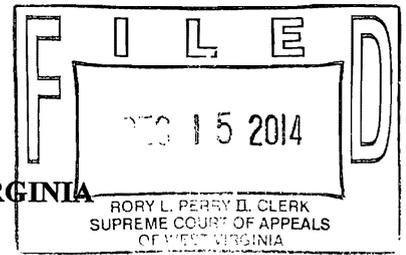


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET No. 14-0998



**GARY W. RICH and LAW OFFICE OF
GARY W. RICH, L.C.**, Plaintiffs/Counter-
Defendants/Third-Party Plaintiffs Below,
Petitioners

v.

JOSEPH SIMONI, Defendant/Counter-
Plaintiff Below, Respondent

v.

**COCHRAN, CHERRY, GIVENS,
SMITH, LANE & TAYLOR, P.C.**, Third-
Party Defendant/Counter-Claimant Below,
Respondent

v.

**LEVIN, PAPANTONIO, THOMAS,
MITCHELL, RAFFERTY & PROCTOR,
P.A.**, Third-Party Defendant/Counter-
Claimant Below, Respondent

v.

BARON AND BUDD, P.C., Third-Party
Defendant/Counter-Claimant Below,
Respondent

From the United States District
Court for the Northern District of
West Virginia (Civil Action No.
1:12-cv-00012-IMK-JSK)

BRIEF OF PETITIONERS ON CERTIFIED QUESTION

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TABLE OF CONTENTS

I. Certified Question Presented.....1

II. Introduction and Relevant Procedural History.....1

III. Statement of Facts.....3

IV. Summary of Argument.....9

V. Statement Regarding Oral Argument and Decision.....10

VI. Argument.....11

VII. Conclusion.....17

TABLE OF AUTHORITIES

	<u>Page(s)</u>
 <u>CASES</u>	
<i>Abbott v. Marker</i> , 722 N.W.2d 162 (Wisc. 2006).....	13-14
<i>Belli v. Shaw</i> , 657 P.2d 315 (Wash. 1983).....	13
<i>Bragg v. United States</i> , 741 S.E.2d 90 (W. Va. 2013).....	11
<i>Brandon v. Newman</i> , 532 S.E.2d 743 (Ga. Ct. App. 2000).....	13
<i>Citizens Coalition for Tort Reform, Inc. v. McAlpine</i> , 810 P.2d 162 (Alaska 1991).....	13
<i>Dragelevich v. Kohn, Milstein, Cohen & Hausfeld</i> , 755 F. Supp. 189 (N.D. Ohio 1990).....	13
<i>Evans & Luptak, PLC v. Lizza</i> , 650 N.W.2d 364 (Mich. Ct. App. 2002).....	13
<i>Foote v. Shapiro</i> , 6 Pa. D. & C.3d 574 (Pa. Ct. Common Pleas, Lehigh County 1978).....	15
<i>Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP</i> , 231 W. Va. 577, 746 S.E.2d 568 (2013).....	11, 14, 16-17
<i>In re Discipio</i> , 645 N.E.2d 906 (Ill. 1994).....	12
<i>In re P&E Boat Rentals, Inc.</i> , 928 F.2d 662 (5th Cir. 1991).....	13
<i>Infante v. Gottesman</i> , 558 A.2d 1338 (N.J. Super. Ct. 1989).....	13, 17
<i>Lawyer Disciplinary Bd. v. Duty</i> , 671 S.E.2d 763 (W. Va. 2008).....	11, 12

Light v. Allstate Ins. Co.,
506 S.E.2d 64 (W. Va. 1998).....11

Manchin v. Browning,
170 W. Va. 779, 296 S.E.2d 909 (1982), *overruled on other grounds by*,
State ex rel. Discover Fin. Servs., Inc. v. Nibert,
231 W. Va. 227, 744 S.E. 625 (2013).....12

Martello v. Santana,
713 F.3d 309 (6th Cir. 2013)13

O’Hara v. Ahlgren, Blumenfeld & Kempster,
537 N.E.2d 730 (Ill. 1989).....13, 17

Perrine v. E.I. du Pont de Nemours & Co.,
225 W. Va. 482, 694 S.E.2d 815 (2010).....7

Post v. Bregman,
707 A.2d 806 (Md. 1998)13

Trotter v. Nelson,
684 N.E.2d 1150 (Ind. 1997), *abrogated on other grounds by*,
Liggett v. Young,
877 N.E.2d 178 (Ind. 2007)13, 17

Watson v. Pietranton,
178 W. Va. 799, 364 S.E.2d 812 (1987)..... 14-16

RULES

W. Va. R. Prof’l Conduct, Scope.....16

W. Va. R. Prof’l Conduct 1.5(e).....13

W. Va. R. Prof’l Conduct 5.4..... *passim*

ABA Model R. Prof’l Resp. 5.4..... 11-12

OTHER AUTHORITIES

ABA Code DRs 3-102(A).....11

ABA Code DRs 5-107(C).....11

ABA Comm. on Prof'l Ethics, Informal Op. 870 (1965)15

ABA Defense Function Standard 4-3.3(d).....12

I. CERTIFIED QUESTION PRESENTED

Are the West Virginia Rules of Professional Conduct statements of public policy with the force of law equal to that given to statutes enacted by the West Virginia State Legislature?

II. INTRODUCTION AND RELEVANT PROCEDURAL HISTORY

Beginning in 1999, assuming that Respondent Joseph Simoni was a licensed attorney, Petitioner Gary W. Rich began discussing a possible collaboration on contingent-fee matters and associated fee sharing arrangement with Dr. Simoni and another West Virginia attorney. Upon learning that, although a law school graduate, Dr. Simoni had not actually been admitted to the West Virginia Bar, Mr. Rich discussed the possibility of a fee-splitting arrangement contingent upon Dr. Simoni passing the bar exam and obtaining a law license. Dr. Simoni never was admitted to the West Virginia Bar, but years later surfaced threatening to sue Petitioners to enforce a claimed right to a portion of the legal fees received or awarded in connection with two mass or class action cases that were filed, litigated, and concluded in the courts of West Virginia during the previous decade.

Petitioners brought a declaratory judgment action in the United States District Court for the Northern District of West Virginia (hereinafter "District Court"), which certified the instant question to this Court when faced with the assertion of a claim for monetary compensation by a non-lawyer, Dr. Simoni, based upon his claimed expectation of a share or "percentage fee split" of legal fees. Mr. Rich and Dr. Simoni disagree about many of the details of their discussions. Petitioners maintain that all such discussions were conditioned upon the understanding that Dr. Simoni could not participate in any fee-sharing arrangement unless and until he passed the bar exam and became a licensed attorney (and even then the extent of his ability to participate might be limited). Dr. Simoni, however, contends that he had an expectation that he would be

compensated based upon an understanding he claims to have had with Mr. Rich that they would work together on cases generally and share the benefits “50/50.” In any event, Dr. Simoni acknowledges that no specific agreement was reached and admits that, during the entirety of the relevant period, he knew and understood that the West Virginia Rules of Professional Conduct did not permit a lawyer to share legal fees with a non-lawyer.

Nevertheless, beginning in March 2010 (at the same time this Court’s opinion in one of the two cases made Dr. Simoni an important fact witness), Dr. Simoni began making vague demands for compensation from all of the various attorneys and law firms who had represented the plaintiffs in the two litigations. All of the attorneys ultimately rebuffed these demands, in part because they were timed to come shortly before he potentially became a testifying witness in a re-trial this Court had ordered, resulting in the odor of a shakedown.

Nearly two years later, Dr. Simoni sent to Mr. Rich’s home address a letter and two draft complaints which he threatened to file in the Circuit Courts of Marion and Harrison counties (Joint Appendix (“JA”) at 417-451.) Petitioners then filed a complaint in the District Court seeking declaratory relief. (JA at 1-9.) In response, Dr. Simoni asserted a Counterclaim seeking the requested compensation from Petitioners (JA at 42-71) and Petitioners moved to dismiss for failure to state a claim. (JA at 72-73.) The District Court granted that motion in part, dismissing “any claim purportedly based upon an implied agreement to split attorneys’ fees” based upon Dr. Simoni’s claimed “disavowal of any claim for compensation predicated on a fee-splitting agreement”. (JA at 131-32.) Dr. Simoni subsequently filed an Amended Counterclaim seeking compensation under theories of quantum meruit, unjust enrichment, breach of implied contract, negligent misrepresentation, conversion, and estoppel. (JA at 135-165.) Petitioners then impleaded as third-party defendants three law firms that had served as lead counsel or co-lead

counsel in the underlying litigations, specifically Respondents Cochran, Cherry, Givens, Smith, Lane & Taylor, P.C.; Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A.; and Baron and Budd, P.C. (JA at 166-199.)

During the course of discovery, the District Court decided to revisit the legal viability of Dr. Simoni's claims and ordered the bifurcation of the issue of Dr. Simoni's claims for compensation in the first instance from the issue of the ultimate responsibility to pay any owed compensation as between Petitioners and the various third-party defendants. After cross-motions for summary judgment were filed and briefed, the District Court dismissed Dr. Simoni's claims for negligent misrepresentation, conversion, and estoppel and—finding it determinative of his remaining claims for quantum meruit, unjust enrichment, and breach of implied contract—certified the instant question to this Court. (JA at 2130-2184.)

III. STATEMENT OF FACTS

Petitioner Gary W. Rich, a graduate of the West Virginia University College of Law, was originally admitted to the Bar of this State in 1980 and was licensed to practice law in West Virginia from the mid-1990s until 2011, and he did so through Petitioner the Law Office of Gary W. Rich, L.C.

Dr. Simoni is a former professor in West Virginia University's Department of Sociology and Anthropology with a long history of community activism in various communities in West Virginia. While on the faculty at WVU, Dr. Simoni attended West Virginia University College of Law and received a juris doctor degree in 1995. (JA at 1570-72.) Dr. Simoni intended to practice as a lawyer (JA at 1572) and he prepared for and took the West Virginia bar exam four times, but he never passed it. (JA at 575, 1583-84.) He is not, and never has been, licensed to practice law in West Virginia or any other jurisdiction. (JA at 1584.)

Mr. Rich and Dr. Simoni met through their mutual friend, the late Larry Harless, Esq., and their respective involvements in a case involving asbestos issues at West Virginia University. In the early 2000s, Mr. Rich and Dr. Simoni also both became involved in efforts to investigate, mobilize the affected communities, and ultimately prosecute two environmental class action or mass action cases involving West Virginia communities. Specifically, *Fullen, et al. v. Philips Electronics North America Corporation, et al.* (Civil Action No. 01-C-319, originally filed in Marion County Circuit Court but later transferred to Monongalia County), involved claims on behalf of a group of plaintiffs arising out of alleged injuries sustained by workers at the Philips/Westinghouse Lighting Plant in Fairmont, West Virginia (hereinafter “the Fairmont litigation”) and *Perrine, et al. v. E.I. DuPont de Nemours & Co., et al.* (Civil Action 04-C-296-2, filed in Harrison County Circuit Court), was a class action filed on behalf of residents living near a zinc-smelting facility located in Spelter, West Virginia who were allegedly injured by the negligent disposal of hazardous materials generated there (hereinafter “the Spelter litigation”).

Mr. Rich served as West Virginia counsel in both the Fairmont and Spelter litigations while larger, out-of-state law firms with experience litigating these types of cases (and the resources to fund them) came in as lead counsel. Because Dr. Simoni had a law degree, made references to law school, and was, apparently, involved in litigation, Mr. Rich initially assumed Dr. Simoni was an attorney. (JA at 1037, 1044.) Based upon that understanding, Mr. Rich discussed with Mr. Harless and Dr. Simoni the possibility a fee-sharing arrangement among counsel. (JA at 1037.) However, once Mr. Rich realized in 2000 or 2001 that Dr. Simoni was not a licensed attorney, he told him he would need to pass the bar and become a lawyer before he could participate in any fee-sharing arrangement. (JA at 1035-1038, 1040-42, 1332-33.) Even then, Mr. Rich had concerns whether such an arrangement could encompass work done by

someone *before* they became licensed. In light of all of the circumstances and potential future contingencies, on multiple occasions during this period Mr. Rich sought the guidance of an experienced ethics and professional responsibility attorney, Sherri Goodman, former Chief Lawyer Disciplinary Counsel of the West Virginia State Bar. (JA at 1051-1054; 1417-18.) Mr. Rich has always recognized Dr. Simoni's contributions to the above-referenced cases and, as he has repeatedly stated in this case, he does not object to compensating Dr. Simoni so long as it is legal and so long as the out-of-state law firms who benefited from his work also contribute to that compensation. That is only fair. Mr. Rich's overriding concern was and remains that any compensation that anyone pays or promises to Dr. Simoni be consistent with the Rules of Professional Responsibility. (JA at 1051-52, 1417.)

Dr. Simoni admittedly understood that neither Mr. Rich nor any other lawyer could split fees with him unless he was a licensed attorney (JA at 1773-75, 1879-80, 1882-83) and that any agreement to do so "was not enforceable." (JA at 1723.) Accordingly, Dr. Simoni took the bar exam again in 2002, but did not pass. (JA at 1583-84.) As the cases progressed and Dr. Simoni still had not obtained a law license, Ms. Goodman advised Mr. Rich that the only way Dr. Simoni ethically could be compensated would be through quantum meruit based upon his actual time worked and a reasonable rate therefor. Mr. Rich relayed this information to Dr. Simoni and told him to "get your hours together." (JA at 1051-52, 1418.)

While the claimed extent of his activities are disputed, Petitioners do not dispute that Dr. Simoni generally was involved in and supportive of the efforts to pursue the rights of the residents of Fairmont and Spelter. Specifically, he organized meetings with community members in the early stages of both cases; he maintained relationships with various of the plaintiffs; he engaged in some investigative activities; he communicated with the lawyers for the

plaintiffs in both cases as the cases developed and proceeded (though more so with the other firms than Petitioners as time went on); he served as a consultant for the lead out-of-state law firms for the plaintiffs, assisting them with various activities at their direction and request (JA at 1497-98, 1508, 1510-11, 1888-89, 1894-96, 1979-80, 1983-85, 2044, 2057, 2071, 2076-77, 2082); and he engaged in other efforts generally supportive of the cases (or at least intended to be so). However, in the course of a discovery dispute in the Spelter litigation over the application of the attorney-client privilege and work product doctrine to Dr. Simoni's communications with and work for the co-lead law firms for the plaintiffs in the Spelter litigation, Respondents Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A. ("Levin Papantonio") and Cochran, Cherry, Givens, Smith, Lane & Taylor, P.C. ("Cochran"), Judge Thomas A. Bedell concluded that those protections did not apply because Dr. Simoni was a volunteer "community activist who was encouraging Spelter residents to advance their claims" and "who created awareness of environmental contamination in Spelter" (JA at 90, 92.)

Dr. Simoni was involved with the Fairmont and Spelter communities and continued to support the ongoing litigations until he retired from WVU and moved to Florida. (JA at 1569-70.) Dr. Simoni's last activities relating to the litigations for which he seeks compensation were in 2005 (*see* JA at 246, 263), though he returned to West Virginia in December 2006 and again in August 2007 to be deposed in the Spelter litigation as a fact witness with respect to matters pertaining to a potential statute-of-limitations issue in the case. At his deposition in the Spelter litigation, Dr. Simoni testified that he had not been promised any money or gifts concerning the Spelter litigation, that he had not requested a fee from plaintiffs' counsel, and that he had not received any compensation from Mr. Rich or anyone else in the Fairmont litigation. (JA at 551, 597, 680.)

The Fairmont litigation ultimately settled in 2008. The Spelter litigation proceeded to trial in the fall of 2007 and the jury returned a verdict in favor of the plaintiffs. On November 7, 2007, in preparing a fee petition, Respondent Cochran sent Dr. Simoni an email asking him and others to submit any bills or invoices they had relating to the Spelter litigation. (JA at 223-24.) Dr. Simoni did not respond. The Spelter verdict was appealed and, on March 26, 2010, this Court issued an opinion affirming in part and reversing in part. *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010). As relevant here, the Court reversed the circuit court's determination of the statute of limitations issue in the plaintiffs' favor on summary judgment, finding that issues of fact existed as to when the plaintiffs had the requisite knowledge of their claims. Accordingly, the Court remanded the case with instructions to hold a new jury trial "on the sole issue of when the Plaintiffs possessed the requisite knowledge to trigger the running of the statute of limitations." *Id.* at 563, 694 S.E.2d at 896. As a result of his longstanding involvement with the Spelter community, Dr. Simoni was an important fact witness with respect to precisely those issues.

Disturbingly though, on March 26, 2010, the very same day the Court issued its opinion an attorney for Dr. Simoni, Jeffrey M. Wakefield, sent a letter to all six law firms that had appeared on behalf of the plaintiffs in the Spelter litigation, including Petitioners and Respondents Levin Papantonio and Cochran. (JA at 411-13.) The letter's stated purpose was "to provide notice that Dr. Simoni believes he has a claim for compensation for professional services rendered and is prepared to pursue appropriate remedies to ensure that he obtains adequate compensation, if necessary." (JA at 412.) On April 16, 2010, counsel for Dr. Simoni sent a similar letter to the three firms that represented the plaintiffs in the Fairmont litigation (including Petitioners and Respondent Baron & Budd, P.C.).

The firms involved in the Spelter litigation other than Petitioners engaged with Mr. Wakefield via telephone discussions, indicating that they were “not necessarily adverse to Dr. Simoni receiving reasonable compensation for professional services so long as such compensation is consistent with the facts of the case as well as legal and ethical standards.” (JA at 414-16.) Through further communications in 2010 with the other Spelter firms, Dr. Simoni ultimately demanded a payment in excess of \$1 million. The firms refused. The Spelter case ultimately settled in late 2010 prior to the retrial on the statute of limitations issue.

Roughly a year later, Mr. Wakefield sent Petitioners a letter again demanding payment for Dr. Simoni and threatening to file two separate lawsuits against them in the circuit courts of Marion and Harrison counties, one relating to each of the Fairmont and Spelter litigations. In support of the threat, Mr. Wakefield attached two draft complaints to his letter. (JA at 417-51.) Rather than defend against two separate state court actions, Petitioners filed a complaint in federal court seeking declaratory relief regarding the issue of whether, in what fashion, and to what extent Petitioners ethically could pay any compensation to Dr. Simoni. (JA at 34-41.) In the course of the litigation before the District Court, Dr. Simoni ultimately produced an after-the-fact purported “Time Summary” claiming compensation for more than 3,000 hours of his time which he claims was spent “in furtherance of the case” and “for the benefit of the plaintiffs” (not just Petitioners) in the Fairmont and Spelter litigations. (JA at 225-264, 2002-03.) Many of Dr. Simoni’s time entries are for blocks of days, weeks, or months for which he summarily claims 30, 40, or even in excess of 100 hours. (*See* JA at 225-264.) He even initially sought compensation for researching possible malpractice claims against Petitioners and the other attorneys representing the plaintiffs in the Fairmont litigation. (JA at 243.)

IV. SUMMARY OF ARGUMENT

Petitioners have always been, and remain, willing to compensate Dr. Simoni if (1) they can do so consistent with the West Virginia Rules of Professional Conduct as interpreted and applied by this Court, and (2) any such compensation reflects the reasonable value of Dr. Simoni's time performing work or other services *for Petitioners* (as opposed to activities in the course of his consulting relationships with other lawyers and law firms, as requested or directed by others, or as a community activist). The question certified by the District Court asks this Court to decide whether the West Virginia Rules of Professional Conduct are statements of public policy with the force of law equal to that given to statutes enacted by the West Virginia State Legislature, with the necessary consequence being that if the answer is yes, Dr. Simoni can neither enforce a fee-sharing arrangement violative of Rule 5.4(a) nor premise a non-contractual claim upon any alleged expectation of such an arrangement. If the answer is no, Dr. Simoni can premise his claims upon, and attempt to enforce, an asserted expectation that would violate the Rules of Professional Conduct promulgated and adopted by this Court.

Petitioners take no position with respect to the particular question put to this Court; their only concern is that any compensation paid to Dr. Simoni be consistent with the ethics rules, be reasonable and factually supported, and (to the extent Petitioners are the ones paying any compensation) relate to services performed for Petitioners. That being said, Petitioners note that the majority of jurisdictions have concluded that the rules of professional conduct are declarations of public policy with the force of law and applicable outside the context of attorney disciplinary proceedings. On that basis, many courts have invalidated and refused to enforce fee-sharing agreements that violate the Rules of Professional Conduct. Further, courts have

extended that rule to equitable or other non-contract claims which would produce the same effective result.

Even though he admits “no specific agreement was reached” (JA at 146 ¶ 41) and has disavowed “any claim for compensation predicated on a fee-splitting agreement” (JA at 132), Dr. Simoni nevertheless bases his remaining claims for quantum meruit, unjust enrichment, and breach of implied contract on a claimed “expectation” that he and Mr. Rich would work together on cases generally and share the benefits “50/50” (JA at 1590-92, 1600) and that he would receive “a percentage fee split” or a payment that would “depend on and be a function of” the legal fees collected in connection with the lawsuits (JA at 139-40 [¶¶ 9-10], 146 [¶ 41], 148 [¶ 52], 162 [¶ 142].) Indeed, Dr. Simoni’s pleadings before the District Court admitted that “the prospect of ‘percentage split of attorney fees’” is the “understanding and expectation which forms the basis for Dr. Simoni’s claims made in this matter.” (JA at 400.)

Petitioners dispute Dr. Simoni’s characterization of their discussions and the reasonableness of his claimed interpretation or understanding of them, factual points which a jury ultimately will have to decide if the case continues. Given the factual contentions by which Dr. Simoni seeks to support his claimed expectation and the excessiveness and over-breadth of the time and monetary amount he is claiming, Petitioners submit that clear guidance is needed from the Court as to the application and force of West Virginia Rule of Professional Conduct 5.4 to Dr. Simoni’s claims and any compensation that might be paid to him by Petitioners or any other lawyers.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Court already has scheduled oral argument for March 4, 2015, and Petitioners believe such argument will be helpful to the Court.

VI. ARGUMENT

A. STANDARD OF REVIEW

The issue presented for review was certified by the United States District Court for the Northern District of West Virginia. This Court undertakes plenary, or *de novo*, review when analyzing legal issues presented by certified question from a federal district or appellate court. *See* Syl. Pt. 1, *Bragg v. United States*, 741 S.E.2d 90 (W. Va. 2013); *see also* Syl. Pt. 1, *Light v. Allstate Ins. Co.*, 506 S.E.2d 64 (W. Va. 1998).

B. THE WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT PROHIBIT LAWYERS FROM SHARING LEGAL FEES WITH NONLAWYERS

Rule 5.4(a) of the West Virginia Rules of Professional Conduct prohibits lawyers from sharing legal fees with nonlawyers. Specifically, the Rule provides that “[a] lawyer or law firm shall not share legal fees with a nonlawyer” W. Va. R. Prof’l Conduct 5.4(a). The Rule provides for four specific, narrow exceptions, none of which have any applicability to the instant circumstances.¹ Otherwise, an attorney may not directly or indirectly share legal fees with a nonlawyer, even if that person is a consultant, partner, or employee of the lawyer. *See generally Lawyer Disciplinary Bd. v. Duty*, 671 S.E.2d 763, 764-65 (W. Va. 2008) (annulling respondent’s license to practice law in part because he agreed to—and did—provide a nonlawyer half of the legal fees he earned in a motor vehicle accident case).

The same is true under the American Bar Association’s Model Rules of Professional Conduct and, to the knowledge of the undersigned counsel, the rules of every other American jurisdiction. *See, e.g.*, ABA Code DRs 3-102(A) & 5-107(C); ABA Model R. Prof’l Resp. 5.4(a) & (d); ABA Defense Function Standard 4-3.3(d). A nonlawyer, for purposes of the Rules,

¹ The exceptions relate to (1) payments to a lawyer’s estate or other persons after the lawyer’s death under a prior agreement by the lawyer, (2) payments to a deceased lawyer’s estate by a lawyer undertaking to complete unfinished legal business of the deceased lawyer, (3) purchase of the practice of a deceased lawyer, and (4) compensation or retirement plans for non-lawyer employees of a law firm. *See* W. Va. R. Prof’l Conduct 5.4(a)(1)-(4).

includes anyone who does not hold a valid law license, even if they have a law *degree* or in the past held a law license. *See In re Discipio*, 645 N.E.2d 906, 912-13 (Ill. 1994) (attorney suspended, *inter alia*, for splitting fee with disbarred attorney).

Further, the prohibition applies not only to the express sharing of legal fees, but to any sort of payment, however denominated, which effectively constitutes the sharing of legal fees. *See Duty*, 671 S.E.2d at 769-70 (a “bonus” paid to a nonlawyer employee violated Rule 5.4(a) when it was paid following the settlement of a case and amounted to approximately 50% of the fees the lawyer received).

No party, including Dr. Simoni, disputes any of the foregoing. Moreover, Dr. Simoni admits that he was aware of and understood Rule 5.4(a)’s prohibition at (and even before) the time of his discussions with Mr. Rich. (JA at 1775, 1879-83.) Indeed, Dr. Simoni acknowledges that whatever agreement he believed he had or was discussing with Mr. Rich “was not enforceable” (JA at 1724) unless he became a licensed attorney (JA at 1880).

C. A MAJORITY OF JURISDICTIONS HAVE HELD THAT THE RULES OF PROFESSIONAL CONDUCT CONSTITUTE STATEMENTS OF PUBLIC POLICY AND HAVE THE FORCE OF LAW

Although the issue has been presented in other cases, the Court has not yet specifically addressed the question “whether violation of a rule of professional conduct constitutes a public policy violation.” *Gaddy Eng’g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W.Va. 577, 589, 746 S.E.2d 568, 580 (2013) (Loughry, J., concurring).² Many other states, however, have addressed this issue and found that the applicable rules of professional conduct for lawyers comprise public policy declarations having the force of law. *See id.* (citing cases from

² The Court has, however, previously stated in *dicta* that “[a]s a lawyer and an officer of the courts of this State, the Attorney General is subject to the rules of this Court governing the practice of law and the conduct of lawyers, which have the force and effect of law.” *Manchin v. Browning*, 170 W.Va. 779, 790, 296 S.E.2d 909, 920 (1982), *overruled on other grounds by State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 231 W.Va. 227, 744 S.E. 625 (2013).

California, Texas, Michigan, Georgia, and Illinois); *Martello v. Santana*, 713 F.3d 309, 313-14 (6th Cir. 2013) (rejecting argument that public policy can only be created by legislature); *Trotter v. Nelson*, 684 N.E.2d 1150, 1153 (Ind. 1997) (“The Rules of Professional Conduct, as enacted by this Court, contain both implicit and explicit declarations of public policy.”), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007); *Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 164-71 (Alaska 1991) (implicitly holding that the Alaska bar’s rules governing professional conduct have the force of law); *Post v. Bregman*, 707 A.2d 806, 818 (Md. 1998) (“Rule 1.5(e) does constitute a supervening statement of public policy to which fee-sharing agreements by lawyers are subject, and [] the enforcement of Rule 1.5(e) is not limited to disciplinary proceedings.”).

For this and related reasons, various federal and state courts have held that fee-sharing agreements violative of the rules of professional conduct are void and unenforceable. *See Martello*, 713 F.3d at 313-14; *In re P&E Boat Rentals, Inc.*, 928 F.2d 662, 664-65 (5th Cir. 1991) (applying Louisiana law); *Dragelevich v. Kohn, Milstein, Cohen & Hausfeld*, 755 F. Supp. 189, 191-94 (N.D. Ohio 1990); *Abbott v. Marker*, 722 N.W.2d 162, 164-66 (Wisc. 2006); *Evans & Luptak, PLC v. Lizza*, 650 N.W.2d 364, 370 (Mich. Ct. App. 2002); *Brandon v. Newman*, 532 S.E.2d 743 (Ga. Ct. App. 2000); *Trotter*, 684 N.E.2d at 1153; *McAlpine*, 810 P.2d at 164-71; *O’Hara v. Ahlgren, Blumenfeld & Kempster*, 537 N.E.2d 730, 734-37 (Ill. 1989); *Infante v. Gottesman*, 558 A.2d 1338, 1344 (N.J. Super. Ct. 1989); *Belli v. Shaw*, 657 P.2d 315, 319 (Wash. 1983). For the same reasons, courts have held that such agreements also cannot be enforced indirectly through equitable and quasi-contractual alternative theories. For instance, in *Abbott v. Marker, supra*, the Wisconsin Supreme Court affirmed the dismissal of a case where a non-lawyer alleged an agreement with an attorney to refer potential clients in exchange for a

percentage of the fees, holding that the contract was unenforceable and specifically rejecting the possibility of any alternative theory to the same end: “we choose not to enforce an agreement through unjust enrichment when the party cannot enforce the agreement through contract because it is illegal.” 722 N.W.2d at 168.

In his concurring opinion in *Gaddy* last year, Justice Loughry addressed the very issue now certified to the Court. In *Gaddy*, the Court affirmed a summary judgment ruling in favor of a law firm defending against the enforcement of an alleged fee-sharing agreement with an engineering company on grounds not relating to the force of the Rules of Professional Conduct. 231 W.Va. at 588, 746 S.E.2d at 579. In his concurrence, Justice Loughry, joined by Justice Davis, noted that the Court should have addressed the ethical issue and observed that other courts “have resoundingly determined that rules of professional conduct contain explicit declarations of a state’s public policy.” *Id.* at 589, 746 S.E.2d at 580. As explained by Justice Loughry, “the prohibition of fee-sharing agreements between lawyers and nonlawyers set forth in Rule 5.4 of the Rules of Professional Conduct is rooted in the need to protect the public from various potential injuries is clear.” *Id.* at 591, 746 S.E.2d at 582. Accordingly, Justice Loughry concluded that the Court should have then taken the opportunity to “reach[] the conclusion that a fee-sharing agreement between a lawyer and a nonlawyer that is in violation of Rule 5.4 of the Rules of Professional Conduct is unenforceable as being contrary to the public policy of this state.” *Id.*

Before the District Court, Dr. Simoni argued that the courts should not treat Rule 5.4(a) as a bar to enforcing an agreement that violates the rule, under *Watson v. Pietranton*, 178 W.Va. 799, 364 S.E.2d 812 (1987). In *Watson*, this Court allowed the enforcement of an agreement that violated DR2-107 of the since-displaced West Virginia Code of Professional Responsibility.

Specifically, in *Watson*, two attorneys entered a fee-splitting agreement covering approximately 35 cases, without the consent of their clients as was required by the disciplinary rule. For a period of years, the younger attorney who took the lead role on the cases consistently honored the agreement and provided half of the fees he received first to the other attorney and then, following the other attorney's death, to his estate. *See id.* at 800, 364 S.E.2d at 813. Eventually, however, the younger attorney obtained a substantial jury verdict providing him with a contingent fee of \$400,000, at which time he ceased honoring the agreement and raised the unethical lack of client consent to the agreement as a bar to its enforcement. *See id.* at 800-01, 364 S.E.2d at 813-14.

This Court stated that it was “reluctant to enforce an agreement which violates an ethical rule,” but did so nevertheless because it was unable to view the \$400,000 contingent fee “in isolation from the thirty-four or so prior cases in which the law firm honored, albeit unethically, the fifty percent fee-splitting agreement” and because “[t]his matter of ethics should have been recognized and adhered to by the attorneys before they entered into the agreement.” *Id.* at 803, 364 S.E.2d at 816 (quoting ABA Comm. on Prof'l Ethics, Informal Op. 870 (1965)); *see also Foote v. Shapiro*, 6 Pa. D. & C.3d 574 (Pa. Ct. Common Pleas, Lehigh County 1978) (similarly enforcing fee sharing agreement between lawyers which violated professional disciplinary rules).

Watson and *Foote* do not address the issue presented by this case as they involved different rules and fee-sharing agreements *between* attorneys and, in the case of *Watson*, an agreement that had been honored for some period of years. In the instant case, on the other hand, a nonlawyer is asserting an equitable (*i.e.*, non-contractual) claim for compensation premised not upon an agreement,³ but an alleged *expectation* of an agreement to share legal fees. It is one

³ Dr. Simoni has not asserted any claim for breach of contract, but instead has asked for an implied contract or equitable relief as if there had been an agreement. Dr. Simoni expressly admits in his Counterclaim that “[n]o

matter to reluctantly enforce an unethical agreement, as the Court did in *Watson*; but it is an altogether different matter to *impose* an unethical agreement based on a claimed expectation. This is especially so where, as here, the party claiming the expectation admittedly knew and understood that the contemplated arrangement violated the Rules of Professional Conduct.

Dr. Simoni also has noted that the “Scope” section of the West Virginia Rules of Professional Conduct states that “[t]he Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.” W. Va. R. Prof’l Conduct, Scope. It is not Petitioners’ intention to invoke the Rules “as procedural weapons.” As previously stated herein and repeatedly made clear before the District Court, Petitioners are not opposed to compensating Dr. Simoni for the reasonable value of his documented time performing services for or at the direction of Petitioners if the Rules of Professional Conduct permit it. It would have been far preferable for Dr. Simoni to have gotten his hours together when Mr. Rich asked him to or, at the latest, when he received such a request from Respondent Cochran. However, because he did not and because the claims he now asserts are vague, excessive, unreasonable, and not limited to activities done for or at the direction of Petitioners, Petitioners have serious concerns (as they always have) about what Dr. Simoni can and cannot receive and under what circumstances. Petitioners have always been concerned as well about the context in which Dr. Simoni’s lawyers initially demanded payment, namely: on the brink of a retrial where the sole issue to be tried—the applicability of the statute of limitations—was one where Dr. Simoni was a key witness.

specific agreement was reached” (JA at 146 [¶ 41]) and has admitted that his “counterclaim and the allegations therein do not allege the existence of an agreement to share legal fees.” (JA at 106.)

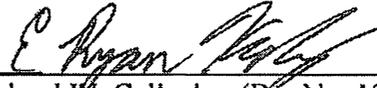
In any event though, Justice Loughry explained in his concurrence in *Gaddy* that “[t]he fact that one party may benefit from an illegal fee-sharing agreement does not tip the proverbial scales of justice in favor of enforcement. ... ‘The Rules of Professional Conduct were not created to protect non-lawyers who enter into contracts with attorneys, but were instead designed to ensure both that the judicial process is ethical and to protect potential clients.’” 231 W.Va. at 591; 746 S.E.2d at 582 (quoting *Martello*, 713 F.3d at 314).⁴

VII. CONCLUSION

By the manner in which Dr. Simoni has asserted, quantified, and attempted to support his claims for compensation in connection with the Fairmont and Spelter litigations, he has raised the inescapable specter that any recovery by or payment to him would violate Rule 5.4(a) of the West Virginia Rules of Professional Conduct. Again, Petitioners do not object to the notion of reasonable compensation for supportable time entries that actually relate to services performed for or at the direction of the lawyer or firm from which Dr. Simoni seeks compensation *if* such can be accomplished consistent with the Rules. Petitioners respectfully request that the Court provide clarity on this point by answering the question certified by the District Court and addressing the implications of that answer for the question of whether, and under what circumstances, Dr. Simoni can be compensated by Petitioners or any other lawyer or law firm associated with the Fairmont and Spelter litigations.

⁴ See also *Trotter*, 684 N.E.2d at 1155 (“[W]hen a court determines that a contract must be declared void as against public policy, it does so on the grounds that the good of the public as a whole must take precedence over the circumstances of the individual, no matter the hardship or inequities that may result.”); *Infante*, 558 A.2d at 1344 (“While we recognize that our decision may unjustly enrich defendant to the extent that he has received the benefit of any investigative and paralegal services performed by plaintiff, the pervasive proscriptions against such agreements require that we not render any assistance to these parties.”); *O’Hara*, 537 N.E.2d at 737–38 (“[b]y refusing in every case to assist the lay party, courts may deter laypersons as well as attorneys from attempting such agreements” and “in this way, the public will be protected more effectively from the potential harms posed by fee-sharing agreements”).

DATED: December 15, 2014



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CERTIFICATE OF SERVICE

I, E. Ryan Kennedy, counsel for Plaintiffs/Counter-Defendants Gary W. Rich and the Law Office of Gary W. Rich, L.C., do hereby certify that I have caused to be served the foregoing **BRIEF OF PETITIONERS ON CERTIFIED QUESTION and JOINT APPENDIX** upon the below counsel of record this 15th day of December, 2014, via first class mail:

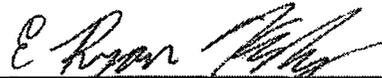
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