sanctions

who ignore the Rules of Professional Conduct will not be allowed to retain the fruits of their ethical violations.

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CERTIFICATE OF SERVICE

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

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all of which was done on the 12th day of May 2006.


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