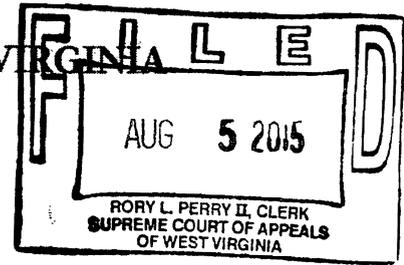


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 14-1118

**J. MICHAEL TEETS, COMMISSIONER; WILLIAM E. KEPLINGER, JR.,
COMMISSIONER; and HARDY COUNTY COMMISSION,
Respondents Below, Petitioners,**

vs.

**WENDY J. MILLER, JOHN A. ELMORE, B. WAYNE THOMPSON,
OVID NEED and BONNIE L. HAGGERTY,
Petitioners Below, Respondents**

Hon. Andrew N. Frye, Jr., Senior Status Judge
Circuit Court of Hardy County
Civil Action 14-C-17

REPLY BRIEF OF PETITIONER

Ancil G. Ramey, Esq.
WV Bar # 3013
Steptoe & Johnson, PLLC
P.O. Box 2195
Huntington, WV 25722-2195
Telephone: (304) 526-8133
ancil.ramey@steptoe-johnson.com

Bridget M. Cohee, Esq.
WV Bar # 8526
Steptoe & Johnson PLLC
P.O. Box 2629
Martinsburg, WV 25402-2629
Telephone: (304) 263-6991
bridget.cohee@steptoe-johnson.com

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE.....2

III. ARGUMENT

 A. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY ORDERING THAT STEPTOE & JOHNSON RETURN FEES EARNED REPRESENTING PETITIONERS PRIOR TO THE CIRCUIT COURT’S ORDER DISQUALIFYING STEPTOE & JOHNSON, WHICH WAS DONE WITHOUT NOTICE, WITHOUT HEARING, AND IN EXCESS OF THIS COURT’S REMAND ORDER.....4

IV. CONCLUSION.....10

TABLE OF CONTENTS

CASES

<i>Cecil v. Clark</i> , 69 W. Va. 641, 72 S.E. 737 (1911)	5
<i>Davis v. Rutherford</i> , 2015 WL 1740930 (W. Va. April 9, 2015)	6
<i>Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A.</i> , 210 W. Va. 223, 557 S.E.2d 277 (2001)	6
<i>In re Charleston Gazette FOIA Request</i> , 222 W. Va. 771, 671 S.E.2d 776 (2008)	6
<i>In re Dental Profile, Inc.</i> , 446 B.R. 885 (Bkrcty. N.D. Ill. 2011)	6
<i>In re Name Change of Jenna A.J.</i> , 234 W. Va. 271, 765 S.E.2d 160 (2014)	8
<i>Quicken Loans, Inc. v. Brown</i> , 2014 WL 6734107 (W. Va.)(memorandum)	8
<i>Security Nat'l Bank & Trust Co. v. Willim</i> , 155 W. Va. 1, 180 S.E.2d 46 (1971)	5
<i>State ex rel. Advance Stores Co., Inc. v. Recht</i> , 230 W. Va. 464, 740 S.E.2d 59 (2013)	8
<i>State ex rel. Frazier & Oxley, L.C. v. Cummings</i> , 214 W. Va. 802, 591 S.E.2d 728 (2003)	7-8
<i>Trickett v. Laurita</i> , 223 W. Va. 357, 674 S.E.2d at 220 (2009)	5

RULES

R. Prof. Cond. 1.5	3
--------------------------	---

I. INTRODUCTION

As addressed fully in the initial brief filed by Petitioner, Steptoe & Johnson PLLC (“Steptoe & Johnson”) the sole issue raised by this Petitioner is the Circuit Court’s *sua sponte* Order that Steptoe & Johnson must return attorney fees earned in representing the Petitioners, J. Michael Teets (“Commissioner Teets”), William E. Keplinger, Jr. (“Commissioner Keplinger”), and the Hardy County Commission (“Commission”) prior to the Order disqualifying Steptoe & Johnson. This disgorgement of fees by the Circuit Court was done without notice, hearing, and in excess of this Court’s remand order.

The Circuit Court went beyond the issue for which this matter was remanded, and in addition to entering an Order of disqualification, the Circuit Court also ordered Steptoe & Johnson to return fees earned in representing the Petitioners. Importantly, the issue of disgorgement of fees was never raised by Respondents, yet in the Brief filed in response to the initial brief by Steptoe & Johnson, the Respondents now, for the first time “demand that all attorney fees paid to Steptoe & Johnson by the Hardy County Commission should be reimbursed.” [Brief of Respondents at 1 and 23]

First, what standing do the Respondents have to “demand” that Steptoe & Johnson disgorge fees it was paid by clients who have never objected to the payment of those fees?

Second, the purpose of hearing was on remand from this Court was limited to the disqualification of Steptoe & Johnson given the language of an order by the Circuit Court on the October 10, 2014, creating the ostensible conflict, not to a disgorgement of fees never requested.

Finally, no motion for the disgorgement of fees was filed; no notice of hearing on the issue was ever provided; and no hearing was ever conducted.

II. STATEMENT OF THE CASE

Much of Respondents' brief is devoted to the refusal of a three-judge tribunal to remove Commissioner Teets and Commissioner Keplinger from office. Respondents are too late, however, challenging the final order of the tribunal that denied the removal action. They never appealed following the May 12, 2014, order. Thus, it cannot be appealed in this action.

Next, Respondents grasp at straws by referencing a pending disciplinary complaint by the one Commissioner who was not named in the suit below. This complaint was submitted to the Circuit Court **after remand** and the Circuit Court ordered that it be kept confidential. [App. 4737] The Circuit Court admitted the submission of the documents for the Court to read, but not to make public. [App. 4741]

There is no legitimate reason for the Respondents to reference this complaint now, just as there was no purpose for it to be entered in the Circuit Court record, except to intimidate and harass opposing counsel, as such pending issues before the Office of Disciplinary Counsel are not public record and shall be confidential due to the fact that they may impugn the reputation of an attorney for baseless reasons. [App. 4736-4737]

In the preamble to the Rules of Professional Conduct, the Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Furthermore, when the Rules are invoked by an opposing party as procedural weapons, the purpose of the Rules can be subverted.

The ODC complaint was not filed until December 8, 2014, well after the October 10,

2014, Order of the Circuit Court that created the ostensible conflict.

The contents of the request to the ODC was that **there be no discipline**, that the request was for separate counsel for the third commissioner, who was never named in the suit below since he voted against the actions taken by the Hardy County Commission. Yet, even though the party who filed the complaint requested that no discipline be imposed, Respondents make reference to the complaint in violation of the Rules of Professional Conduct.

Respondents' reference to the disciplinary complaint is unfair, unwarranted, and inaccurate. The ODC documents were not submitted to this Court prior to remand and Respondents' made it part of the record over objection and over the order of the Circuit Court that the communications to and from the ODC be kept confidential. Therefore, it could not have been contemplated as rationale for the remand to address the alleged conflict and has nothing to do with the *sua sponte* order to return fees.

Respondents do not dispute the Rules of Professional Conduct require that a lawyer's fee shall be reasonable. R. Prof. Cond. 1.5. Respondents have offered no response to counter that the fees earned by Steptoe & Johnson in this matter were reasonable and, indeed, there was no finding by the Circuit Court that the fees were unreasonable. The fees were based upon a negotiated rate set by an agreement between the Hardy County Commission's insurer, West Virginia Counties Risk Pool, and Steptoe & Johnson. The hourly rate was far less than the standard hourly rate for the attorneys staffing the matter, and indeed less than the current Special Prosecutor's hourly rate. Thus, it cannot be argued that the fees were excessive.

Respondents further offer no legal basis for the action taken *sua sponte*. The order to return fees was not premised upon a request made by the Hardy County Commission for the

return of the fees earned by Steptoe & Johnson in representing the Commission and the two Commissioners in their official capacity. There has been no showing, argument, or briefing that the fees earned do not accurately reflect the amount of time and labor required to perform the legal services properly. Likewise, it is apparent that the Hardy County Commission benefitted from the diligent assistance of counsel, and the Hardy County Commission was charged the same hourly rate that had been charged during the initial representation of the two county commissioners in their official capacity under the insurance policy. The Hardy County Commission was provided itemized statements of services provided and paid the bills without dispute.

III. ARGUMENT

A. THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY ORDERING THAT STEPTOE & JOHNSON RETURN FEES EARNED REPRESENTING PETITIONERS PRIOR TO THE CIRCUIT COURT'S ORDER DISQUALIFYING STEPTOE & JOHNSON, WHICH WAS DONE WITHOUT NOTICE, WITHOUT HEARING, AND IN EXCESS OF THIS COURT'S REMAND ORDER.

Respondents' brief addresses the law regarding removal of public officers [Brief of Respondents at 11-12]; the law of collateral estoppel [id. at 12]; the allegation that once the Circuit Court entered its order of October 10, 2014, a conflict of interest was created among Steptoe & Johnson's clients - none of whom included the minority Commissioner - and all of whom are now represented by a single attorney in the same manner as did Steptoe & Johnson [id. at 13-15]; and what procedurally occurred upon remand by this Court [id. at 16-23], but **this Court will look in vain for a single legal authority -- not one - in support of an order directing Steptoe & Johnson to disgorge fees it was paid by its clients to which those clients have interposed no objection.**

Of course, as Respondents never filed a motion below asking for disgorgement; never noticed a hearing at which the issue of disgorgement was to be an issue; never filed any legal authorities indicating that disgorgement was a proper remedy; or otherwise did anything to substantively support the remedy of disgorgement, this omission – even after Respondents have had months to find some authority to include in their brief – is not surprising, particularly in light of the other things that occurred in this case and are the subject of an appeal by Steptoe & Johnson’s former clients, that not only do Respondents offer no legal authority for their argument for disgorgement of fees – they make no effort to distinguish the legal authority relied upon by Steptoe & Johnson.

The law is well-settled and Respondents have offered no response to this Court’s decisions, relied upon by Steptoe & Johnson, addressing attorney fee disputes. Indeed, “Respondents acknowledge that Steptoe and Johnson has performed substantial legal services . . .” [Brief of Respondents at 22]

This Court has held that “[p]arties to a suit accepting the services of an attorney, with knowledge thereof, as the services are performed from time to time, and in the absence of any agreement for gratuitous service and circumstances from which gratuitous service would be implied in law, are liable therefore.” Syl. pt. 1, *Cecil v. Clark*, 69 W. Va. 641, 72 S.E. 737 (1911); see also Syl. pt. 2, in part, *Security Nat’l Bank & Trust Co. v. Willim*, 155 W. Va. 1, 180 S.E.2d 46 (1971) (“The general rule is that the creation of a relationship of attorney and client by contract, expressed or implied, is essential to the right of an attorney to recover compensation from one for whose benefit the attorney claims to have rendered legal services.”), as cited in *Trickett v. Laurita*, 223 W. Va. 357, 674 S.E.2d at 220 (2009).

Here, there is no legitimate dispute in the record that that fees in question were earned, were reasonable, and Steptoe & Johnson's clients are not requesting Steptoe & Johnson's refund of the fees.

The "disgorgement of fees," it has been noted, "is an extreme, harsh remedy that is typically 'confined to extraordinary situations.'" *In re Dental Profile, Inc.*, 446 B.R. 885, 908 (Bkrcty. N.D. Ill. 2011) (Citation omitted). Substantively, no such "extraordinary situation" warranting such "extreme, harsh remedy" is presented by the record in this case.

Procedurally, Respondents also fail to reply to the property interest in retention of fees received in conjunction with its representation of Petitioners.

Steptoe & Johnson was entitled to notice and a hearing on the issue, see, e.g., *Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A.*, 210 W. Va. 223, 557 S.E.2d 277 (2001)(trial court violated due process by awarding attorney fees without a hearing), and not to be subjected to a *sua sponte* order without adequate notice or an opportunity to be heard, see, e.g., *Davis v. Rutherford*, 2015 WL 1740930 at *3 (W. Va. April 9, 2015)(memorandum decision)("The summary method of the circuit court's actions gave the petitioner no opportunity to be heard on his underlying failure to participate in discovery or to contest the reasonableness of the sanctions. This was an abuse of the court's discretion and the circuit court's order must therefore be reversed."); *In re Charleston Gazette FOIA Request*, 222 W. Va. 771, 778, 671 S.E.2d 776, 783 (2008)("By dismissing the complaint *sua sponte*, the circuit court denied both parties an opportunity to be heard in violation of their due process rights."); *Kanawha Valley*, *supra* at 229, 557 S.E.2d at 283 ("With respect to the circuit court's *sua sponte* award of attorney's fees without conducting a hearing to allow CNA to dispute the award, CNA contends that it was denied due

process. We agree.”). There has been no hearing addressing the issue of disgorgement of fees.

Respondents argue at length that the remand was for the making of a record on the issue of any potential conflict of interest. On this point, Steptoe & Johnson agrees. That was the sole reason for remand.

Beyond that, the Brief of Respondents deteriorates into a bitter abusive criticism alleging conspiracy and unlawful behavior on the part of attorneys zealously advocating for their clients. A thorough review of the record in this matter will reveal this is a continuing tone throughout this litigation, wherein the accusations have been offensive and ill-tempered at each stage of the proceedings, with no deference to responsibility to the quality of justice, and with disrespect to other lawyers and public officials.

Finally, this Court’s remand order stated as follows:

It is therefore ORDERED that this matter shall be, and it hereby is, remanded to the Circuit Court of Hardy County for the making of a record on the issue of any potential conflict of interest; for the entry of findings of fact and conclusions of law regarding the conflict issue; and for the entry of any order(s) necessary and appropriate to accommodate the foregoing. The respondents herein, petitioners below, Wendy J. Miller, et al., are directed to participate as the movant as appropriate regarding the motion to disqualify opposing counsel.

It is further ORDERED that the stay of lower court proceedings entered by this Court on October 30, 2014, shall be, and it hereby is, lifted for the limited purpose of allowing the circuit court to comply with the directives herein.

Therefore, the sole scope of the remand was “any potential conflict of interest,” not whether fees received by Steptoe & Johnson should be refunded.

As fully set forth in Steptoe & Johnson’s initial brief, this Court held in Syllabus Points 3, 4, and 5 of *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728

(2003), upon remand the Circuit Court must proceed according to the mandate of the appellate court, and may not misconstrue or act beyond the mandate. Furthermore, in *Quicken Loans, Inc. v. Brown*, 2014 WL 6734107 (W. Va.) (memorandum), this Court held that under a limited remand, the Circuit Court is precluded from considering other issues, or new matters.

This Court was specific in the mandate on remand, thus the Circuit Court was limited to address the specific act. The entire case was not reopened. Rather the Circuit Court was only authorized to carry out this Court's mandate, and the Circuit Court was powerless to undertake any proceedings beyond making a record regarding the issue of conflict. *In re Name Change of Jenna A.J.*, 234 W. Va. 271, 765 S.E.2d 160 (2014) (trial court erred in exceeding scope of remand); *State ex rel. Advance Stores Co., Inc. v. Recht*, 230 W. Va. 464, 740 S.E.2d 59 (2013) (trial court erred in exceeding scope of remand).

Thus, in this case, the Circuit Court erred in exceeding the scope of this Court's limited remand to address alleged conflict of interest and potential disqualification of Steptoe & Johnson by ordering Steptoe & Johnson to refund fees to the Hardy County Commission.

Again, Respondents offer only rhetoric and no legal authority in support of their argument to affirm the order directing the disgorgement of fees. Rather, Respondents argue that they "have yet to see how Steptoe and Johnson has benefitted the citizens of Hardy County or the Hardy County Commission as a sovereign body representing the citizens of Hardy County." [Brief of Respondents at 22]

Apparently, Respondents believe that they can through litigation overturn the results of an electoral process that placed into office a majority of the members of the Hardy County Commission to run county affairs; that they can ignore rather than appeal the results of a removal

proceeding in which their efforts failed to remove the majority of the members of the Hardy County Commission because they disagree with a vote of those members regarding county ambulance services; that they can decide that one of three members of the Hardy County Commission can speak for the entire Commission after an order is entered at their urging requiring a majority of the members of the Hardy County Commission to reimburse the county for \$1.130 million for a building that the county will still continue to own without regard for an obvious windfall and then argue that such order creates a conflict necessitating disqualification of the Commissioners' and the Commission's chosen counsel; that they can securing an injunction the Hardy County Commission from ever again legislating county ambulance services in a manner with which they disagree; that they can invalidate the provisions of Emergency Ambulance Act of 1975 prescribing the notices that are to be provided under that Act; that they can ignore the provisions of the Open Governmental Meetings Act and the cases of this Court interpreting that Act; and finally that they judge whether lawyers representing the Hardy County Commission and the two members making up a majority of the Commission regarding the issue of county ambulance services have "benefitted the citizens of Hardy County or the Hardy County Commission as a sovereign body representing the citizens of Hardy County" and without notice or hearing secure an order requiring those lawyers to disgorge fees earned and paid by their clients.

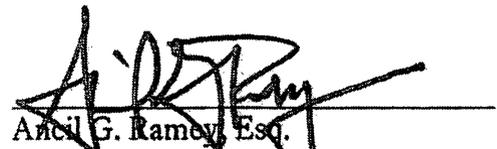
In the very last sentence of their brief, Respondents state: "Respondents also demand full reimbursement of all attorney fees and expenses of litigation below and through this appeal" [Brief of Respondents at 23] and, again, as is their practice, citing absolutely no legal authority in support of their request.

Rather, this Court should deny all of the relief requested by Respondents; reverse all aspects of the Circuit Court's judgment which are the subject of the current appeals; and remand with clear direction that judgment be entered for all of the Petitioners and that Respondents' case be dismissed from the Circuit Court of Hardy County.

IV. CONCLUSION

WHEREFORE, Petitioner, Steptoe & Johnson PLLC, respectfully requests that this Court set aside the Order of the Circuit Court of Hardy County directing it to refund fees earned and received in the representation of Petitioners.

STEPTOE & JOHNSON PLLC



Ancil G. Ramey, Esq.
WV Bar # 3013
Steptoe & Johnson, PLLC
P.O. Box 2195
Huntington, WV 25722-2195
Telephone: (304) 526-8133
ancil.ramey@steptoe-johnson.com

Bridget M. Cohee, Esq.
WV Bar # 8526
Steptoe & Johnson PLLC
P.O. Box 2629
Martinsburg, WV 25402-2629
Telephone: (304) 263-6991
bridget.cohee@steptoe-johnson.com

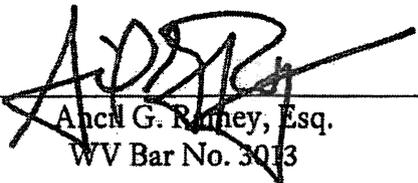
CERTIFICATE OF SERVICE

I do hereby certify that on August 4, 2015, I served the foregoing REPLY BRIEF OF PETITIONER on counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

John W. Cooper, Esq.
Cooper & Preston, PLLC
P.O. Box 365
Parsons, WV 26287
Counsel for Petitioners

J. David Judy, III, Esq.
Judy & Judy
110 North Main Street
P.O. Box 636
Moorefield, WV 26836
Counsel for Respondents

John A. Kessler, Esq.
Carey, Scott & Douglas
P.O. Box 913
Charleston, WV 25323
Counsel for Petitioners


Ancel G. Rainey, Esq.
WV Bar No. 3013