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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
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, PH.D.,
Defendant/Counter-Plaintiff Below,
RESPONDENT,
v.

BARON AND BUDD, P.C.,
Third-Party Defendant Below,
RESPONDENT,
v.

COCHRAN, CHERRY, GIVENS,
SMITH, LANE & TAYLOR P.C.,
Third-Party Defendant Below,
RESPONDENT,
v.

LEVIN, PAPANTONIO, THOMAS,
MITCHELL, RAFFERTY & PROCTOR, P.A.,
Third-Party Defendant Below,
RESPONDENT.

FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST
VIRGINIA, CIVIL ACTION NO.: 1:12-cv-12

RESPONSE BRIEF OF JOSEPH SIMONI, Ph.D. ON CERTIFIED QUESTION

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STATEMENT OF THE CASE

1. Introduction.

This Court has been asked to resolve a question with practical implications that far exceed the strict confines of the question certified by the Honorable Irene M. Keeley:

> 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?

(Joint Appendix at 2190.) The wide breadth of that inquiry serves to conceal the narrow and relatively unsavory issue that is actually before this Court. Plainly said, this Court has been asked to determine whether a lawyer should be permitted to evade personal and financial responsibility to a non-lawyer behind the shield of the West Virginia Rules of Professional Conduct.

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, Respondent Joseph Simoni, Pd.D. ("Dr. Simoni"), respectfully tenders his response to the Brief of Petitioners on Certified Question.[1] In response to the question posited above, Dr. Simoni submits that the West Virginia Rules of Professional Conduct are "rules of reason" that define the boundaries of the ethical practice of law in this State; although they are undeniably statements of public policy, they are not entitled to the same force of law as statutory expressions of public policy. Moreover, as explained herein, no public policy of the State of West Virginia would be adequately served by allowing a lawyer, a public citizen entrusted with special responsibility for the quality of justice, to defensively wield the West Virginia Rules of Professional Conduct as a shield against personal and financial responsibility.

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[1] Consistent with Rule 10(d), W.Va. R. App. P., Dr. Simoni has elected to submit his own Statement of the Case in order to correct certain omissions and factual liberties taken in the Petitioner's own Statement of the Case. See W.Va. R. App. P. 10(d). Dr. Simoni's Statement of the Case is derived from the Factual Background portion of the Memorandum Opinion and Order entered by Judge Irene M. Keeley on September 30, 2014, which begins on page 2133 of the Joint Appendix in this matter.

2. Relevant Facts.

This matter involves the longstanding efforts by Dr. Simoni to collect the reasonable value of his significant and relatively undisputed contributions to two successful lawsuits in North Central West Virginia. (J.A. at 0158-0160; 1894.)[2] Dr. Simoni is a retired sociology professor and graduate of the West Virginia University College of Law. (J.A. at 1570-1; 1877, 1928, 2005.) Despite graduating with a law degree, Dr. Simoni did not pass the bar exam and has, as a result, never been admitted to practice law in West Virginia or any other jurisdiction. (J.A. at 0136; 0204.)

Dr. Simoni was introduced to Gary A. Rich ("Mr. Rich") in the late 1990s by the late Larry Harless and began a professional relationship with Mr. Rich thereafter that persisted through the mid 2000s. (J.A. at 0139; 1026, 1051, 1874.) At that time, Mr. Rich was largely practicing immigration law in Morgantown, West Virginia. (J.A. at 0034.) The professional relationship between Dr. Simoni and Mr. Rich was driven, in large part, by the fact that Mr. Rich's law experience was inadequate to prosecute environmental and toxic tort class actions.

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[2] The lawsuits referenced hereinabove are as follows:

> Philips/Westinghouse Litigation: civil actions styled Fullen, et al. v. Philips Electronics North America Corporation, et al. (Civil Action No. 01-C-319) and Andryziak, et al. v. Philips Electronics North American Corporation, et al. (Civil Action No. 03-C-63), filed in the Circuit Court of Marion County, West Virginia. A settlement in this civil action was reached between Baron & Budd, P.C.; Law Office of Gary Rich, LC; and Law Offices of Masry & Vititoe and CBS Corporation and Phillips Electronics North America Corporation and Philips Lighting Company in a total amount of $36,500,000. This settlement amount included $34,675,000 for the 1,292 plant exposure cases and $1,825,000 for a Residual Fund. The Phillips/Westinghouse plaintiffs' attorneys were entitled to share a 40% contingency fee in this matter of approximately $14,600,000.
>
> Spelter Litigation: civil action styled Perrine et al. v. E.I. DuPont de Nemours & Co., et al. (Civil Action No. 04-C-296-2), filed in the Circuit Court of Harrison County, West Virginia. A settlement in this civil action was reached between Levin, Papantonio, Thomas, Mitchell, Eschner & Proctor; Cochran, Cherry, Givens, Smith, Lane & Taylor; The Law Office of Gary Rich; West & Jones; and Kennedy & Madonna and E.I. DuPont de Nemours in a total amount of $150,000,000. By Final Order Awarding Attorneys' Fees and Litigation Expenses and Awarding Class Representatives' Incentive Payments dated January 27, 2011, the Spelter plaintiffs' attorneys were awarded attorneys' fees in the amount of $22,800,000 and expenses in the amount of $7,749,379.71.

(J.A. at 0170). As part of their professional relationship, Dr. Simoni contributed to the development and successful prosecution of the Philips/Westinghouse Litigation and Spelter Litigation by Mr. Rich and others, including the other Respondents to this matter. (J.A. at 1123; 2136.)

Dr. Simoni's contributions to the Philips/Westinghouse Litigation and Spelter Litigation were multifaceted, and included such activities as discovering and developing the cases, organizing the cases, investigating the cases and researching national law firms to fund and prosecute the cases. (J.A. at 0168, 0170-1, 0173-4, 0178-80; 1894-5, 1956-7, 1970-91, 2070-7.) Dr. Simoni organized and attended initial meetings in both cases and was the primacy contact with the residents in both the Philips/Westinghouse Litigation and Spelter Litigation. (J.A. at 0168-9; 1906-7, 1970-2.) Dr. Simoni obtained key documents from a variety of sources, most notably the West Virginia Department of Environmental Protection. (J.A. at 0179; 1894.) He also played a key role in organizing property access for purposes of collecting samples, which was a necessary element of the plaintiffs' claims in the Spelter Litigation. (J.A. at 0180; 1981, 1894-5.) He researched filing fee issues, noteworthy environmental cases, and key toxic tort questions. (J.A. at 0173; 2070-7.) Significantly, Dr. Simoni was also the major liaison to, and still maintains relationships with, the residents of Fairmont, Spelter, and other towns in North Central West Virginia. (J.A. at 1956-7.)

Though he did not keep a contemporaneous time summary, Dr. Simoni has reconstructed a reasonable list of the activities and hours expended in support of both the Philips/Westinghouse Litigation and the Spelter Litigation. (J.A. at 0225-64; 1889-90.) Both Dr. Simoni and Mr. Rich were extensively questioned about the contents of this time summary, and Mr. Rich generally

agreed with its contents during his deposition in May, 2013. (J.A. at 1809-12; 1889-91, 1987-90, 2001-4, 2007-38; 1259-1378, 1500-3.)

Many of Dr. Simoni's contributions drew upon his unique skill set, which includes doctorate degrees and training in both sociology and law. (J.A. at 2005-8.) While some of his assigned activities were paraprofessional type work, or even high-end paraprofessional type work, other activities required and called on skills that Dr. Simoni obtained through his studies, degrees, and experiences, including his sociology and law degrees. (J.A. at 2005-6.)

Dr. Simoni was generally aware of the ethical prohibition against a lawyer sharing his fee with a non-lawyer. (J.A. at 1880.) Still, his conversations with Mr. Rich left him with the distinct impression that there was a "clear possibility of being compensated [by Mr. Rich] at the end of the case or cases." (J.A. at 1881.) Dr. Simoni and Mr. Rich discussed compensation on a number of occasions. (J.A. at 1037.) However, Mr. Rich was sufficiently vague, or even clandestine, in discussing compensation with Dr. Simoni, yet one salient fact persisted: Dr. Simoni always had the understanding, in all his communications with Mr. Rich, that he would be compensated. (J.A. at 1592-3, 1881-2; 1084-5.) Dr. Simoni elaborated on this point by saying that what he intended to agree to was compensation that "would be fair, given the contributions that [he] made in each of the cases..." (J.A. at 1960.) At different points in their ongoing professional relationship, Dr. Simoni was promised varying portions of Mr. Rich's fee, from 50 percent to 20 percent, presumably meant to entice him to continue his work in furtherance of the cases. (J.A. at 1591, 1653-5.) Dr. Simoni also understood that his compensation was to be contingent upon the successful outcome of the litigation. (J.A. at 2034.) Even after Mr. Rich learned that Dr. Simoni was not a licensed lawyer early in their relationship, he continued to rely on Dr. Simoni's organization, legal skills, and other contributions for years. (J.A. at 1075.)

Indeed, Dr. Simoni understood his professional relationship with Mr. Rich to be something of a "joint venture." (J.A. at 1666.)

Mr. Rich has admitted that Dr. Simoni is entitled to reasonable compensation for his contributions in both the Philip/Westinghouse Litigation and Spelter Litigation. (J.A. at 1123.) Mere months after filing his declaratory judgment complaint, and before any meaningful discovery had commenced, Mr. Rich admitted that "Dr. Simoni contributed to the lawsuits which resulted in recoveries for the plaintiffs in those suits and fees to their attorneys." (J.A. at 0078) And, Mr. Rich specifically admitted that he "never had an objection to compensating Dr. Simoni, lawfully, for that contribution." (J.A. at 0078) Mr. Rich has also admitted that he discussed the possibility of paying Dr. Simoni through quantum meruit or some other means with others involved in the litigation, and was assured by others, including the other Respondents, that Dr. Simoni could be paid like any other vendor. (J.A. at 1083.) In fact, Mr. Rich sought a legal/ethical opinion on the subject of quantum meruit from Sherri Goodman, a lawyer with experience advising clients on ethical issues, and was told that it might apply. (J.A. at 1354, 1418.) Those sentiments only grew more pronounced as discovery commenced. During his deposition on April 30, 2013, Mr. Rich again admitted that he, along with his clients, had directly benefited, financially and otherwise, from the contributions of Dr. Simoni. (J.A. at 1123.)

Despite discussing the prospect of compensation on numerous occasions, all of which served to entice Dr. Simoni to continue working with the expectation that he would be compensated for his contributions, Mr. Rich has failed to pay any compensation to Dr. Simoni for his significant involvement, time, and efforts. (J.A. at 0158-9; 0176, 0183.) Mr. Rich's

steadfast and continued refusal to compensate Dr. Simoni in a reasonable manner prompted Dr. Simoni to demand compensation by way of his claims made in this matter. (J.A. at 0159.)

3. Procedural History.

The procedural history of this matter is recounted in the Memorandum Opinion and Order entered by the Honorable Irene M. Keeley on September 30, 2014. (J.A. at 2143-2150.) Succinctly stated, Mr. Rich filed a complaint in the United States District Court for the Northern District of West Virginia on January 13, 2012. (J.A. at 0034-41.) Mr. Rich's declaratory judgment action sought a very limited declaration from the court, namely that Dr. Simoni is not entitled to any compensation for "any services or other activities performed in connection with the [Philips/Westinghouse] Litigation or [the] Spelter Litigation." (J.A. at 0036.) In response, Dr. Simoni answered Mr. Rich's complaint and filed a counterclaim on October 5, 2012, alleging that he is due some compensation under theories sounding in quantum meruit (Count I), unjust enrichment (Count II) and implied contract (Count III). (J.A. at 0158-60.) Dr. Simoni's counterclaim against Mr. Rich revealed, on its face, no claim to any portion of a "percentage fee split," contingency fee, or similar arrangement to share any legal fees. (J.A. at 0158-63.) Rather, Dr. Simoni's claims sought compensation as a means to prevent the inequity that would otherwise result from the failure on the part of Mr. Rich to reasonably compensate Dr. Simoni after reaping the substantial financial benefits of his knowledge, relationships, work, and expertise. (J.A. at 0068-69.)

In answering Dr. Simoni's counterclaim, Mr. Rich sought indemnity and contribution from three of the national litigation firms that had been jointly involved in the prosecution of the underlying Philips/Westinghouse Litigation and the Spelter Litigation. (J.A. at 0190.) Those law firms, the other Respondents to this action, filed individual counterclaims against Mr. Rich. (J.A.

at 2143-5.) Following discovery, the various parties filed summary judgment motions that culminated in the Memorandum Opinion and Order and Order of Certification to the West Virginia Supreme Court that were both entered on September 30, 2014. (J.A. at 2130-84.)

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter has been scheduled for oral argument at West Virginia University in Morgantown, West Virginia, on Wednesday, March 4, 2015, pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. See W.Va. R. App. P. 20.

SUMMARY OF ARGUMENT

The crux of Dr. Simoni's argument is that West Virginia law should permit him to collect a reasonable and equitable sum from Mr. Rich as compensation for the services that he rendered and the role that he played in furtherance of the Philip/Westinghouse Litigation and the Spelter Litigation. To that end, Rule 5.4 of the West Virginia Rules of Professional Conduct should not be interpreted as a statement of public policy sufficient to foreclose Dr. Simoni from receiving such compensation from Mr. Rich under the guise of protecting some intangible public interest. Although the West Virginia Rules of Professional Conduct unquestionably define unethical conduct for which members of the West Virginia State Bar may be disciplined or sanctioned by this Court, they are not statements of public policy on par with those found in federal and state constitutions, public statutes, regulations, or even this Court's decisions. Further, in no event should the fee splitting prohibition in Rule 5.4 be wielded by Mr. Rich as a procedural weapon to prevent Dr. Simoni from realizing the reasonable value of his significant and well-documented services, particularly through other, non-contractual theories. Inasmuch as Mr. Rich is attempting to rely on the West Virginia Rules of Professional Conduct as a shield against responsibility, any decision otherwise would put a hefty premium on Mr. Rich's disregard of the very rules authored

to guide his conduct as a licensed lawyer and should not be permitted by this Court. Other jurisdictions faced with similar facts and circumstances have permitted recovery under equitable theories where, as here, equity demands a fairer result. For these reasons and in response to the question above, the West Virginia Rules of Professional Conduct should not be construed as prohibiting the result that fairness and equity demand.

ARGUMENT

II. STANDARD OF REVIEW.

The standard for this Court's review of the legal issues presented by the certified question from the United States District Court for the Northern District of West Virginia is plenary, or *de novo*. See Syl. Pt. 1, Bragg v. United States, 230 W. Va. 532, 741 S.E.2d 90 (2013)(per curiam); see also Syl. Pt. 1, Light v. Allstate Inc. Co., 203 W. Va. 27, 506 S.E.2d 64 (1998).

III. THE RELIEF SOUGHT BY DR. SIMONI DOES NOT VIOLATE THE PUBLIC POLICY OF THE STATE OF WEST VIRGINIA.

A. Rule 5.4 of the West Virginia Rules of Professional Conduct only serves to prohibit a lawyer from ethically sharing legal fees with a non-lawyer.

It is undoubtedly true that a licensed lawyer is ethically prohibited from sharing legal fees with a non-lawyer under Rule 5.4 of the West Virginia Rules of Professional Conduct. That rule states, rather plainly, that "[a] lawyer or law firm shall not share legal fees with a non-lawyer...." See W.Va. R. Prof'l Conduct 5.4(a); Lawyer Disciplinary Bd. v. Duty, 222 W. Va. 758, 671 S.E.2d 763 (2008)(per curiam)(noting that a lawyer may not directly or indirectly share legal fees with a non-lawyer whether he is a consultant, partner or employee). The same holds true under the American Bar Association's Model Rules of Professional Conduct. See ABA Model R. Prof'l Resp. 5.4(a). However, the ethical prohibition against sharing legal fees is a matter separate and distinct from the question here, to wit, whether the ethical prohibition expressed in

Rule 5.4 is sufficient to give rise to a legal prohibition against a lawyer sharing legal fees with a non-lawyer, where the compensation sought by the non-lawyer is based upon the reasonable value of services provided.

B. The West Virginia Rules of Professional Conduct do not amount to statements of public policy with the force of law equal to that given statutes enacted by the West Virginia legislature.

This Court has not specifically addressed the question "whether violation of a rule of professional conduct constitutes a public policy violation" under West Virginia law. See 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). Nonetheless, this Court has explained the concept of public policy in Cordle v. General Hugh Mercer Corp., 175 W.Va. 321, 325, 325 S.E.2d 111, 114 (1984), when it quoted approvingly the observation made in Allen v. Commercial Casualty Ins. Co., 131 N.J.L. 475, 477-78, 37 A.2d 37, 38-39 (1944), that:

> Much has been written by text writers and by the courts as to the meaning of the phrase "public policy." All are agreed that its meaning is as "variable" as it is "vague," and that there is no absolute rule by which courts may determine what contracts contravene the public policy of the state. The rule of law, most generally stated, is that "public policy" is that principle of law which holds that "no person can lawfully do that which has a tendency to be injurious to the public or against public good * * *" even though "no actual injury" may have resulted therefrom in a particular case "to the public." It is a question of law which the court must decide in light of the particular circumstances of each case.
>
> The sources determinative of public policy are, among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government -- with us -- is factually established.

Cordle, 175 W.Va. at 325 (quoting Allen, 37 A.2d at 37.))

It has also been stated that "[a] determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact for a jury." Syl. pt. 1, Cordle, 175

W.Va. at 321. However, this Court has acknowledged that "[t]he power to declare an action against public policy is a broad power and one difficult to define." Yoho v. Triangle PWC, Inc., 175 W. Va. 556, 561, 336 S.E.2d 204, 209 (1985). There is no fixed rule to determine what is, or what is not, public policy. Id. It is sometimes defined "as that principle of law under which freedom of contract or private dealings are restricted by law for the good of the community--the public good." Id. (quoting Higgins v. McFarland, 196 Va. 889, 894, 86 S.E.2d 168, 172 (1955).

Typically, public policy is articulated by the legislature. See, e.g., Collins v. Elkay Mining Co., 179 W. Va. 549, 371 S.E.2d 46 (1988) (West Virginia Mine Safety Act, W. Va. Code § 22A-1A-20); McClung v. Marion County Comm'n, 178 W. Va. 444, 360 S.E.2d 221 (1987)(per curiam)(Wage and Hour Act, W. Va. Code, W.Va. Code § 21-5C-8); Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980) (Workers' Compensation Act, W. Va. Code § 23-5A-1); Harless v. First Nat'l Bank in Fairmont, 169, W. Va. 673; 289 S.E.2d 692 (1982) (West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101, *et seq.*). This Court acknowledged as much when it quoted 72 C. J. S., Policy, at page 213, for the following proposition:

> Primarily it is for the lawmakers to determine the public policy of the state, for the public policy of a state is a law of the state, and is a legislative and not a judicial function, and it is not the function of the judiciary to declare what is the public policy of the state respecting matters on which the legislature has spoken or to create or announce a public policy of its own.

State ex rel. Pinson v. Varney, 142 W. Va. 105, 112, 96 S.E.2d 72, 76 (1956). In short, this Court is compelled to proceed with the utmost caution to insure that any declared public policy is, in fact, the public policy of this State.

As explained herein, public policy has many sources, whether constitutional, statutory or arising by common law. The question becomes, then, whether the ethical rules promulgated by

this Court for the governance of the legal professional have the same force of law as the sources above, and pointedly, whether such ethical rules operate to render unenforceable a compensation arrangement that is derived from an agreement which calls for the sharing of legal fees between a lawyer and a non-lawyer.

Dr. Simoni submits that the West Virginia Rules of Professional Conduct, though statements of public policy that proscribe standards for the ethical conduct of the legal profession, are "rules of reason" not entitled to the same weight as other constitutional or statutory sources. Perhaps the case most relevant to this question is Watson v. Pietranton, 178 W.Va. 799, 364 S.E.2d 812 (1987), which held that "[a] lawyer or law firm which enters into and honors a fee splitting agreement with another lawyer may not later raise DR2-107 of the West Virginia Code of Professional Responsibility as a bar to enforcement of the agreement."[3] Although some facts in Watson are dissimilar, the undeniable fact remains that this Court was faced with the questionable enforceability of a fee sharing agreement and unequivocally held that West Virginia' governing rules of professional discipline could not be used as a bar to enforcement of such an agreement. Watson, 178 W.Va. at 799, 364 S.E.2d at 812. This decision is dispositive of the certified question before this Court.

In authoring the opinion in Watson, this Court relied on an informal opinion from the American Bar Association and the case Foote v. Shapiro, 6 Pa.D. & C.3d 574 (Lehigh County, 1978). In Foote, the Pennsylvania court rejected the argument that a fee sharing agreement between two lawyers, found to be in violation of professional disciplinary rules, was unenforceable for that reason. In reliance on Foote, the Supreme Court of Appeals of West Virginia noted as follows:

[3] The West Virginia Code of Professional Responsibility was the predecessor to the West Virginia Rules of Professional Conduct.

> In addition to setting forth Informal Opinion No. 870, the Shapiro court noted that the Code of Professional Responsibility is not a statement of positive law, but guidelines "to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the [disciplinary rules]." Shapiro at 577, quoting ABA Code of Professional Responsibility, Preamble and Preliminary Statement (1970). This observation is helpful in distinguishing "illegal" conduct from "unethical" conduct. **A court of law is the appropriate forum in which to litigate the enforceability of an agreement between two parties. On the other hand, disciplinary proceedings before the State Bar are available to redress unethical conduct under the Code of Professional Responsibility.**

Watson, 178 W.Va. at 802, 364 S.E.2d at 815, n.5 (emphasis added). Thus, a clear distinction can be drawn between "unethical conduct" prohibited by the West Virginia Rules of Professional Conduct and "illegal conduct" (in terms of the doctrine of illegality) which is best left to civil litigation.

In further support of the distinction between "illegal conduct" and "unethical conduct", the West Virginia Rules of Professional Conduct are illustrative. The Rules, on their face, are "rules of reason" that are meant to be interpreted "with reference to the purposes of legal representation and of the law itself." See W.Va. R. Prof'l Cond., scope, ¶ 14. In that regard, "[f]ailure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process" but is not a "basis for civil liability." Id. at ¶¶ 19-20. Moreover, "violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation." Id.[4] The Rules are clearly intended to establish ethical standards of conduct that can subject lawyers to discipline, yet are not intended as a basis for any other "nondisciplinary remedy." Compare W.Va. R. Prof'l Cond., scope, ¶ 20 ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any

[4] Dr. Simoni notes that the West Virginia Rules of Professional Conduct were amended on January 1, 2015. However, the ethical rule at the heart of this matter, Rule 5.4, remains unchanged in any way materially related to this matter. See Rule 5.4, W.Va. R. Prof'l Cond. (providing that "[a] lawyer or law firm shall not share legal fees with a nonlawyer...").

presumption in such a case that a legal duty has been breached."), with Syl. Pt. 1, in part, Reed v. Phillips, 192 W.Va. 392, 452 S.E.2d 708 (1994) ("Violation of a statute is *prima facie* evidence of negligence.").

Nonetheless, the Petitioners cite several cases from other jurisdictions for the proposition that any agreement which calls for legal fees to be split between a lawyer and a non-lawyer is void as against public policy. Notably, many of these cases are factually distinguishable for the same reason that the Petitioners would distinguish Watson – they do not involve fee splitting agreements between lawyers and non-lawyers. See e.g. In re P&E Boat Rentals, Inc., 928 F.2d 662 (1991); Dragelevich v. Kohn, Milstein, Cohen & Hausfeld, 755 F.Supp. 189 (1990); Belli v. Shaw, 98 Wn.2d 569, 657 P.2d 315 (Wash. 1983). Another of the cases cited by the Petitioner, Citizens Coalition for Tort Reform v. McAlpine, 810 P.2d 162 (Alas. 1991), was decided on different grounds entirely, namely the Alaska Supreme Court's constitutional power to regulate the practice of law in that state by adopting a rule limiting contingency fees. Id. at 172. Thus, while some states have adopted the position that ethical rules amount to statements of public policy with the force of statutes, West Virginia should decline to do so under the facts and circumstances of this matter.

Moreover, not all courts have determined that rules of professional conduct completely foreclose reasonable compensation. Instead, because of the harsh results that might befall innocent parties to a contract when their agreement is voided for illegality, some courts have fashioned exceptions. See e.g. McIntosh v. Mills, 121 Cal. App. 4th 333, 347, 17 Cal. Rptr.3d 66, 76 (Cal. App. 1st Dist. 2004). One such exception is stated as follows:

> Where parties to an illegal contract are in *pari delicto*, neither may recover from the other property or money transferred in the course of the illegal transaction. But a member of a class for whose protection a statute was enacted is ordinarily not considered in *pari delicto* with those who violate the statute. The statute being

> for his benefit and he not being in *pari delicto*, he is entitled to relief and may resort to the courts to recover ... The rule, therefore, is that if refusal to enforce or rescind an illegal bargain would produce a harmful effect on parties for whose protection the law making the bargain illegal exists, enforcement or rescission, whichever is appropriate, is allowed.

Cain v. Burns, 131 Cal. App. 2d 439, 280 P.2d 888 (Cal. App. 1st Dist. 1955). In Cain, the court did not allow an attorney to raise the defense of illegality, in part, because the California State Bar Rules of Professional Conduct did not prohibit the object of the contract and because the rules only applied to lawyers, not lay-persons. The court quoted the trial court judge as saying that the applicable ethical rule "is not a two-edged sword, but a rule binding the lawyer who has accepted the fruits of his unlawful contract and now says he is forbidden to pay for them because he has violated the rules of professional conduct." Id. at 444. The court continued, "[t]o permit the attorney to retain the moneys he promised to pay plaintiff would put a premium on the attorney's disregard of the rules made for his guidance and conduct." Id. Those words are equally applicable here, and Cain is properly read as holding that a determination of whether the parties are in *pari delicto* involves an analysis of the relative culpability of each. (Cain, supra, 131 Cal. App. 2d at p. 443.)

The court revisited its decision in Cain more recently in McIntosh v. Mills and declined to extend its application to a similar fee splitting arrangement upon finding that the parties were in *pari delicto* or equally at fault. Nonetheless, the court commented that, "[w]hile certainly the voiding of a fee sharing agreement may result in the lawyer receiving more of a fee than entitled under the agreement, the court's observation does not address the countervailing factors such as whether the layperson with whom the fees were to be shared is entitled to assert equitable claims, including quantum meruit, against the attorney." Id.

The objective of the professional relationship between Dr. Simoni and Mr. Rich was legal and proper, and successfully resulted in the vindication of the legal rights of thousands of individuals affected by toxic torts in North Central West Virginia. Although Dr. Simoni was aware of the prohibition against fee splitting in Rule 5.4, it should not serve to prohibit his recovery of reasonable compensation for the same reasons expressed in Cain and elsewhere. The West Virginia Rules of Professional Conduct do not amount to positive statements of the law or of public policy sufficient to render an agreement to share legal fees unenforceable. Instead, the Rules define "unethical conduct" for which an attorney may be disciplined or sanctioned by the Supreme Court of Appeals of West Virginia. Conversely, the rules do not define "illegal conduct" subject to the doctrine of illegality. This Court is compelled by its prior decisions to tread carefully in determining the public policy of the State of West Virginia, a function that is typically reserved to the legislature. Here, the West Virginia Rules of Professional Conduct are explicitly intended to govern disciplinary matters and to prescribe a lawyer's professional responsibilities, not to articulate public policies of this State with the force of law equal to constitutional, statutory or common law protections. For this reason, West Virginia's governing rules of professional discipline for lawyers should not be used to disqualify Dr. Simoni, a non-lawyer, from receiving the reasonable compensation that fairness and equity demand.

C. The concurring opinion in Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP was not embraced by this Court.

Dr. Simoni recognizes that this Court recently authored an opinion of importance to this matter in Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP, 231 W.Va. 577, 746 S.E.2d 568 (2013). In Gaddy, this Court narrowly avoided the precise issue that it has now been asked to decide and considered, among other things, whether certain documentation submitted by Gaddy Engineering Company should have been sufficient to avoid summary judgment. Gaddy,

231 W.Va. at 581, 746 S.E.2d at 572. After reviewing the relevant evidence, this Court agreed with the trial court that no verifiable proof of Gaddy Engineering Company's work existed and affirmed the trial court's decision. Id. By contrast, in this matter, Dr. Simoni's contributions to the Philips/Westinghouse Litigation and Spelter Litigation have been well documented in the form of Dr. Simoni's time summary and other evidence. (J.A. at 0168, 0170-1, 0173-4, 0178-80; 1894-5, 1956-7, 1970-91, 2070-7.) Dr. Simoni's contributions to the case are largely uncontested by Mr. Rich. (J.A. at 1259-60.) In fact, when taken as a whole, Dr. Simoni's time summary and other evidence constitute a figurative treasure trove of verifiable proof as to the extent of his contributions to the Philips/Westinghouse Litigation and the Spelter Litigation. At worst, they present questions of fact for a jury to determine. Regardless, Dr. Simoni's efforts to avail himself of compensation for his labors are completely in alignment with this Court's holding in Gaddy.

Nonetheless, of particular importance to this matter is the concurring opinion authored by Justice Loughry and joined by Justice Davis, which directly addresses the question currently before this Court. Justices Loughry and Davis, as well as the Petitioners, all advance the proposition that the West Virginia Rules of Professional Conduct are, in fact, statements of public policy. Justice Loughry cites the Indiana case 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), in support of such a declaration. The reasons for the general prohibition against fee splitting agreements are detailed in Trotter, as follows:

> Rule 5.4(a) prohibits an attorney from sharing legal fees with a nonlawyer. This Rule states the public policy against fee splitting with a non-lawyer ... [F]ee splitting with a non-lawyer is disfavored because of its potential [e]ffect on the client-attorney relationship. For example, fee splitting with a non-lawyer provides the incentive for a non-lawyer to recommend an attorney's services for their own pecuniary interests rather than the client's legal best interests. Furthermore, fee splitting provides a potential disincentive to the attorney to devote their full time and energy to the client, as the attorney must share fees with another who has

> done little to earn it. Finally, fee splitting might interfere with the attorney's "professional independence of judgment." Thus, in general, fee splitting agreements with a non-lawyer are contrary to Indiana public policy and unenforceable.

684 N.E.2d at 1154-55. Of course, the harms threatened by the foregoing excerpt are really conjecture, which should be carefully weighed against the actual harm that has occurred in this case, namely thousands of hours of uncompensated professional services performed by Dr. Simoni. In fact, without Dr. Simoni's organization, investigation, and zealous pursuit of a law firm or firms that could accommodate the claims of the individual plaintiffs in the Philips/Westinghouse Litigation and in the Spelter Litigation, those suits would likely never have been filed. (J.A. at 2136-7.) In that regard, the uncompromising rule of law advocated by the Petitioners would serve to have an opposite, chilling effect on civil litigation, stifling plaintiffs with viable claims from ever setting foot into the courtrooms of this State. Certainly no viable public policy concern is protected by this Court by prohibiting compensation to Dr. Simoni under these facts, despite his substantial and well-document contributions, and causing an unwarranted windfall to Mr. Rich.

For these reasons, Rule 5.4 does not define "illegal conduct" but does define "unethical conduct" for which an attorney may be disciplined or sanctioned by this Court. And, this Court chose not to embrace the concurring opinion of Justices Loughry, which would have been a marked departure from the Watson decision, which remains instructive here. Accordingly, the West Virginia Rules of Professional Conduct are not statements of public policy with the full force of law and, even if they are interpreted as such, should not prevent Dr. Simoni from recovering the reasonable value of his professional services rendered under quantum meruit, unjust enrichment and implied contract.

D. The West Virginia Rules of Professional Conduct are not meant to be wielded by lawyers as procedural weapons to the detriment of non-lawyers.

There is perhaps no better summary of the intention of the West Virginia Rules of Professional Conduct than the prefatory "Scope" portion of the rules, which threatens that "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." W.Va. R. Prof. Resp., scope. Notably, there is no affirmative "public policy" statement in the Preamble or Scope of the West Virginia Rules of Professional Conduct, nor does such a statement occur anywhere else. Instead, the Rules characterize the lawyer as being "[a] public citizen having special responsibility for the quality of justice." W.Va. R. Prof. Resp., preamble ¶ 1. From these statements alone, it is abundantly clear that the West Virginia Rules of Professional Responsibility are not intended to be wielded in the manner in which the Petitioners contend. To permit Mr. Rich to retain the compensation that he admits is owed to Dr. Simoni would put a premium on Mr. Rich's disregard for the West Virginia Rules of Professional Conduct and should not be permitted.

IV. WEST VIRGINIA AND OTHER JURISDICTIONS HAVE PERMITTED REASONABLE COMPENSATION UNDER SIMILAR FACTS THROUGH QUANTUM MERUIT AND RELATED EQUITABLE THEORIES.

Even if this Court resolves the question certified above and determines that the West Virginia Rules of Professional Conduct have the force of law equal to that of statutory enactments, some question will remain as to Dr. Simoni's entitlement to compensation. (Pet'r's Br. 17) ("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 [Philips/Westinghouse Litigation] and [the Spelter Litigation].") (emphasis added). In order to fully address the questions raised by

Dr. Simoni's claims, this Court should reform the question certified to it to address the latter question raised above, namely, whether Dr. Simoni might be entitled to compensation of an equitable nature. In answering that question, this Court should look to the Restatement (Second) of Contracts and cases from this and other jurisdictions to determine that quantum meruit is an appropriate mechanism to avoid the injustice that would otherwise occur.

A. This Court should reformulate the question certified in this matter in order to fully address the questions involved.

This Court's ability to reform certified questions is discussed at length in Kincaid v. Mangum, 189 W. Va. 404, 432 S.E.2d 74 (1993) ("When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it ..."). Accordingly, this Court should exercise its authority to reformulate the certified question above in order to fully address the multiple questions of law involved. Importantly, this Court should determine whether, and through what means, a compensation arrangement can be enforced by a non-lawyer against a lawyer notwithstanding an ethical prohibition against fee splitting. It bears reiterating that Dr. Simoni is not seeking to enforce a percentage fee splitting agreement, and is instead attempting to collect the reasonable value of his professional services through claims sounding in unjust enrichment, quantum meruit and implied contract. (J.A. at 0158-60.) That is, Dr. Simoni did not complain against Mr. Rich with the intention of recovering 20 percent or 50 percent or any other percentage of the millions of dollars in attorneys' fees recovered by Mr. Rich as a result of the underlying Philips/Westinghouse Litigation or Spelter Litigation. Id. Instead, he only sought to recover in equity the reasonable amount of his contributions to the underlying cases. Id. This Court is wholly capable of resolving this matter by reformulating the question presented herein.

B. West Virginia and other jurisdictions permit compensation through quantum meruit and other equitable theories where, as here, injustice would otherwise occur.

This Court has previously adopted §§ 261 and 265 of the Restatement (Second) of Contracts. See Waddy v. Riggleman, 216 W.Va. 250, 606 S.E.2d 222 (2004). Those sections allow a court that finds that an injustice has been committed to consider just and equitable remedies. Id. Dr. Simoni has prayed for relief on non-contractual grounds in this matter, including claims sounding in unjust enrichment, quantum meruit and implied contract. (J.A. at 0158-60.) Those claims are meant to remedy the injustice that has occurred in this case, namely thousands of hours of uncompensated professional services.

Other courts, too, have fashioned recovery of compensation under similar circumstances, notwithstanding unenforceable "fee splitting" agreements. See e.g. Practice Management Associates v. Bitet, 654 So. 2d 966, 969 (1995) (holding that although the professional is prohibited from benefitting from a fee splitting contract, the nonprofessional may be entitled to compensation for his services under an unjust enrichment theory); Eichholz Law Firm, P.C. v. Tate Law Group, LLC, 310 Ga. App. 848, 852 (2011) (holding that, although a fee splitting provision could not be enforced as contrary to public policy, one law firm could seek to recover from another in quantum meruit for services it provided pursuant to their joint venture); "We the People" Paralegal Services v. Watley, 766 So. 2d 744 (2000) ("[W]here it has been determined that no cause of action exists for enforcement of the alleged contract, [the paralegals seeking compensation] may still seek recovery under the alternative theory of unjust enrichment."); Alderson v. Homolka, 2007 Minn. App. Unpub. LEXIS 290 (2007) (allowing compensation not as a share of attorneys' fees, but as compensation for valuable services rendered); Starkey, Kelly, Blaney & White v. Estate of Nicolaysen, 340 N.J. Super. 104 (App.Div. 2001) (holding that

"under the facts presented here, where all parties agree there was an oral fee agreement in place which was ultimately memorialized, albeit too late to be enforced according to its terms, denial of any recovery would be too harsh a remedy and a quantum meruit recovery may be awarded to plaintiff for the reasonable value of legal services rendered."); Crumley & Associates v. Charles Peed & Associates, 219 N.C. App. 615 (2012) (holding that "the fact that [a] fee splitting agreement was determined to be in violation of the Rules of Professional Conduct and unenforceable is of no consequence to [plaintiff's] right of recovery in quantum meruit.") From these cases, a clear trend emerges in favor of allowing compensation where it is due, notwithstanding an otherwise impermissible fee splitting arrangement.

Dr. Simoni's attempts to collect the reasonable value of his professional services through unjust enrichment, quantum meruit and implied contract theories are also completely in accord with the law in most jurisdictions, including many of the jurisdictions cited by the Petitioner. See Dragelevich v. Kohn, Milstein, Cohen & Hausfeld, supra at 194 (finding that a fee splitting agreement between attorneys which violated the Code of Professional Responsibility was unenforceable, "[h]owever, this decision does not preclude Dragelevich from seeking fair and just compensation for his efforts in an action based on quantum meruit.").

In Abbot v. Marker, 295 Wis. 2d 636, 722 N.W.2d 162 (2006), a non-lawyer filed suit against a lawyer for breach of contract and quasi-contract, claiming that the lawyer had failed to pay a percentage of fees he earned on a case that the non-lawyer had referred to him. The court found that the fee splitting agreement between the non-lawyer and lawyer was directly contrary to statute, and therefore unenforceable as a contract. The court next considered whether the non-lawyer could be awarded a portion of the attorney fees on unjust enrichment grounds. In that court's words:

> Unjust enrichment is an equitable doctrine. . . . A circuit court's decision to grant relief due to unjust enrichment is discretionary. . . . A plaintiff may recover through quasi-contract unjust enrichment when the plaintiff confers a benefit on the defendant, the defendant is aware of the benefit, and the retention of the benefit would be inequitable. . . . Unjust enrichment is grounded upon the moral principle that a party who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust ...
>
> First, we choose not to enforce an agreement through unjust enrichment when the party cannot enforce the agreement through contract because it is illegal. Second, [the lawyer] has not received a benefit from [the non-lawyer] which requires him to make restitution. [The non-lawyer] provided [the lawyer] with a client referral. WISCONSIN STAT. §§ 757.295 and 757.45 make it illegal for an attorney to receive a referral through paying a third party. Thus, [the lawyer] has not received a benefit that has a marketable value.

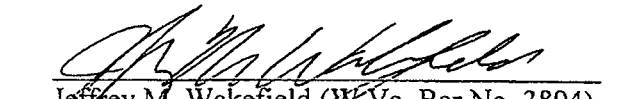
Id. at 168. Accordingly, although the court, at its discretion, chose not to permit relief on unjust enrichment grounds in this particular instance, it recognized that it lawfully could do so, provided that the party seeking compensation conferred some benefit on the defendant. In this matter, Dr. Simoni undeniably conferred a substantial and verifiable benefit on Mr. Rich. Even if this Court determines that 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, equity demands that this Court not adopt a rule of law that prevents Dr. Simoni from realizing just compensation for that benefit under the non-contractual theories advanced in his counterclaim.

CONCLUSION

WHEREFORE, on the basis of the foregoing authorities and arguments made thereupon, Dr. Simoni respectfully requests: (i) that this Court answer the certified question in the negative by finding that the West Virginia Rules of Professional Conduct are not statements of public policy with the force of law equal to that given to statutes enacted by the West Virginia State Legislature, and (ii) that this Court award such other and further relief as it may deem proper.

JOSEPH SIMONI, PH.D.,

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
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, PH.D.,
Defendant/Counter-Plaintiff Below,
RESPONDENT,
v.

BARON AND BUDD, P.C.,
Third-Party Defendant Below,
RESPONDENT,
v.

COCHRAN, CHERRY, GIVENS,
SMITH, LANE & TAYLOR P.C.,
Third-Party Defendant Below,
RESPONDENT,
v.

LEVIN, PAPANTONIO, THOMAS,
MITCHELL, RAFFERTY & PROCTOR, P.A.,
Third-Party Defendant Below,
RESPONDENT.

FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST
VIRGINIA, CIVIL ACTION NO.: 1:12-cv-12

CERTIFICATE OF SERVICE

I, Caleb P. Knight, counsel for the Respondent, Joseph Simoni, Ph.D., do hereby certify that I have served the foregoing, ***Response Brief of Respondent Joseph Simoni, P.h.D. on Certified Question***, upon the below counsel of record this 29th day of January, 2015, via United States mail:

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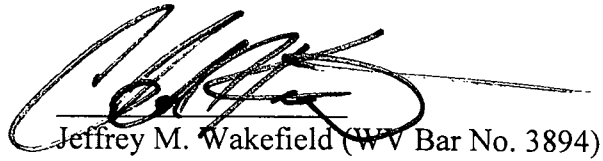

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