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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Starcher, J., concurring:

While I am joining in the decision to impose disciplinary sanctions upon the respondent attorney, Michael P. Markins, I write separately to express my preference for somewhat different sanctions – a penalty that would have required the respondent to make restitution for injuries that resulted from his conduct.

The facts in this case are well-stated in the Court's opinion and will not be repeated except to note that a victim of the respondent's conduct, the law firm of Offutt Fisher & Nord ("OFN"), suffered a significant economic loss in investigating the unlawful intrusion into its computer e-mail system. OFN was required to hire a computer systems engineer to investigate the integrity of its computer systems and to institute remedial measures. Additionally, OFN was required to expend resources with respect to the investigation and the aftermath of the discovery of the intrusion.

According to D.C. Offutt, managing partner of OFN, "There is no way to realistically quantify the overall economic loss or the overall impact it had on the firm." Offutt also stated, "The negative ramifications and effect of Markins' deliberate assaults on the firm's computer network is not completely known and will never be fully known. What is known, for certain, is that the negative ramifications of his illegal actions will continue for years to come and the stigma placed on the firm may never be completely erased."

Furthermore, the respondent's own law firm was also required to conduct an independent investigation and review its own computer system.

Rather than acknowledging and taking responsibility for his conduct, the respondent suggests that he "has suffered the most from his actions." Furthermore, the respondent attempts to excuse himself from the obligation for making restitution by pointing to Mr. Offutt's failure to quantify the amount of the injury during Mr. Offutt's testimony before the Hearing Panel Subcommittee.

Remarkably, the Lawyer Disciplinary Board discussed the significance of the injury caused by the respondent's conduct, yet failed to recommend the imposition of restitution as permitted by Rule 3.15 of the *Rules of Lawyer Disciplinary Procedure*.<sup>1</sup>

I believe that if this Court is to be guided in lawyer disciplinary matters by crafting sanctions designed to restore and maintain confidence in lawyer disciplinary procedures and in our legal system, then this Court must require lawyers who cause actual injury to make restitution for their wrongful conduct.

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<sup>1</sup>Rule 3.15 of the *Rules of Lawyer Disciplinary Procedure* state in relevant part:

**Rule 3.15. Permissible sanctions.**

A Hearing Panel Subcommittee may recommend or the Supreme Court of Appeals may impose any one or more of the following sanctions for a violation of the Rules of Professional Conduct or pursuant to Rule 3.14: (1) probation; (2) *restitution*; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment. . . .

(Emphasis added.)

For the forgoing reasons I would have preferred to remand this matter to the Lawyer Disciplinary Board with instructions to conduct further investigation into the damages incurred by the law firms of Offutt Fisher & Nord and Huddleston Bolen LLP as a result of he respondent's conduct. The Board should quantify the damages, review Mr. Markins' earnings capacity, evaluate his ability to make restitution, and recommend a payment schedule to the Court. With this information, the Court could better determine an appropriate period of suspension for Mr. Markins – whether to impose a longer or shorter suspension, taking into consideration Mr. Markins' obligation to make restitution in this matter.