January 1988

Excessive Fees and Attorney Discipline: The Committee on Legal Ethics v. Tatterson

Cassandra M. Neely
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Legal Ethics and Professional Responsibility Commons, and the Legal Profession Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol90/iss2/13
EXCESSIVE FEES AND ATTORNEY DISCIPLINE: THE COMMITTEE ON LEGAL ETHICS v. TATTERSON

I. INTRODUCTION

Few areas within the legal profession are as subject to differing interpretations as the issue of what constitutes an excessive fee. No single area of attorney conduct is more important or more susceptible to public scrutiny and criticism. For example, a report by the Special Committee on Resolution of Fee Disputes of the American Bar Association notes that "disputes concerning fees are universally recognized as constituting the most serious problem in the relationship between the Bar and the public." Furthermore, as Robert H. Aronson notes in his study on fee arrangements, because lawyers are the public's means of access to our judicial system, they "owe a special ethical duty to society to ensure that the value of their services is fairly measured." In light of these considerations, it is imperative that attorneys avoid charging excessive fees and develop some standards by which to determine when fees are no longer reasonable or fair.

Recognizing the serious impact excessive fees have on the legal profession, the justice system, and the public, lawyers, judges, academicians, politicians, and private citizens have addressed the issue without reaching a clear consensus on what constitutes an excessive fee. Part of the difficulty in determining the value of legal services comes from the fact that to do so brings together two competing considerations: 1) a need to preserve the effectiveness, integrity, and independence of the profession and 2) a desire that all of society be given reasonable access to the legal system. To realize the first consideration requires that attorneys be adequately compensated for

1. ABA Special Comm. on Resolution of Fee Disputes, The Resolution of Fee Disputes, A Report and Model Bylaws 5 (undated).
their services while the second consideration mandates that attorneys' fees be fair and reasonable in light of all the facts and circumstances of each particular attorney-client relationship. Unfortunately, case law, ethical canons, and disciplinary rules on the issue are, for the most part, relatively unproductive of definitive standards by which to evaluate excessiveness. Rather, they provide useful, general guidelines which can be used on a case-by-case basis.

Committee on Legal Ethics v. Tatterson presented the West Virginia Supreme Court of Appeals its first opportunity to determine whether and under what circumstances a legal fee is so clearly excessive as to warrant disciplinary action. The court took this opportunity to identify the standard of review and criteria it would use to determine excessive fees, to reassert its authority and power to regulate and discipline attorneys, and to reaffirm its commitment to protecting the public and maintaining the integrity of the legal profession.

This Comment will identify the standard of review and criteria used to determine excessive fees, analyze applications of the standard by other state courts, and discuss the decision in Tatterson in terms of the factors the West Virginia Supreme Court of Appeals found to be relevant in assessing disciplinary sanctions.

II. STATEMENT OF THE CASE

On January 3, 1984, Mrs. Nellie Marie Herbert sought the advice of attorney Ray Michael Tatterson regarding an insurance policy of her deceased son in which she was named sole beneficiary. During this meeting, no legal fees were discussed. In fact, Tatterson indicated to Mrs. Herbert that he did not intend to charge her a fee for his assistance in obtaining the life insurance proceeds. However, approximately one month after the discussion, Tatterson entered into a written contingent-fee contract with Mrs. Herbert which provided that he was to collect all sums due her as sole beneficiary of her

4. Id.
6. Id. at 109.
deceased son's group life insurance policy. Specifically, the contract called for Tatterson to receive thirty-three percent of the gross recovery if settled without suit or forty-five percent if it was necessary to go to trial. At no time, however, was there any legitimate doubt about the receipt of the life insurance proceeds. Furthermore, the majority of work Tatterson did to assist Mrs. Herbert was completed before he prepared the written contingent-fee contract, during the period of time in which his services supposedly were being provided at no charge. Finally, at the time she signed the contract, Mrs. Herbert was seventy-three years old, a widow, in poor health, and legally blind.

The totality of Tatterson's efforts to recover the uncontested insurance proceeds for Mrs. Herbert consisted of assisting her in completing two standardized forms required by the insurance company and notarizing one of them, making two calls and writing one letter to the personnel coordinator of the son's former employer (the policy was a group life insurance policy provided by the employer), sending the coordinator a copy of the son's death certificate, and researching incontestability clauses in group life insurance policies for four hours.

Approximately four days after Mrs. Herbert signed the contingent-fee contract with Tatterson, the insurance company issued a check in the amount of $61,661.81 in payment of the life insurance proceeds and sent it to the personnel coordinator for forwarding to Mrs. Herbert. The coordinator sent the check to Tatterson. Shortly

7. Id. at 110.
8. Id.
9. Two potential problems which might have had an impact on the recovery of the proceeds never materialized. First, Mrs. Herbert initially sought Tatterson's advice because she was distrustful of her daughter, who was a co-administrator of the son's estate. However, the daughter had no legitimate claim to the insurance proceeds, a fact known to Tatterson, and never interfered or asserted any claim to the insurance proceeds. Second, the death of Mrs. Herbert's son was the result of suicide and there was an initial concern that this might affect the recovery. The insurance company and Tatterson soon determined, however, that the group life insurance policy contained a standard two-year incontestability clause. Thus, there was never any real question as to the recovery of the proceeds by Mrs. Herbert as sole beneficiary. Tatterson simply misrepresented the potential risks involved to Mrs. Herbert in order to justify the contingent-fee arrangement. Id. at 109, 112.
10. Id. at 109-11.
11. Id. at 109.
12. Id. at 111.
after receiving it, he delivered the check to Mrs. Herbert along with a handwritten accounting of his services. The accounting reflected a deduction of $20,334.63 as his fee for legal services. 13 Mrs. Herbert endorsed the check, whereupon Tatterson collected his fee and deposited the net proceeds in a bank account for her. 14

Thereafter, Mrs. Herbert filed a complaint against Tatterson with the West Virginia State Bar, claiming that Tatterson’s fee was clearly excessive. 15 The Committee on Legal Ethics (the Committee) conducted a preliminary investigation. An evidentiary hearing was held before a subcommittee, which subsequently filed a report. Thereafter, the full Committee adopted the subcommittee’s report and filed a verified complaint with the West Virginia Supreme Court of Appeals. The Committee, in its complaint, sought disbarment of Tatterson for his violation of various provisions of the disciplinary rules, including charging an excessive fee and misrepresenting information to a client. 16 The Committee felt such a severe sanction as disbarment was warranted in light of the fact that Tatterson’s violations of the disciplinary rules with respect to Mrs. Herbert occurred while another disciplinary proceeding against him was pending. 17

The court concurred with the Committee’s recommendation and, on December 19, 1986, revoked Tatterson’s license to practice law in West Virginia. 18 It held that “charging of excessive contingency

13. Id.
14. “The report of the subcommittee conducting the evidentiary hearing in this case indicated that the endorsement on the life insurance check was ‘less than a mirror image’ of Mrs. Herbert’s signature on the life insurance claim form or on the contingent-fee contract.” Id. n.3.
15. Id.
16. W. Va. Code of Professional Responsibility DR 2-106(A), & 1-102(A)(4), (6)(1983). (The W. Va. Code is modeled after the ABA Model Code of Professional Responsibility (1981)). DR 2-106(A) provides that “[a] lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.” DR 1-102(A), prohibiting certain types of misconduct, states, “[a] lawyer shall not... Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation... Engage in any other conduct that adversely reflects on his fitness to practice law.”
17. On July 12, 1984, the court suspended Tatterson’s license to practice law for six months. In that proceeding, the first such disciplinary action against him, the court sanctioned Tatterson for misrepresentation to clients and for failure to make an accounting of client funds. Committee on Legal Ethics v. Tatterson, 319 S.E.2d 381 (W. Va. 1984).
18. Tatterson, 352 S.E.2d at 116.
fee to collect undisputed proceeds of life policy while other disciplinary proceedings are pending warrants disbarment." 19

III. PRIOR LAW

A. Identifying the Standard of Review for Legal Fees

1. The Pre-Code Standard: "Exorbitant, Unconscionable or Radically Excessive"

Prior to the Model Code of Professional Responsibility, it was generally accepted that charging an excessive fee was not grounds for disciplinary sanctions without additional ethical violations being present. 20 In fact, any inquiry into the appropriateness of the amount of a legal fee was seen by many courts as an unwarranted interference with the freedom of attorneys to contract with their clients. 21 In West Virginia, the right of attorneys to recover whatever sums contracted for with clients and the validity of such contracts were provided for by statute 22 and given judicial recognition by the State’s courts. 23 Furthermore, fee contracts, whether express or implied, were not limited as to amount and could be enforced under traditional contract principles. 24

As a result of this focus on the preservation of the freedom to contract, the benchmark for triggering judicial review of fees was extremely high and narrow. For disciplinary action to be warranted, it was necessary that a fee be "so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it was called" 25 or involve other unprofessional conduct in violation of fiduciary duties (i.e., fraud). 26

19. Id. at 107.
20. See, e.g., In re Myrland, 54 Ariz. 284, 95 P.2d 56 (1939); Colorado Bar Ass’n v. Robinson, 32 Colo. 241, 75 P. 922 (1904); Grievance Comm’n v. Ennis, 84 Conn. 594, 80 A. 767 (1911); People ex rel Chicago Bar Ass’n v. Pio, 308 Ill. 128, 139 N.E. 45 (1923); In re Wiltse, 109 Wash. 261, 186 P. 848 (1920).
22. W. VA. CODE § 13 (1899); W. VA. CODE § 3772 (1906) (repealed).
2. The Model Code Standard of "Clearly Excessive": Widening the Scope of Ethical Inquiry

With the adoption of the Model Code of Professional Responsibility, many courts no longer required a showing of extreme excessiveness amounting to unconscionability or fraud in order for disciplinary action to be imposed. Both ethics committees and the judiciary began to scrutinize attorneys' fees more closely, using a standard of "illegality" or "clear excess" as the new benchmark. As a result, disciplinary authorities had only to prove that a lawyer charged a "clearly excessive" fee to demonstrate an ethical violation.

Under Disciplinary Rule (DR) 2-106(A), a fee must be either "illegal or clearly excessive" to warrant attention from disciplinary authorities. "Clearly excessive" is defined in DR 2-106(B): "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." In addition to this subjective standard, the rule also provides a noninclusive list of eight factors to be considered in determining whether a given fee exceeds what would be "reasonable" under the circumstances.

Ethical Consideration (EC) 2-18 outlines the important considerations in broader terms:

---

29. Id.
30. Id.
32. Id. The eight non-inclusive factors set forth in DR 2-106(B) to be considered as guides in determining the reasonableness of a fee include the following:
(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.
The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the result obtained.\textsuperscript{33}

Unfortunately, although the standard of "reasonableness," as determined by a lawyer of ordinary prudence, theoretically broadens the scope of ethical review for excessive fees, it also suffers from imprecision,\textsuperscript{34} offers little guidance to lawyers, and leaves a great deal of room for excessively high fees that still do not result in disciplinary action.\textsuperscript{35} As J. Lieberman comments in \textit{Crisis at the Bar}:

A fee will thus be deemed excessive only when an ordinary lawyer reviews the situation and, try though he may, cannot avoid the conclusion that the fee is excessive. If he has any doubts, the fee must be within the bounds of professionalism. . . . About all that can be safely concluded is that a grossly inflated fee is unethical.\textsuperscript{36}

Case law on the issue of excessive fees is equally unproductive of definitive standards. In comparison to other forms of judicial misconduct, few attorneys are disciplined for violation of DR 2-106.\textsuperscript{37} As a result, there are few judicial opinions interpreting the rule. Furthermore, some courts which have addressed the issue have continued to require a showing of radical excessiveness amounting to unconscionability or fraud in order for disciplinary action to be imposed, despite the Model Code's focus on reasonableness under the totality of the circumstances.\textsuperscript{38}

3. The Model Rules Standard: "Reasonable" Fees
For those courts which now adhere to the American Bar Association's Model Rules of Professional Conduct,\textsuperscript{39} the scope of in-
EXCESSIVE FEES

query into attorney-client fee arrangements has been expanded even further with the adoption of its standard which prohibits unreasonable as well as clearly excessive fees. Ethical Rule (ER) 1.5(a) stipulates that a lawyer’s fee must be "reasonable," thereby eliminating the need to show that a fee is "clearly excessive" in order to warrant disciplinary action. The rule employs a list of non-inclusive factors for determining the reasonableness of a fee identical to those set out in DR 2-106(B).

As a result of this focus on reasonableness, the benchmark for triggering judicial review of fees has been lowered and its scope broadened in those jurisdictions which have adopted the Model Rules. For disciplinary action to be warranted, it is now only necessary that a fee be unreasonable in proportion to the services performed.

B. Defining the Standard of "Clearly Excessive"

1. Where to Draw the Line

The Supreme Court of Virginia addressed the issue of what constitutes an excessive legal fee in the 1984 case of Myers v. Virginia State Bar. In Myers, a three-judge court held that on those facts and circumstances, Philip H. Myers, a state attorney, violated certain provisions of the Virginia Code of Professional Responsibility in his handling of an estate and ordered a six-month suspension of his license to practice law. In its suspension order, the court noted that among other ethical violations, Myers had charged "clearly excessive" fees for the legal services he had performed on behalf of his client. On appeal, the supreme court affirmed, holding that the three-judge court had presented ample evidence on which to conclude that Myers' fee was clearly excessive in proportion to the services rendered.

40. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 states: "A lawyer's fee shall be reasonable."
41. Id.
43. Id. at 631, 312 S.E.2d at 287.
44. Id. at 632, 312 S.E.2d at 287.
45. Id.
Initially, Myers had been employed by Ira and Ruth Erwin to prepare the couple's wills. He drafted these documents, naming himself as executor.\textsuperscript{46} Approximately nine months later, Mr. Erwin died, and Mrs. Erwin contacted Myers regarding settlement of her husband's estate. According to testimony from Mrs. Erwin and a son, who was present during the meetings with Myers, Mrs. Erwin repeatedly inquired as to the cost to settle the estate. On each occasion, Myers indicated that he had no idea what the cost would be and refused to offer even a rough estimate.\textsuperscript{47}

Subsequently, Myers listed his fee as executor as $500 in a filing with the Commissioner of Accounts but presented Mrs. Erwin with an accounting showing his fees as $4,910.\textsuperscript{48} Dissatisfied with Myers' explanation of the fee and his handling of the estate, Mrs. Erwin engaged new counsel who instituted several hearings, during which Myers sought to justify his fee claiming that the $500 was for his work on the estate while the $4,910 was his fee for non-estate work done on behalf of the Erwins.\textsuperscript{49} The three-judge court, finding Myers' contentions contradictory and unconvincing, recommended a six-month suspension of his license to practice law.

After examining the findings of the three-judge court, the supreme court held that Myers had charged and collected a "clearly excessive" fee.\textsuperscript{50} In reaching its decision, the court stressed that there was a minimal amount of work for Myers to do in connection with settling the estate.\textsuperscript{51} Evidence showed that the value of the personal property in the estate was $700. The value of the real estate was $92,000, but all that property was held by the Erwins as tenants by the entireties and passed to Mrs. Erwin upon her husband's death as an operation of law.\textsuperscript{52} Furthermore, Myers' work on the non-estate matters amounted to no more than five and one-half hours of work on out-of-state property issues and an uncertain amount

\textsuperscript{46} Id. at 633, 312 S.E.2d at 288.  
\textsuperscript{47} Id. at 634, 312 S.E.2d at 288.  
\textsuperscript{48} Id. at 634, 312 S.E.2d at 289.  
\textsuperscript{49} Id. at 637, 312 S.E.2d at 290.  
\textsuperscript{50} Id. at 640, 312 S.E.2d at 292.  
\textsuperscript{51} Id. at 639, 312 S.E.2d at 291.  
\textsuperscript{52} Id.
of time on unnecessary and unavailing medical research.\textsuperscript{53} Given these facts, the court stated that it was convinced "that Myers charged and collected a clearly excessive fee for services rendered to the Erwins" and affirmed the earlier suspension of his license.\textsuperscript{54}

The factors and analysis used by the Virginia Supreme Court in \textit{Myers} are representative of the approach employed by many courts to determine when legal fees are "clearly excessive" in light of the amount and complexity of the work involved. For example, in the case of \textit{Kirby v. Liska},\textsuperscript{55} an attorney charged a fee of $22,500 for representing a client in a quiet title suit brought by the client's brother. No novel or difficult legal matters were involved, and the case was settled due largely to the efforts of the mother of the parties. The Nebraska Supreme Court found that any fee in excess of $6,500 was unwarranted in light of these factors.\textsuperscript{56} Similarly, an attorney who claimed to have spent eight hundred hours and charged $46,500 for representing a client in a drug case which never went to trial was found to have charged a grossly excessive fee. The court determined that a competent attorney would have devoted approximately one hundred fifteen hours to the case and that the highest fee charged by the attorneys representing the client's codefendants, who went to trial, was only $12,000.\textsuperscript{57}

These cases illustrate the importance courts place on the amount and complexity of the work involved when a question arises as to the excessiveness of a fee. While the Model Code's "clearly excessive" standard leaves considerable room for excessively high fees that do not result in disciplinary action, courts appear not to hesitate to declare fees unacceptably excessive when the legal skills and professional time of the attorney are not required to resolve the client's legal problem.

\textsuperscript{53} Id.
\textsuperscript{54} Id. at 640, 312 S.E.2d at 292.
\textsuperscript{56} Id.
2. The Contingent Fee as a Violation of the "Clearly Excessive" Standard

The question of whether and under what circumstances a contingent fee is so excessive as to warrant disciplinary action was addressed by the Supreme Court of Florida, in *The Florida Bar v. Moriber.* In this case, the court suspended an attorney from the practice of law for the sole offense of charging an excessive contingent fee, holding that the fee charged was not only excessive, but "was so 'clearly excessive' as to constitute a violation of Disciplinary Rule 2-106."

Moriber entered into a written contingent-fee agreement with a client to collect all sums due the client as sole beneficiary of his mother's estate. The agreement called for Moriber to receive one-third of the gross recovery of the estate if it was settled without suit, or forty percent if it was necessary to resort to litigation. The assets of the estate consisted of $23,126.10 from mutual trust funds and $823.31 from other sources. Based on this recovery and the contingent-fee agreement, Moriber calculated his fee to be $7,983.14 and notified his client that he would forward the balance to him once the client executed a general release in favor of Moriber.

Thereafter, the Florida Bar filed a complaint. Following a judicial administrative proceeding, a referee found that the contingent-fee agreement was improper under the circumstances in that there was no real risk involved in settling the estate and that $2,500 was a reasonable fee for the services rendered. The referee ordered Moriber to reimburse the client for the difference and recommended that discipline by the court would only be warranted if he failed to make

---

59. *Id.* at 149.
60. *Id.* at 146.
61. *Id.*
62. *Id.* at 146-47.
63. *Id.* at 147.
64. *Id.*
the reimbursement. Moriber did not make the ordered reimbursement, and, in response, the referee added a forty-five day probation from practicing law onto the reimbursement order. Following this second order, Moriber still failed to make the reimbursement, and the referee recommended that he be suspended for forty-five days. At this point, the supreme court called for briefs from both sides. After reviewing the evidence, the court concluded that the contingency fee charged by Moriber was so clearly excessive that it warranted his suspension.

In undertaking its analysis to determine the excessiveness of the fee, the court noted the broad spectrum of interpretations that exists as to what constitutes excessive attorneys' fees. With this in mind, the court reviewed the services Moriber performed in settling the estate. These included, in addition to actual collection of the mutual trust funds and other cash, writing approximately seven letters, completing a few forms, and making several telephone calls. Utilizing the eight factors outlined in DR 2-106(B) as guidelines, the court determined that the settlement of the estate required very little expenditure of time, did not involve any real risk or novel or difficult legal issues, and "could have easily been performed by a layman."

As a defense to the charges of excessive fees, Moriber pointed out to the court that his client had been fully informed as to the contingent-fee arrangement and had entered into it freely. In response, the court first suggested that it was unlikely that the client was familiar with legal practices concerning fees. Furthermore, the court stated that even if the client were educated and dealing at arms length, an attorney still could be subject to disciplinary sanctions if the fees charged were "grossly disproportionate to the services rendered." On the basis of these findings, the court declared

66. Id. at 147-48.
67. Id. at 148.
68. Id. at 149.
69. Id. at 148.
70. Id.
71. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) (1981).
72. Moriber, 314 So. 2d at 148.
73. Id. at 149.
74. Id.
Moriber's use of a contingent-fee arrangement under the circumstances of the settlement of the estate to be "manifestly improper" and held that his fee was "clearly excessive," in violation of DR 2-106.

Other courts similarly have found that, in the absence of any real risk, an attorney's purported contingent fee which is grossly disproportionate to the amount of work required qualifies as a clearly excessive fee. For example, in the case of In re St. John, a New York court found an attorney's contingent fee of $33,350 for processing a widow's claim for accidental death benefits on her husband's $100,000 life insurance policy to be so excessive as to constitute an ethical violation when the matter involved a minimal amount of time and did not present any real risk or unique difficulties for the attorney. Similarly, an attorney who induced the beneficiary of a $4,000 life insurance policy to execute a fifty percent contingent-fee contract to recover the policy proceeds was found to have charged an unconscionable fee when he received $2,000 and his only real work consisted of forty-seven hours spent to locate the beneficiary, with no real legal problems involved in recovering the insurance proceeds. Likewise, a twenty-five percent contingent fee for assisting a client in obtaining fire insurance proceeds was found to be clearly excessive within the meaning of DR 2-106(A) when the matter involved an uncontested loss and the attorney's services consisted of contacting the insurer and accepting the proceeds check on behalf of the client.

The decisions in Moriber, In re St. John, In re Stafford, and Horton may be read in such a way as to infer from them that contracts for contingent fees, because they generally have a greater potential for overreaching of clients than a fixed-fee contract, will be closely scrutinized by the courts where there is a question as to their reasonableness. This close scrutiny arises from the duty of the

75. Id. at 148.
76. Id. at 149.
courts to guard against the charging and collection of clearly excessive fees, thereby fulfilling the primary purpose of attorney-disciplinary proceedings, which is to protect the public and maintain the integrity of the legal profession.

IV. ANALYSIS

The West Virginia Supreme Court of Appeals adheres to the Model Code standard of "clearly excessive" as its benchmark for imposing disciplinary sanctions. The court determines when an attorney’s fee has exceeded that standard by applying the following eight noninclusive factors set forth by DR 2-106(B):

1. The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The limitations imposed by the client or by the circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the lawyer or lawyers performing the services.
8. Whether the fee is fixed or contingent.

Using these factors as general criteria, the Supreme Court in Tatterson addressed the appropriateness and reasonableness of a contingent-fee agreement which entitled Tatterson to recover one-third of the uncontested proceeds of a life insurance policy. The court found that even though the client had consented to the arrangement, the fee was "grossly disproportionate" to the services rendered and, thus, "clearly excessive." This finding was accurate in light of the Model Code provisions for determining excessiveness and case law regarding the nature and appropriate use of contingent fees. In addition, the court held that this type of ethical violation warrants disbarment when committed while other disciplinary proceedings are pending against the same attorney for similar violations. The court based its decision to annul Tatterson’s license on

82. Tatterson, 352 S.E.2d at 107.
83. Id. at 116.
three distinct but interrelated considerations: that the fee was based on a contingent-fee contract; that it was clearly excessive; and that there was a prior disciplinary action pending.

The court first addressed the issue of whether, under the facts and circumstances of this case, the contingent-fee contract was justifiable. Although contingent fees provide an avenue to the courthouse for people who otherwise would not be in a position to seek vindication of their legal rights, they continue to generate concern within the legal community and to attract close scrutiny by the courts. The American Bar Association has acknowledged the necessity of contingent fees. Ethical Consideration 2-20 of the Code of Professional Responsibility currently provides the general guidelines for lawyers in West Virginia who enter into contingent-fee arrangements.

Generally, courts have permitted the typically elevated contingent fee only where the representation of the client involves a significant degree of real risk. "For this reason, the contingent fee is seen as a reward to the attorney for her skill, diligence, ability and experience in prosecuting doubtful cases rather than as a payment for the rendition of 'minor' services." Furthermore, because contracts for contingent fees have a greater potential for overreaching of clients than do fixed contracts, they are closely examined by the courts where there is a question as to their reasonableness. This close scrutiny arises from the duty of the courts to guard against the collection of clearly excessive fees. In so doing, the courts protect the public and maintain the integrity of the legal profession.

85. EC 2-20 provides as follows:

... Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement.

See also Tatterson, 352 S.E.2d at 113 n.8.
86. Aronson, supra note 2, at 75.
87. Id. (citing Dorr v. Camden, 55 W. Va. 226, 46 S.E. 1014 (1904)).
88. Tatterson, 352 S.E.2d at 114.
89. F. MacKINNON, CONTINGENT FEES FOR LEGAL SERVICES, 44-45 (1964).
After examining the evidence presented by the Committee in this case, the court concurred with its finding that "the full, preponderant and clear evidence shows that there never was any doubt about the receipt of the life insurance proceeds." In its analysis, the court first pointed out that the contingent-fee contract, prepared by Tatterson, itself indicated that the contingent fee was in consideration of "recovering" the life insurance proceeds, not in consideration of other legal services he provided to Mrs. Herbert. The court also concluded that any question raised by the fact that the son had committed suicide was insubstantial and unwarranted; two-year incontestability clauses in group life insurance policies are standard, and Tatterson discovered this information before preparing the written contingent-fee contract. Finally, the court gave scant consideration to Tatterson's contention that there was a potential problem due to a possible claim or interference by Mrs. Herbert's daughter. It dismissed this argument as being "ethereal at all times, not just from hindsight." Moved by these facts, the court declared that Tatterson's misrepresentations to Mrs. Herbert concerning the difficulty in obtaining the life insurance proceeds and the blatant overreaching in this case were "egregious and unconscionable."

The court next reached the question of whether, under the facts of this case, the fee charged by Tatterson was excessive for the legal services he rendered to Mrs. Herbert. At the outset, the court acknowledged the importance of determination of a proper fee as a
means to ensure that laypersons will utilize the legal system in protection of their rights and to guard against abuses of the professional relationship between lawyer and client.\footnote{96} Using the standard of "clearly excessive" and applying each of the eight factors listed in DR 2-106, the court found that Tatterson's efforts to recover the life insurance proceeds and to research the incontestability statutes involved very little expenditure of time; required very limited skills; did not preclude employment; involved an amount which was actually obtained; did not require negotiation or litigation; were not conducted under pressing time limitations; were the first professional relationship between Tatterson and Mrs. Herbert; did not bring into play any special experience, reputation or ability of Tatterson; and, finally, involved a contingent fee rather than a fixed one.\footnote{97} Having reached these conclusions, the court held that Tatterson had entered into an agreement for, charged, and collected a "clearly excessive" fee in violation of DR 2-106(A).\footnote{98}

Having determined that the fee was "clearly excessive," the court finally proceeded to determine the appropriate disciplinary sanction. Historically, the court has asserted that the principle purpose of attorney disciplinary proceedings, including disbarment, is not to punish the individual attorney but to preserve the purity of the bar and to safeguard the public's interest in the administration of justice.\footnote{99} To ensure these safeguards, constitutional authority to define, regulate and control the practice of law in West Virginia is vested in the Supreme Court of Appeals.\footnote{100} This authority includes the power to admit and disbar attorneys.\footnote{101}

In disciplinary proceedings, the court does not endeavor to establish a uniform standard of disciplinary action.\footnote{102} Instead, it de-
cides whether and/or what disciplinary action is warranted by considering the facts and circumstances in each particular case.\textsuperscript{103} However, there is one factor which the court automatically considers in any disciplinary action against an attorney. That factor is whether there has been any prior discipline for ethical violations. The court considers the prior discipline of an attorney to be a very significant factor in determining an appropriate disciplinary sanction against the same attorney in a pending disciplinary proceeding.\textsuperscript{104} The court considers prior discipline an aggravating factor "because it calls into question the fitness of the attorney to continue to practice in a profession imbued with a public trust."\textsuperscript{105}

The court began its determination of the appropriate disciplinary sanction by stating that the impropriety of the contingent-fee arrangement under the circumstances of this case and the misrepresentations as to risk used to secure the arrangement were indicative of a lack of consideration of Mrs. Herbert's interests and an abuse of the attorney's professional relationship with her.\textsuperscript{106} It then cited the fact that Tatterson's disregard of ethical standards in his dealings with Mrs. Herbert occurred while there was pending before the court another disciplinary proceeding against him involving a very similar "lack of consideration of the client's interests,"\textsuperscript{107} referring to his prior discipline for misrepresentation of facts to clients.\textsuperscript{108} Prior discipline of an attorney, the court opined, is a significant aggravating factor in a pending disciplinary action.\textsuperscript{109} The court then held that "[f]ulfillment of those objectives [protecting the public and maintaining the integrity of the legal profession] requires that one [such as the respondent] who has manifested the degree of insensitivity to ethical standards demonstrated here and in the case disposed of earlier be disbarred."\textsuperscript{110}

\textsuperscript{103.} Id.
\textsuperscript{105.} Tatterson, 352 S.E.2d at 115.
\textsuperscript{106.} Id.
\textsuperscript{107.} Id. at 116.
\textsuperscript{108.} Tatterson, 319 S.E.2d 381.
\textsuperscript{109.} Tatterson, 352 S.E.2d at 115.
\textsuperscript{110.} Id. at 116 (citing In re Teichner, 104 Ill. 2d 150, 168, 470 N.E.2d 972, 981 (1984), cert. denied, 470 U.S. 1053 (1985).
V. CONCLUSION

The Tatterson decision demonstrates the West Virginia Supreme Court of Appeals’ commitment to protecting the public and maintaining the integrity of the legal profession. Furthermore, it establishes the criteria the court will apply to future cases in which fees are a central issue and highlights the significant role that prior sanctions will play in the court’s determination of subsequent disciplinary action. Finally, the court’s close scrutiny of the contingent-fee contract in this case indicates its willingness to discipline an attorney who charges a clearly excessive fee.

Cassandra M. Neely