

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 31784

LAWYER DISCIPLINARY BOARD,
Complainant,

v.

JOHN PATRICK BALL, a member
of the West Virginia state Bar,
Respondent.

MONONGALIA COUNTY BAR ASSOCIATION, Intervenor

BRIEF OF THE RESPONDENT

Counsel for Complainant

Lawrence J. Lewis
W. Va. State Bar # 2199
Chief Lawyer Disciplinary Counsel
2008 Kanawha Blvd. E.
Charleston, WV 25311
Tel: (304) 558-7999

Counsel for Intervenor

Allan N. Karlin
West Virginia Bar # 1953
Allan N. Karlin & Associates
174 Chancery Row
Morgantown, WV 26505
Tel: (304) 296-8266

Counsel for Respondent

William Brewer
W. Va. State Bar # 448
Brewer & Giggenbach
P.O. Box 4206
Morgantown, WV 26504
Tel: (304) 291-5800
Patrick D. Deem
W. Va. State Bar # 977
Steptoe & Johnson PLLC
P.O. Box 2190
Clarksburg, WV 26302
Tel: (304) 624-8000
Morgan Palmer Griffith
West Virginia Bar # 7721
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326
Tel: (304) 353-8175

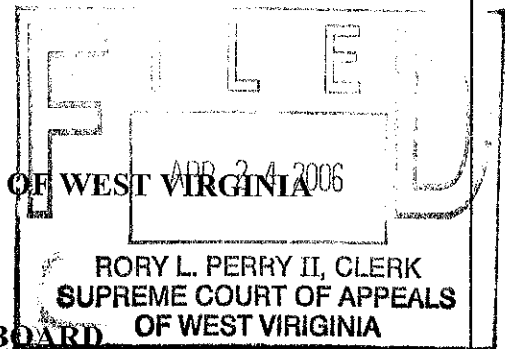


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I.

KIND OF PROCEEDING

This is a lawyer disciplinary case originating with information anonymously provided to the Office of Disciplinary Counsel. The Office of Disciplinary Counsel ("ODC") opened a complaint on its own authority and, after a complete investigation and full discovery, entered into with Respondent entered into certain stipulations, noting his violations of the Rules of Professional Conduct, expressing his remorse, and imposing upon him significant penalties all of which was approved by the Hearing Panel Subcommittee of the Lawyer Disciplinary Board. In this proceeding, the Court is reviewing the stipulations and stipulated discipline.

II.

STANDARD OF REVIEW

"This Court reviews *de novo* questions of law and the appropriateness of a particular sanction." *Committee on Legal Ethics of the West Virginia State Bar v. McCorkle*, 192 W. Va. 286, 289, 452 S.E.2d 377, 380 (1994). Further, while this Court exercises plenary review over ""the adjudicatory record made before the [Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions[,]"" it also ""gives respectful consideration to the [Board's] recommendations while ultimately exercising its own independent judgment."" Syl. Pt. 3, *Lawyer Disciplinary Bd. v. Cunningham*, 195 W. Va. 27, 464 S.E.2d 181 (1995) (citation omitted).

III.

STATEMENT OF FACTS

Respondent, John Patrick Ball, a United States Air Force veteran, Resp. Ex. 30 at 105,¹ began to practice law in 1963 and remained continually active until he assumed inactive status on July 1, 2004, in which status he currently remains. With the exception of this case, he has never been disciplined. Hearing Panel Sub. Com Tr. (Nov. 10, 2005) at 7 (hereinafter “Nov. 10 Tr. at ___.”); Rep. Hearing Panel Subcom. at 12. Respondent prepared wills for two sisters, Vivian Davis Michael and Gladys G. Davis (sometimes hereinafter “the sisters”). ODC Ex. 8 at 0042.

Although not related by blood or marriage to the sisters, there was a close fifty year relationship between Respondent and Respondent’s mother and the sisters. Ex. 8 at 0042-43. Ms. Michael and Respondent’s mother both belonged to the Daughters of the American Revolution, the Daughters of American Colonists, and a number of other organizations. Resp. Ex. 30 at 8. Because Respondent’s mother did not drive, Ms. Michael would drive her to club meetings and yearly high school reunions. *Id.* at 9. Both Respondent’s mother and Ms. Michael were extremely close and became best friends. *Id.* Indeed, when Ms. Michael’s mother passed away, Respondent’s mother, at the sister’s insistence, rode in the Davis family car as if a member of the family. *Id.* at 10. Ms. Michael and Ms. Davis considered the Respondent’s mother as one of their sisters. *Id.* at 106.

¹Respondent’s Exhibit 30 is the sworn statement Respondent gave to the ODC. The Hearing Panel Subcommittee considered it in rendering its recommendation. No. 10 Tr. at 61.

Respondent met Ms. Michael in his senior year in high school, when he spoke at a DAR Flag Day ceremony. *Id.* at 8. Respondent became acquainted with Ms. Davis in the 1970's. *Id.* at 8. Because the sisters had no spouses, children, or siblings, *id.* at 106, nor any really close friends, *id.* at 108, the sisters became very close with Respondent, treating him as a nephew. *Id.* at 106. The sisters and Respondent's family, although sharing no blood or martial ties, *id.* at 13, considered each other family because they shared a "different kind of relationship than you have with a lot of people." *Id.* at 106. As Respondent testified, "they were family to me." *Id.* at 107. Respondent's wife and Ms. Michael also developed a close relationship and became good friends in an older/younger sort of way. *Id.* at 11. Ms. Michael would give Christmas presents to Respondent or his children and Respondent's children would play with Ms. Michael's dogs at her insistence. *Id.* at 13.

Respondent began doing legal work for the sisters a few days after he graduated from law school. *Id.* at 14. After Respondent's mother passed away, Respondent did more legal work for the sisters. *Id.* In 1995, Ms. Michael called Respondent telling him that her cousin had died in Seattle. *Id.* at 64. She asked if Respondent would make any necessary arrangements. *Id.* at 65. Respondent arranged for shipment of the body from Seattle back to West Virginia, including making arrangements for the interment. *Id.* at 66. As a result, Ms. Michael became concerned about what would happen in the event of her death, and concluded that she needed a will. *Id.* at 67. Ms. Michael saw Respondent's wife in a grocery store and told Respondent's wife that she would like Respondent to draft wills for her and her sister. *Id.*; Nov. 10 Tr. at 44-45.

When the sisters first approached Respondent to prepare their wills, Respondent was unaware of the extent of the assets involved. Resp. Ex. 30 at 16. Because he had handled the estate of the sister's mother, he was aware that each sister had received \$500,000 in 1976. *Id.* at 17. However, in the interim, Ms. Michael, a former mathematics teacher, *id.* at 59, and an avid reader of the *Wall Street Journal*, *id.* at 18, managed to parlay that sum into two or three million dollars, *id.* at 17, solely as a result of her astute financial sense, *id.* at 18, 20, 109, 110, without a broker or investment advisor. *Id.* at 19.

Respondent spent many hours over many weeks in preparing the wills and meeting with both Ms. Michael and Ms. Davis, either at his office or their house. *Id.* at 27. In preparing the wills, Respondent thought of [the sisters] as [his] dear friends and family, people that needed help." Nov. 10 Tr. at 44. During the discussions, the question of an executor arose. Resp. Ex. 30 at 60. Under the wills, each sister was to an executrix of the other, and upon the survivor's death, Respondent was to be the executor. *Id.* at 34, 36; ODC Ex. 8 at 0043. While Respondent never suggested anyone other than himself, Respondent was motivated by his knowledge of the sisters intense dislike for lawyers, *id.* at 44, inasmuch as their father had been a lawyer had abandoned them and their mother to take up with another woman in Florida. *Id.* at 16. The sisters were adamant that they wanted no other lawyer. *Id.* at 64. Ms. Michael "didn't want anybody knowing her business, especially a bank. She didn't want any other lawyers ever involved with her and her private business." *Id.* at 60. Both sisters "didn't want to seek other counsel and didn't want any other counsel around." *Id.* at 64. Even if Respondent

was not a lawyer, the sisters would likely have appointed Respondent executor anyway. *Id.* at 63.

Further, during the discussions, the question of executor fees also arose. *Id.* at 58. Respondent informed Ms. Michael that the will should contain a fiduciary fee. *Id.* at 58. Ms. Michael indicated that she wanted at least 5%, which Respondent agreed was customary. *Id.* Ms. Michael then indicated that she wished the 5% to be after taxes, *id.*, as she was familiar with the duties of an executor having served as her mother's executor and concluding that the 5% paid to her was not sufficient. Nov. 10 Tr. at 37-38. Being a former mathematics teacher, Ms. Michael calculated the numbers in her head to offset the taxes and came to the 7.5% fee. Resp. Ex. 30 at 59. Thus the only reason the fee was set at 7.5% was because it was Ms. Michael's direction that any executor be compensated at 7.5 % as payment for the duties imposed by the position of executor. *Id.* at 88. In fact, the 7.5% was set when the sisters believed that Ms. Davis would die first (which would mean that Ms Michael would get the 7.5% fee) and Ms. Michael wished to retain the 7.5% even after Respondent pointed out that she could predecease Ms. Davis. *Id.* at 59. In the end, the sisters' wills "were essentially identical, making specific bequests to their church and to a non-profit corporation, leaving personal property to each other, leaving the largest amount to each other that could pass free of federal and state estate taxes, establishing a trust for the benefit of the surviving sister and, upon the survivor's death, leaving the remainder and residue to the West Virginia University Foundation, Inc." Rep. Hearing Panel Subcom. at 12.

The sisters had a very close relationship with their pet dogs and cats, which the sisters treated almost like children. Resp. Ex. 30 at 108-09. The sisters did not have a veterinarian that they liked, so they wished to donate money to establish a scholarship program for pre-veterinary students attending West Virginia University. *Id.* at 30. The sisters originally proposed that Respondent have full authority over the residuary estates. *Id.* at 29. Respondent informed them he could not do this. *Id.* When Respondent suggested establishing a fund through the West Virginia University Foundation, the sisters expressed concern because they knew of the Foundation's history of not using the funds donated for the purposes desired by the donors. *Id.* at 28, 30; Nov. 10 Tr. at 20. Consequently, the sisters included provisions in the wills giving the executor an oversight role in the program. Resp. Ex. 30 at 28-29; Nov. 10 Tr. at 20.² The sisters executed their respective wills on November 7, 1996, ODC Ex. 1 at 0011; ODC Ex. 4 at 0031. Ms. Michael passed away on January 6, 1998, and Ms. Davis passed way on January 3, 2001. Rep. Hearing Panel Subcom. at 3.

When Ms. Michael died, Ms. Davis took it very hard because the sisters anticipated that due to her age that Ms. Davis would die first. Resp. Ex. 30 at 34. Therefore, Ms. Davis renounced her executorship of Ms. Michael's will. *Id.*

After Ms. Michael died, Respondent began to take up more responsibility for caring for Ms. Davis, on many occasions working around the clock and trying to ensure that she received

²In fact, Ms. Davis was so concerned that her money would not be used as she intended in her 1999 codicil, she created a "safety valve" naming Respondent's wife, as immediate successor overseer to the funds, with subsequent overseers specifically named. Resp. Ex. 30 at 46-47.

prompt medical care. Nov. 10 Tr. at 56. During this period, Ms. Davis decided that she wanted to donate some of her income as a means of offsetting her income tax. Resp. Ex. 30 at 42. Ms. Davis donated funds to both the West Virginia University Creative Arts Center and Law School. *Id* at 42-44. Respondent asked Ms. Davis if she would like to make bequests in her will to include the Center and the Law School and she readily agreed. *Id.* at 49. Ms. Davis also decided to leave personal goods with emotional attachment to Respondent's wife as a means of at least keeping it in what Ms. Davis thought of as her family. Nov. 10 Tr. at 28. Ms. Davis also decided that she wished to be different from her sister and therefore also changed her will to direct that if Respondent died, oversight responsibilities would transfer to Respondent's wife. Resp. Ex. 30 at 40.

After Ms. Michael's death, Respondent and the Foundation reached an agreement that Respondent would be paid 1% of each fund as an overseers fee. *Id.* at 49-50, 85. From the times of the sisters deaths, their estate tax returns have been reviewed by taxing agencies and beneficiaries and no question has ever been raised about the administration of the estates or of any fees Respondent has charged. Nov. 10 Tr. at 31. Even though permitted by the wills, Respondent never charged either legal fees or fees for extraordinary services. Resp. Ex. 30 at 58.

Before her death, Ms. Davis had to change Ms. Michael as the beneficiary on her annuity. Resp. Ex. 30 at 73-74. Although Ms. Davis originally wanted the beneficiary to be Respondent, Respondent immediately informed her that he did not want it. *Id* at 71, 75. Respondent informed her that she could leave the money to her estate, but Ms. Davis opined

that her estate had enough money in it. *Id.* at 72. Ms. Davis then decided that she wished the beneficiaries to be Respondent's children. *Id.* Ms. Davis wanted Respondent's children to be the beneficiaries because she had no family and the Respondent's children were the grandchildren of Respondent's mother, *id.* at 72, 75, and in Ms. Davis's mind were her family. *Id.* at 114-15.

After Ms. Davis's death, the ODC received recorded copies of the sisters wills provided to it anonymously. Nov. 10 Tr. at 59. ODC opened a six count Statement of Charges complaint against Respondent. Thus, the complaint against Respondent was not "brought here by a member of the family, by a beneficiary, by the University, [or] by anyone we know of[.]" Nov. 10 Tr. at 35. In making its charges, the ODC never considered this an undue influence case, Nov. 10 Tr. at 36, and Respondent maintains the violations with which ODC charged him were not intentional. *Id.* at 59.

The Hearing Panel recommended to this Court the dismissal of two counts of the Statement, at the request of ODC. Rep. Hearing Panel Subcom. at 11.³ Further, as a result of intense and good-faith negotiations, Respondent and ODC entered into stipulated findings of fact, conclusions of law, and recommended discipline in an effort to amicably close this case. After a public hearing, the Hearing Panel Subcommittee issued a report adopting the stipulations and concluding that Respondent violated Rule of Professional Conduct 1.5, Rule

³The dismissed charges dealt with another Estate, the Elmore Estate, under which Respondent served as executor. As noted below, Respondent gave up certain fees from this estate as part of his settlement.

of Professional Conduct 1.8(c), and Rule of Professional Conduct 1.7. Currently, Respondent remains on inactive status.

While the Hearing Panel Subcommittee found that Respondent's conduct was aggravated by his substantial experience in the practice of law, a pattern of misconduct and a self-serving motive, it further found in mitigation that Respondent has practiced law since 1963 without any discipline, that he has been cooperative, that he truly believed from his close association with the sisters that the wills reflected their wishes, and he has expressed remorse for his conduct. Rep. Hearing Pan. Subcom. at 12. The Subcommittee recommended the following: (1) Respondent reduce his one percent overseers fee of the Michael's and Davis' funds to one quarter of one percent per year-resulting in an immediate yearly savings to the West Virginia University Foundation of approximately one hundred eight thousand dollars, with a savings to the Foundation over Respondent's expected lifespan⁴ of approximately one million four hundred fifty million dollars, Rep. Hearing Panel Subcom. at 13;⁵ (2) Respondent limit his executor fees of the Elmore estate to no more than five percent, Rep. Hearing Panel Subcom. at 15; (3) Respondent remain on voluntary inactive status for a period of not less than five years, Rep. Hearing Panel Subcom. at 14; (4) Respondent must file an appropriate petition with this Court pursuant to Rule of Lawyer Disciplinary Procedure 3.33 and comply with such

⁴Elizabeth Arias, Ph.D., Centers for Disease Control, Division of Vital Statistics, *National Vital Statistic Reports*, Vol. 53, No. 6 at 3 (Nov. 10, 2004) (Table A).

⁵Respondent has also agreed to forgo his fees on another estate, the Elmore estate, in which he is involved with the Foundation, representing a ten thousand dollar yearly savings to the Foundation, resulting in a savings to the Foundation (when coupled with the Davis and Michael trust reductions) of one million five hundred thousand to one million six hundred thousand dollars. Rep. Hearing Panel Subcom. at 13.

terms as this Court may impose upon his desire for reinstatement, Rep. Hearing Panel Subcom. at 14; and, (5) upon his reinstatement to the practice of law, Respondent must pay the Foundation a sum up to five hundred thousand dollars. Rep. Hearing Panel Subcom. at 15. Additionally, while the ODC characterized the violations here as “egregious,” Nov. 10 Tr. at 60, it did not dispute that the violations were not intentional. Nov. 10 Tr. at 59.⁶

Of note, if there was a “victim” in this case it would be the Foundation, Nov. 10 Tr. at 18, but the Foundation is not a complaining party in this case. *Id.* at 19. Moreover, at no time did anyone complain about the impact the oversight fees were having on the pre-veterinary scholarships, Resp. Ex. 30 at 69, 79-80. The Foundation was in agreement with how the oversight fees were to be paid, considering them to be fair and reasonable, Nov. 10 Tr. at 20, and had no issue with the 7.5% executor fee. *Id.* at 23. The Foundation had every opportunity to review the estates and the wills and expressed no reticence about them, *id.* at 31, as it apparently has expressed no reticence or objection to the recommended disposition at issue here. *Id.* at 19.

⁶Intervenor Monongalia County Bar Association does not reference either Respondent’s statements before the Hearing Panel Subcommittee nor Respondent’s Sworn Statement considered by the Hearing Panel, but nevertheless contends, ipse dixit, that “[a]lthough 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 [sic] of Professional Conduct was wilful [sic].” Br. Mon. County Bar Ass’n at 9-10.

IV.

ARGUMENT

“This Court has stated that “[t]he primary purpose of the ethics committee is not punishment but rather the protection of the public and the reassurance of the public as to the reliability and integrity of attorneys [.]” *Committee on Legal Ethics of West Virginia State Bar v. Ikner* 190 W. Va. 433, 436, 438 S.E.2d 613, 616 (1993) (quoting *Committee on Legal Ethics of the West Virginia State Bar v. Mullins*, 159 W. Va. 647, 651, 226 S.E.2d 427, 429 (1976), overruled on another point, *Committee on Legal Ethics v. Cometti*, 189 W. Va. 262, 430 S.E.2d 320 (1993)). See also *Office of Lawyer Disciplinary Counsel v. Albers*, 214 W. Va. 11, 13, 585 S.E.2d 11, 13 (2003) (per curiam); *Committee on Legal Ethics of West Virginia State Bar v. Tatterson*, 177 W. Va. 356, 364, 352 S.E.2d 107, 115 (1986); *Committee on Legal Ethics of West Virginia State Bar v. Dolly*, 176 W. Va. 250, 252, 342 S.E.2d 217, 218-19 (1986) (per curiam); *Daily Gazette Co., Inc. v. Committee on Legal Ethics of the West Virginia State Bar*, 174 W. Va. 359, 363, 326 S.E.2d 705, 709 (1984); *Committee on Legal Ethics of West Virginia State Bar v. Pence*, 171 W. Va. 68, 74, 297 S.E.2d 843, 849 (1982). Accord *Committee on Legal Ethics of the West Virginia State Bar v. Battistelli*, 185 W. Va. 109, 112-13, 405 S.E.2d 242, 245- 46 (1991). The sanctions agreed to by both the Bar and Respondent satisfy these goals.

Under the terms of his stipulation, Respondent will forgo one million, five hundred thousand to one million, six hundred thousand dollars. Additionally, Respondent must remain on inactive status for a period of five years and may only seek reinstatement pursuant to Rule

3.33 of the Rules of Lawyer Disciplinary Procedure. Rule 3.33(a) deals with reinstatement of an annulled license and imposes significant hurdles upon a respondent seeking reinstatement. The involuntary status Respondent has assumed is the equivalent of a disbarment because under Rule 3.33(a), “[t]he annulment of a license to practice law shall revoke and terminate such license, and shall constitute a disbarment.” *See also In re Salyer*, 2005 WL 1389225, *4 (Cal. Bar Ct.) (“Although petitioner resigned with disciplinary charges pending, he must meet the same requirements for readmission as if he were disbarred.”). Further, Respondent will be subject to whatever additional conditions this Court may impose upon his reinstatement and will also be required to possibly pay up to half a million dollars to the Foundation as a condition of reinstatement. For all intents and purposes, the recommended decision of the hearing panel disbars Respondent, affords the Foundation a savings of up to one million six hundred thousand dollars, and conditions reinstatement upon payment of up to a half a million dollar in restitution and any additional conditions imposed by this Court upon petition for reinstatement. Moreover, the tangible sanctions Respondent accepts is not the total sum of the punishment inflicted on him.

Before the Hearing Panel Subcommittee, Respondent testified as to the effect these proceedings have had on him personally. On the morning of the hearing, Respondent was literally front page news in his hometown newspaper. Nov. 10 Tr. at 48. Lawyers with whom Respondent has practiced for years shun him, crossing the street to avoid him, *id.* at 49, and his law partner has ended their partnership, *id.* at 50. Respondent is no longer invited to social engagements which heretofore he was always invited. *Id.* And, at the time when he was

phasing his practice out, his legal career is forever marred. *Id.* at 49. As the Respondent testified, "I don't know how to explain it. It's emotional punishment. It's a mental thing I know, but it's still punishment." *Id.* "Sometimes I feel I need a psychiatrist." *Id.* at 52.

This Court has held:

In disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and circumstances in each case, including mitigating facts and circumstances, in determining what disciplinary action, if any, is appropriate, and when the committee on legal ethics initiates proceedings before this Court, it has a duty to advise this Court of all pertinent facts with reference to the charges and the recommended disciplinary action.

Committee on Legal Ethics v. Mullins, 159 W. Va. 647, 226 S.E.2d 427 (1976), *overruled on other grounds by Committee on Legal Ethics v. Cometti*, 189 W. Va. 262, 430 S.E.2d 320 (1993).

In so doing the Court should also consider sanctions imposed in other cases. *See Lawyer Discip. Bd. v. Moore*, 214 W. Va. 780, 801, 591 S.E.2d 338, 359 (2003) (per curiam) (Maynard, J., concurring) ("Logically, how could we deny a law license to, or disbar a person, whose conduct is less egregious than, or equally egregious to, the conduct for which Smith's license was originally annulled?").

This Court has approved a disciplinary sanction similar to this one in *Lawyer Disciplinary Board v. Larry N. Sullivan*, No. 22870 (W. Va. Nov. 13, 1996). In *Sullivan*, a lawyer violated West Virginia Rules of Professional Conduct 1.3, 1.4(a), 1.7(a), 1.15(b), 1.16(d), and 8.1(b). The Hearing Panel Subcommittee in *Sullivan* presented stipulations of fact and a recommended disposition that Sullivan: (1) be placed on inactive status; (2) not be permitted to apply for active status for five years; (3) be required to petition for reinstatement

consistent with Rule of Lawyer Disciplinary Procedure; (4) be barred from seeking admission to any other Bar for five years; and (5) provide notice if applying for admission in another jurisdiction. *Sullivan* clearly weighs in favor of the stipulations between ODC and Respondent. Additionally, decisions from other courts also demonstrate the appropriateness of the stipulated discipline.

In re Smith, 572 N.E.2d 1280 (Ind. 1991) (per curiam), respondent prepared a will for Mary Maxon and a Power of Attorney in her friend, Fred Wilson. *Id.* at 1282. Maxon was the wealthy 82 year old widow (of a husband who founded his own corporation) without children or siblings, but one nephew, Harry. *Id.* Maxon broke her shoulder and was hospitalized until February 27, 1979. *Id.* On December 28, 1978, she executed an "Authorization" giving authority to Attorney Merrill Smith to assist Fred Wilson in caring for her affairs. *Id.* Maxon was released and placed in a nursing home when she continuously insisted on returning home. *Id.* Respondent arranged for Nurse Rose Daniels to take Maxon from the nursing home during the days and return her in the evenings. *Id.* at 1282-83. Respondent and Wilson opened Maxon's safety deposit boxes and found them filled with tax free negotiable municipal bonds and corporate stock certificates worth hundreds of thousands of dollars. *Id.* at 1283. Respondent's secretary organized these documents. *Id.* From time to time respondent invested the earnings in certificates of deposit and additional stock. *Id.* Maxon executed a power of attorney respondent prepared making him her additional attorney in fact. *Id.* Although Wilson executed the checks for Maxon's care and expenses, respondent's secretary prepared the checks and respondent's office maintained the checkbook and records. *Id.* Wilson died in December,

1980, and on February 6, 1981, Maxon executed another power of attorney that respondent prepared naming respondent's son and law partner as second attorney in fact. *Id.* Maxon's nephew, who had no legal responsibility or standing regarding Maxon's affairs, but advised respondent that he (Harry) would assume responsibility for looking after Maxon's affairs in the Corporation and would act as a family adviser. *Id.*

About May or June of 1980 respondent advised Wilson that he needed to upgrade his office technology in order to better maintain Maxon's records, although the manual inventory of the records was only four pages long. *Id.* Respondent was interested in buying a word processor for \$16,790. *Id.* He wrote Harry about the proposed purchase suggesting that Maxon's funds be used but that the law firm contract with her to pay back the expense with an interest free one hundred dollar a month payment. *Id.* Harry agreed but suggested one hundred and thirty-five dollars per month. *Id.* Wilson signed the contract which provided that Maxon would purchase the processor for use by the firm for the one hundred and thirty-five dollars until repaid in full with any unpaid balance immediately due and payable at her death, although neither Wilson nor Harry discussed the matter with Maxon. *Id.* Respondent testified that he and she alone discussed the contract but there was no written memorialization or other evidence to indicate that she was aware of the transaction, that she approved it, that she was advised of the inherent conflict or that she was advised to seek independent counsel. *Id.* At no time before or after the purchase did anyone advise Maxon of the expenditure of her funds, get her consent or explain the inherent conflict. *Id.* Respondent credited his firm with six thousand dollars against the firm's obligation to Maxon. *Id.* Respondent claimed that Maxon wanted these

credits to be gifts to the law firm for extra nice behavior and instructed him to handle the gifts accordingly. *Id.* Respondent observed he did not tell her to seek independent counsel regarding the matter as she would not have followed that advice. *Id.* Neither the credits nor the monthly payments were reflected in the respective statements of cash assets, income and expenditures and the credits were also omitted from the IH-6 form respondent prepared. *Id.*

On December 12, 1980, while Wilson was in respondent's office, respondent's secretary received a one thousand dollar check Wilson signed from Maxon's funds and was told she was doing a good job. *Id.* The following year respondent gave his secretary a three thousand dollar check he signed from Maxon's funds indicating that he had spoken with Harry who thought she deserved it for handling Maxon's affairs. *Id.* at 1284. On August 12, 1982, respondent gave his secretary a third check from Maxon's funds, signed by him for three thousand dollars. *Id.* Maxon then died with a total estate of \$4,951,573.96. *Id.*⁷ In December of 1981, Harry suggested respondent make gifts from Maxon's assets to trusts benefitting Harry's three children and seven grandchildren totaling \$27,714.30 and a gift of 1,000 shares of Corporation stock valued at \$27 per share to Maxon Founder's Fund, a Ball State Foundation. *Id.* Later, in December of 1981, Harry wrote respondent advising that, as Maxon's next of kin, he was "quite certain that if she were mentally in position to do so, she would wholeheartedly agree that" respondent and his staff should receive Christmas bonuses including \$10,000 to respondent, \$5,000 to respondents law partner and son, and \$3,000 to respondent's secretary.

⁷In 2006 dollars, this amount would be \$11,883,775.00. See Alaska Dep't of Workforce Development, Workforce Info, <http://almis.labor.state.ak.us/?PAGEID=67&SUBID=198>.

Id. Respondent issued the checks. *Id.* At no time either before or after the transfers from Maxon's funds did respondent or anyone else explain to her the conflict of interest inherent in such gifts nor did anyone obtain her consent. *Id.* Further, respondent sought court approval for attorney's and executor's fees, but failed to disclose that the firm had been paid fees while Maxon was alive in the amount of \$31,315.55, and within ten days of Maxon's death paid himself and firm \$1,047.67 as pre-death fees and, without court approval, paid himself and his firm \$8,000.00. *Id.* When respondent sought \$300,000.00 in attorney's fees and executor fees, the court reduced the fees to \$140,000.00. *Id.*

The Indiana Bar charged respondent with violating Disciplinary Rules 5-101(A)⁸ and 5-104(A)⁹ of the Code of Professional Responsibility. For this conduct, including lying to a court, the court found that "a substantial period of suspension is warranted." *Id.* at 1290. The court imposed a two year suspension. *Id.*

Similarly in *State v. Gulbankian*, 196 N.W.2d 730 (Wis. 1972), respondent practiced law for 36 years and enjoyed an extensive probate practice. *Id.* at 730. Seventy-six year old Pearl Kradwell, a longtime friend of the Gulbankian family, was brought to respondent's office by respondent's sister Akabe Gulbankian. *Id.* at 730-31. Respondent drafted Kradwell's will

⁸"Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." DR 5-101(A), *quoted in Smith* 572 N.E.2d at 1284. The Indiana Supreme Court observed that Rule of Professional Conduct 1.8(c) superceded DR 5-101(A). *Smith*, 572 N.E.2d at 1286.

⁹"A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." DR 5-104(A), *quoted in Smith*, 572 N.E.2d at 1284.

which contained a specific \$10,000.00 bequest to Akabe and also designated Akabe executor a designated respondent as successor executor. *Id.* at 731. The will's residuary clause bequeathed the rest of the estate, which amounted to roughly one half of the \$180,000 estate, to the executrix "to distribute the same to and among my heirs, named legatees, and such other persons she may deem deserving and for benevolent objects, and to such of them and in such proportion as she shall deem just and proper, and her decision upon such matters shall be final, conclusive and binding upon all parties." *Id.* Kradwell died suddenly two days after executing the will. *Id.* Respondent offered the will for probate. *Id.* Janet Nelson Ross, a daughter of a deceased brother of Mrs. Kradwell, filed objections to the will and a petition for the construction of the residuary clause. *Id.* The will was admitted to probate, but the residuary clause was held void for lack of ascertainable beneficiaries. *Id.*

The complaint against respondent claimed she acted in an unprofessional manner. *Id.* Respondent argued the will's provisions were consistent with Kradwell's wishes; that there was a long and intimate friendship between Kradwell and her sister Akabe Gulbankian and the gift to Akabe of \$10,000 was not unnatural in fact under the circumstances; that in four previous wills Mrs. Kradwell had made a bequest to Akabe; no will contest was anticipated; and the public's confidence in the legal profession had not been damaged. *Id.* The referee's report to the court found no evil intent on respondents's part in drafting the will in respect to the bequest and the invalid residuary devise. *Id.* Concluding that respondent "overstepped the boundary line and should not have prepared the will of Pearl Kradwell under the circumstances" the court imposed a sixty days suspension and part of the costs of the proceeding. *Id.*

Similarly, *In re Martin*, 506 N.W.2d 101 (S.D. 1993) the court imposed a two year suspension on an attorney who committed numerous violations of the Code of Professional Responsibility by drafting a will and other documents in which he had a personal financial interest, without advising the client to seek independent legal advice. The Court rejected Disciplinary Board's disbarment recommendation by noting lawyer's remorse and character witnesses of the attorney's community service and conditioning readmission on continuing legal education classes, ethics seminars, passing the professional responsibility exam, and participation in community service work during his two-year suspension. *Id.* at 105-06.

Likewise, in *In re McCann*, 669 A.2d 49 (Del. 1995) a was charged in regard to three separate matters with failure to effect and perfect an appeal, failing to file complaints, and drafting a will wherein he received a bequest from the testator. Particularly, respondent represented Gerald and Frances Bow on various matters, including the preparation of their wills before they moved from Delaware to Florida. *Id.* at 53. Mr. Bow died and respondent continued to give legal help and advice to Mrs. Bow without pay because of his friendship with Mr. and Mrs. Bow— a friendship so close that Mrs. Bow referred to respondent as nephew and he referred to her as aunt, although there was no family relationship. *Id.* Mrs. Bow obtained a Florida lawyer to write her will in which she left 10% of her estate to her “friend” the respondent. *Id.* Respondent was unaware of this version of the will at the time. *Id.* In 1990, Mrs. Bow asked respondent to her will. *Id.* At Mrs. Bow's request, respondent changed Mrs. Bow's reference to him in her will from “friend” to “nephew” and named himself as Mrs. Bow's personal representative. *Id.* The 10% ten percent bequest was continued. *Id.*

Respondent retained Florida counsel and respondent executed a Petition for Administration which contained a declaration certified by McCann as true under penalty of perjury that referred to respondent as Mrs. Bow's "nephew." McCann then was appointed as Mrs. Bow's personal representative. As a result of unrelated family litigation, questions arose over respondent's role since he was not a nephew, which prompted respondent McCann to resign receiving no direct benefit from Mrs. Bow's 1990 will beyond the ten percent bequest. *Id.* Even in including the violations not related to the drafting of the will, and even though respondent had twice before been subject to discipline, the Delaware Supreme Court imposed a one year suspension and required as conditions of reinstatement letters of apology to the complainants and any other injured parties in each of the matters, consultation with the Professional Guidance Committee of the State Bar and a representative of the Trustees of the Lawyers' Fund for Client Protection regarding his law office practices with agreement to implement whatever reasonable changes in procedures or practices are suggested by either of those entities, completion of 6 hours of continuing legal education in ethics and professionalism, over and above mandated hours, and an additional 6 hours of continuing legal education in law office management prior to applying for reinstatement, and shall report his completion of such work to the Office of Disciplinary Counsel. *Id.* at 59.

Similarly, *In re Kalled*, 607 A.2d 613 (N.H. 1992), respondent performed legal services for Mr. and Mrs. Lawrence J. Wood dating back to 1983. *Id.* at 614. Respondent was a close friend of Lawrence J. Wood, and Mr. Wood placed enormous trust in the respondent. *Id.* Mr. Wood's only living relative was his wife, Amelia. *Id.* The Woods were of modest means until

Lawrence's sister Eunice Palmer, died in 1988 and left her brother approximately \$3 million. *Id.* Shortly after his sister died, Mr. Wood approached respondent with a new estate plan because Mr. Wood desired to ensure his invalid and incompetent wife would be cared for in their home, but that her family would get nothing. *Id.* Mr. Wood was of sound and determined mind, fully capable of formulating and understanding the estate plan he laid out for the respondent, and very definite about the disposition of his assets. *Id.* Five weeks after Eunice's death, Lawrence executed a new will providing for the care of his wife for her life, appointing respondent executor of the estate and trustee for the benefit of Amelia, and providing respondent or his son would inherit the entire Wood estate as remaindermen. At the time of Lawrence's death, respondent knew or should have known there was a question of Amelia's competency. *Id.* Yet just after Lawrence's death respondent supervised the drafting of three documents for Amelia giving respondent complete control over all of the assets owned by Amelia Wood and available to her through the estate of Lawrence Wood or otherwise, and provided for the same estate plan as that provided for by Lawrence's will. *Id.* at 614-15. Respondent had commissioned Amelia's caregiver to ask Amelia if she wished to have an estate plan like her husband or whether she wanted the estate to go to her relatives. *Id.* at 615 Thus, the committee concluded "that her options were not adequately explained to her, if she could understand them." *Id.*

Further, the committee determined that, in light of Amelia's incompetence, "the will and trust were clearly solicited by Mr. Kalled" as Amelia would not have been capable of either understanding or conceiving such a plan, "nor would she have been able to understand

and waive the conflicts such a plan presented.” *Id.* At about the same time that Amelia signed the documents, Amelia’s family filed a guardianship petition. *Id.* Respondent undertook to represent Amelia in this proceeding. *Id.* Further, as executor under Lawrence’s will, respondent moved to intervene in the guardianship proceeding while still representing Amelia. *Id.* Even after a guardian was finally appointed, respondent continued to resist the appointment and to contest Amelia’s election to waive the provisions of Lawrence’s will in the estate proceeding. *Id.* The disciplinary committee concluded respondent violated Rules 1.4(b), 1.7(b), 1.8(c), 1.14(a) and 8.4(a), but that these violations were not dishonest, fraudulent, deceitful or a misrepresentation. The court found that respondent’s violations occurring over a period of time warranted respondent’s suspension as well as being ordered to reimburse the committee for the costs of investigating and prosecuting these matters. *Id.* The court also directed that respondent should not petition the court for five years for reinstatement with such reinstatement, at a minimum, being contingent on his satisfying the bar requirements for new applicants, and passing the Multistate Professional Responsibility Examination. *Id.*

Similarly, in *People v. Berge*, 620 P.2d 23 (Colo. 1980) (En Banc) a lawyer committed several violations of Code of Professional Responsibility in regard to preparing, executing, and probating client’s will and the court looked to Standards 7.1 and 1.1 of the 1979 version of the A.B.A. Standards for Lawyer Disciplinary Proceedings to reduce a recommended one year suspension to 90 days, noting that the attorney had no prior disciplinary actions against him in nearly 30 years of practice and that there was no evidence that the bequests did not reflect the client’s true intent. *Id.* at 29.

In these cases, the respondents committed the same kinds of offenses as did Respondent before this bench. The respondents in the above cases received similar or lighter penalties than those agreed to by Respondent with the ODC. The Court should therefore accept the recommendation of the Hearing Panel subcommittee.

However, the Monongalia County Bar Association, which was not a party below¹⁰ (and was not, therefore, a participant in the hearings, discovery, and negotiations leading to the stipulations),¹¹ nevertheless assert that the sanctions imposed on Respondent are insufficient.

¹⁰And only became an intervenor as the result of a fractured vote taken at an Association meeting with only a minuscule number of members in attendance.

¹¹The Association's absence from the proceedings below might explain why it finds it necessary to attach exhibits to its brief which were not introduced before the Hearing Panel Subcommittee. Although the Association does not invoke it, Respondent recognizes that this Court may take judicial notice in its review of disciplinary proceedings. *Lawyer Disciplinary Bd. v. Allen*, 198 W. Va. 18, 32, 479 S.E.2d 317, 331 (1996). However, "Judicial notice is 'not [a] talisman[] by which gaps in a litigant's evidentiary presentation . . . may be repaired on appeal.'" *American Stores Co. v. C.I.R.*, 170 F.3d 1267, 1270 (10th Cir. 1999) (quoting *City of New Brunswick v. Borough of Milltown*, 686 F.2d 120, 131 n. 15 (3d Cir.1982)).

The Association attempts to interject an additional issue in the case--that there is no evidence that a 5% fee was reasonable. Br. Mon County Bar Ass'n at 6 n.7. However, the ODC never contended that a 5% fee was impermissible or that Respondent should not get 5%. Indeed, the Hearing Panel Subcommittee found that a 5% was reasonable based upon the evidence and exhibits it had before it. Finally, for the Court to address it would interfere with the integrity of the lawyer disciplinary system.

The rationale behind [the raise or waive] rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.

Whitlow v. Board of Educ. of Kanawha County, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993). Here, Respondent never had the opportunity to address any claims that the 5% fee was

In particular, they assert that additional restitution should be ordered in this case and not tied to reinstatement. Br. Mon. County Bar Ass'n at 12.¹² In responding, it is some moment that ODC takes the position that its restitutionary power is limited to actions on a lawyer's license. Br. Law. Discip. Bd. at 13. "Virtually every jurisdiction has incorporated restitution as a possible condition of reinstatement, either through explicit provisions in the jurisdiction's bar disciplinary rules, establishment of a client reimbursement fund (to which the lawyer must submit repayment) or case law." See Donna S. Harkness, *Packaged and Sold: Subjecting Elder Law Practice to Consumer Protection Laws*, 11 J.L. & Pol'y 525, 578 n. 56. (2003) "Restitution . . . cannot be independently enforced by the client and is contingent upon a suspended or disbarred attorney's desire to be reinstated. (Footnote omitted)" *Id.* at 560.

The Bar Association asserts that additional restitution is appropriate in this case and cites *In re Babilis*, 951 P.2d 207 (Utah 1997) in support of its position. *Babilis* gives the Association its little solace. At issue in *Babilis* was whether the disciplinary authority or court could order restitution when the respondent and client had reached a settlement on the issue. *Id.* at 217. *Babilis* did not address how the restitution was to be crafted, both because it was not

impermissible. Indeed, the Association's argument is misleading because the schedules of fees set forth in the Association's exhibits ignores the fact that financial institutions must often go outside to find special help needed to administer an estate—and the persons providing these special services are also entitled to be paid.

¹²Aside from the issue of whether restitution beyond that covered in the stipulations could be sought, the ODC informed the hearing panel in this case that "I think in all, considering the circumstances in hand that the proposal that we are making to the panel, in which we are asking the panel to adopt and recommend to the Supreme Court, adequately addresses the situation and is a fair and just resolution to this matter to Mr. Ball, to the public, and to the Bar." Nov. 10 Tr. at 8.

at issue before the court and because the issue was foreclosed by Utah precedent. *See, e.g., In re McCune*, 717 P.2d 701, 705 n.3 (Utah 1986) (“A number of courts, including this one, have ordered payment of restitution to a client as a condition of reinstatement to the Bar.”), *overruled on other grounds by Monson v. Carver*, 928 P.2d 1017 (Utah 1996). The Association’s brief also misunderstands the purpose of the disciplinary system and the role of restitution within that system.

“This Court has . . . stated that ‘the primary purpose of the ethics committee [Office of Lawyer Disciplinary Counsel] is not punishment but rather 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) (per curiam) (quoting *Committee on Legal Ethics v. Ikner*, 190 W. Va. 433, 436, 438 S.E.2d 613, 616 (1993) (internal citations omitted)). *See also* Franklin D. Cleckley, *Clearly Erroneous: The Fourth Circuit’s Decision to Uphold Removal of a State Bar Disciplinary Proceeding under the Federal Officer Removal Statute*, 92 W. Va. L. Rev. 577, 627 & n.218 (1990) (collecting cases from other jurisdictions in accord with this view). Discipline imposed out vindictiveness goes beyond what is needed to protect the public and is not in the public interest. *In re Rivkind*, 791 P.2d 1037, 1042 (Ariz. 1990) (discipline beyond that needed to protect the public impermissible because it “would become purely vindictive and punitive.”); *In re Feldman*, 500 A.2d 377, 381 (N.J. 1985) (“Additional discipline, at this time, would be more vindictive than in the public interest.”).

Restitution in a disciplinary setting is not necessarily to reimburse a client, but to also

allow a respondent to demonstrate rehabilitation (and his commitment to the public) by providing to the lawyer a concrete reminder of the impact of the attorney's actions. "Restitution imposed as a condition of probation serves the state interest of rehabilitating culpable attorneys (and protecting the public) by forcing the attorney to 'confront, in concrete terms, the harm his actions have caused.'" *Brookman v. State Bar*, 760 P.2d 1023,1026 (Cal.1988) (quoting *Kelly v. Robinson* 479 U.S. 36, 49 n.10 (1986)). "Primarily . . . this requirement is imposed to help the State Bar make a functional assessment of the character and fitness of the person wishing to be reinstated." *State Bar v. Moore*, 932 S.W.2d 132, 137 (Tex. App.), *vacated by settlement*, 938 S.W.2d 717 (Tex.1997). In other word, the main reasons for "imposing the restitution requirement is for the respondent to demonstrate his rehabilitation prior to reinstatement." *People v. Sullivan*, 802 P.2d 1091, 1096 (Colo.1990). "[R]estitution is symbolic of repentance, honesty and a desire to do the right thing under the circumstances." *The Florida Bar v. Della-Donna*, 583 So.2d 307, 310 (Fla.1989) (quoting *In re Dawson*, 131 So.2d 472, 474 (Fla.1961)). It is this volitional aspect of disciplinary restitution that prevents ODC and the Disciplinary Board from becoming nothing more than a private collection agency. *Compare Id.* at 312 ("Restitution can be ordered as a condition of resuming the practice of law, but its only effect can be on one's ability to practice law. We cannot and should not turn restitution as a condition to practicing our profession into a judgment for a third party.") and *In re Feeley*, 814 P.2d 777, 780 (Ariz. 1991) ("Respondent objects to the Commission's recommendation of suspension with reinstatement predicated upon his paying restitution to the Aldorasis, claiming that this type of order makes the Commission a collection agency. We do not agree.").

In fact, the only authority that the Bar Association can muster for its claim, those cases cited in footnote 14 of its Brief, are either not relevant, because they do not address restitution, or actually undermine the Association's position. For example, in *In re Copren*, 2005 WL 2173951 (Cal. Bar. Ct.), the question was whether a disciplined lawyer had to comply with the notification requirements contained in the California Rules of Court, but the actual sanctions imposed included restitution as a condition of reinstatement. And in *Lydon v. State Bar*, 248 Cal. Rptr. 830, 831 (Sup. Ct. 1988) the court suspended the lawyer "for three years and until he had (1) made restitution totaling \$650 to two clients[.]" The remaining jurisdictions represented in the Association's Brief, all make restitution a condition of reinstatement. *See, e.g. In re Cater*, 887 A.2d 1, 27 (D.C. 2005) ("respondent . . . is hereby suspended from the practice of law for 180 days, with reinstatement conditioned upon . . . proof that full restitution has been made to the Morton and Hinton Estates."); *In re Haas*, 770 N.Y.S.2d 663, 663 (App. Div. 2004) (citations omitted) ("Upon any reapplication for reinstatement, respondent shall make the showing required by this Court's rules including the restitution ordered by this Court's decision which censured respondent in 1997"); *Disciplinary Counsel v. Holland*, 835 N.E.2d 361, 366 (Ohio 2005) (per curiam) ("Respondent's reinstatement, therefore, is conditioned on his complete restitution, taking into account any amounts he may have already repaid to the county through a reduction in fees, also to be determined by relator."). Moreover, the Association's argument is further undercut in this case by the record in this case.

While the Association claims that "the wronged entity is an estate without any apparent heirs[.]" Br. Mon. County Bar Ass'n at 15-16, this is incorrect and ignores the record in this

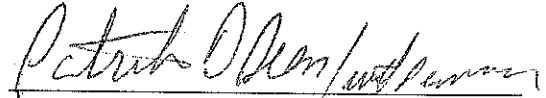
case that the only “victim,” (if it can be called such) is the Foundation, Nov. 10 Tr. 18, and the Foundation, (which did not bring this complaint nor seek restitution in the proceedings below), had no objection to the original executor fees, the original overseers fees, or the now pending proposed discipline. Nov. 10 Tr. at 19, 20, 31; Resp. Ex. 30 at 69. Perhaps most importantly, there has been no showing that the wills or the Respondent’s actions were in any way contrary to the testator’s wishes. *See People v. Berge*, 620 P.2d at 29 (“[O]ur review of the record discloses no evidence that the distribution of assets directed in the . . . will did not reflect the testator’s true testamentary intent.”) Indeed, the 7.5% executor fee was set by Ms. Michael herself (a shrewd and acute expert in matters financial), based on her familiarity with the costs and efforts associated with settling her mother’s estate, Nov. 10 Tr. at 37-38, and even after Respondent informed her the customary fee was 5%. Resp. Ex. 30 at 58. In determining excessive fees, this court has held, “If an attorney’s fee is grossly disproportionate to the services rendered *and is charged to a client who lacks full information about all of the relevant circumstances*, the fee is “clearly excessive” within the meaning of [Rule 1.5 of the Rules of Professional Conduct], even though the client has consented to such fee.” Syl. Pt. 4, in part, *Lawyer Disciplinary Board v. Morton*, 212 W. Va. 165, 569 S.E.2d 412 (2002) (per curiam) (quoting Syl. Pt. 2, *Committee on Legal Ethics v. Tatterson*, 177 W. Va. 356, 352 S.E.2d 107 (1986)) (emphasis added). Here the evidence shows that Ms. Michael was well aware of the 7.5% fee and the reasons which she believed justified it.¹³

¹³This is consistent with this Court’s view of West Virginia Code § 44-4-12 (providing for compensation and expenses of fiduciaries) which is that the statute becomes effective only when no other arrangements are provided for. *Curl v. Security Trust Co.*, 127 W. Va. 501, 505, 33

V.

CONCLUSION

Respondent respectfully requests that this Court adopt the recommendation of the Hearing Panel subcommittee.



Patrick D. Deem, W. Va. Bar # 977

Steptoe & Johnson PLLC

P.O. Box 2190

Clarksburg, WV 26302

Tel: (304) 624-8000

Morgan Palmer Griffith, W.Va. Bar # 7721

Steptoe & Johnson PLLC

P.O. Box 1588

Charleston, WV 25326

Tel: (304) 353-8175

William Brewer, W. Va. Bar # 448

W. Va. State Bar ID. 448

Brewer & Giggenbach

P.O. Box 4206

Morgantown, WV 26504

Tel: (304) 291-5800

S.E.2d 677, 678 (1945) (emphasis added) (“[T]his section provides no fixed compensation and *limits the commissioner of accounts in allowing a reasonable compensation to cases in which it is not ‘otherwise provided’*”). If a testator wishes to set a fee higher than would otherwise be permissible under the statute the testator is free to do so. *See id.*, 33 S.E.2d at 679 (“The creation of an active trust being purely contractual, the settlors of course had it within their discretion to fix the compensation of the acting trustee as they saw fit. Otherwise, under our cases, the compensation to be allowed apparently rests on quantum meruit, a five per cent commission on receipts being the general allowance.”); *William v. Bond*, 91 S.E. 627, 629 (Va. 1917) (“When a testator fixes the compensation for an executor or trustee under his will, and the executor or trustee named therein accepts the appointment, he is entitled to as much and is limited to as little as the testator has fixed.”); *Patterson v. Harris*, 593 S.W.2d 489, 490-91 (Ark. Ct. App. 1980) (approving testator’s decision that executor to be paid 10% of gross estate). Respondent would like to point out that this point tends to confirm his contention below that the ODC did not even have jurisdiction over this case since the fees at issue were not legal fees set by Respondent but were fees set by the sisters. Again, though, Respondent simply wishes this Court to approve the stipulations.

CERTIFICATE OF SERVICE

I, do hereby certify that on April 24, 2006, I served the foregoing "Brief of the Respondent" upon all counsel of record, by first-class mail, postage prepaid, as follows:

Lawrence J. Lewis, Esquire
Chief Lawyer Disciplinary Counsel
2008 Kanawha Blvd. E.
Charleston, WV 25311
Counsel for Complainant

Allan N. Karlin, Esquire
Allan N. Karlin & Associates
174 Chancery Row
Morgantown, WV 26505
Counsel for Intervenor

