STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 30th day of May, 1996, the following order was made and entered:

Lawyer Disciplinary Board,
Complainant

vs.) No. 22523

Jeffrey A. Holmstrand, a suspended member of The West Virginia State Bar, Respondent

On a former day, to-wit, May 3, 1996, came the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, by Claudia W. Bentley, Esq., its chairperson, pursuant to Rule 3.10, Rules of Lawyer Disciplinary Procedure, and presented to the Court its written recommended disposition in the above-captioned proceeding, recommending that (1) respondent's license to practice law in the State of West Virginia be suspended for a period of one year; (2) respondent undergo a psychiatric evaluation with particular emphasis on the respondent's conduct in this matter and the underlying basis for such conduct, together with other issues deemed appropriate by the evaluator; (3) respondent undergo counselling/psychotherapy during the period of suspension from a provider recommended by respondent's psychiatric evaluator with a frequency of at least one session per month or more frequently if recommended by the provider; and (4) respondent be required to petition for reinstatement.

Thereafter, on the 28th day of May, 1996, came the respondent, Jeffrey A. Holmstrand, by Kay, Casto, Chaney, Love & Wise, and Dina M. Mohler, his attorneys, pursuant to Rule 3.12, Rules of Lawyer Disciplinary Procedure, and

presented to the Court his written consent thereto. Finally, on the 30th day of May, 1996, came the Office of Lawyer Disciplinary Counsel, by Sherri D. Goodman, its Chief Counsel, pursuant to Rule 3.11, Rules of Lawyer Disciplinary Procedure, and presented to the Court its written consent thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby approve said written recommended disposition. It is therefore ordered that (1) respondent's license to practice law in the State of West Virginia be, and it hereby is, suspended for a period of one year effective on the 1st day of July, 1996; (2) respondent authorize David A. Clayman, Ph.D., and Process Strategies Institute to forward all records of his evaluation to Wayne Dickison, East Regional Hospital, North Fourth Street, Martins Ferry, Ohio 43935, and respondent undergo, at his own expense, a psychiatric evaluation with particular emphasis on the respondent's conduct in this matter and the underlying basis for such conduct, together with other issues deemed appropriate by the evaluator; (3) respondent undergo counselling/psychotherapy during the period of suspension from a provider recommended by respondent's psychiatric evaluator with a frequency of at least one session per month or more frequently if recommended by the provider; (4) respondent petition for reinstatement; and (5) respondent reimburse the Lawyer Disciplinary Board for any costs and/or expenses incurred during the investigation of this matter. Justice Recht deemed himself disqualified and did not participate in the consideration or decision of this matter.

Service of a copy of this order upon all parties shall constitute sufficient notice of the contents herein.

A True Copy

Attest: Cecil E. Ramey
Clerk, Supreme Court of Appeals

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BEFORE THE LAWYER DISCIPLINARY BOARD
OF THE
STATE OF WEST VIRGINIA

IN RE: JEFFREY A. HOLMSTRAND, a member of The West Virginia State Bar

I.D. No. 94-02-099

RECOMMENDED DECISION

FINDINGS OF FACT

The following facts were stipulated by the parties and adopted by the Hearing Panel.

Jeffrey A. Holmstrand ("Respondent" herein), is a member of The West Virginia State Bar who maintains a law practice in Ohio County, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board of The West Virginia State Bar. Respondent was admitted to The West Virginia State Bar on January 12, 1988. Respondent practiced law as an associate with the firm of Bachmann, Hess, Bachmann & Garden ("the firm" herein) in Wheeling, West Virginia, beginning in 1987. In 1991, Respondent became a partner in the firm.

Facts Applicable to Count I

On May 26, 1992, a suit was filed in the Circuit Court of Marshall County, West Virginia, styled Eileen Teeman as Attorney-in-Fact for Donald Edward Jones, Plaintiff, v. The Health Plan of the Upper Ohio Valley, Inc., Defendant, Civil Action No. 92-C-277M. Plaintiff was represented by W. Dean Hartley and Brett Jardine of Phillips, Gardill, Kaiser, Boos & Hartley, of Wheeling. The defendant, The Health Plan of the Upper Ohio Valley, Inc., hired the firm to defend the case.

Respondent undertook the defense on behalf of the firm. Removal papers were filed by Respondent on June 23, 1992, to remove the case to the United States District Court for the Northern District of West Virginia. Respondent did not file an Answer in response to the allegations of the Complaint.

On July 24, 1992, counsel for plaintiff filed a motion to remand the suit to the Marshall County Circuit Court. No response was filed by Respondent to the remand Motion as required by the Local Court Rules, if a party opposes a motion. Respondent considered filing a response but concluded that no legal basis existed to oppose the motion. By Order of August 19, 1992, the U.S. District Court remanded the civil action to the Marshall County Circuit Court.

On August 21, 1992, counsel for plaintiff moved for a default judgment against the defendant on the ground that it had failed to timely answer the plaintiff's Complaint. A hearing on the default judgment motion was held on August 31, 1992, before The Honorable John T. Madden, Circuit Court Judge. At the hearing, Respondent produced a copy of an Answer to plaintiff's Complaint bearing a copy of date stamp of the United States District Court of the Northern District of West Virginia on July 9, 1992. A copy of the Answer is attached to the original Stipulation as Exhibit "A". Respondent represented to Judge Madden that although plaintiff's counsel, Mr. Jardine, had not received the Answer and the Court docket did not show the Answer being filed, it had been filed in the United States District Court on July 9, 1992. He explained that he had hand carried it to the Clerk's office and had his copy stamped. Judge Madden took the matter under advisement.

By Memorandum Order of September 15, 1992, Judge Madden denied plaintiff's default judgment motion based upon Respondent's representations to the Court and ordered that the Answer with the Federal Court's original date stamp be filed in Marshall County as the Answer of defendant. The original date stamped Answer was not filed by Respondent.

Plaintiff's counsel persisted with the seeking of a default judgment and at a hearing on November 7, 1992, Judge Madden ordered that Respondent file the original date stamped Answer within seven days. Respondent did not do so. Respondent wrote Judge Madden on December 10,

1992, and reported that the original date stamped Answer could not be found. Judge Madden subsequently granted a default judgment to plaintiff.

Respondent never informed his client of any of the developments in the case after the civil action was removed to Federal Court. The judgment of $26,299.53 was satisfied by the firm. Of this amount, Respondent, upon his own initiative, paid $10,000.00, which would have been the firm's deductible had the claim been paid by its malpractice carrier, and paid his partnership share of the remainder.

The firm retained a documents expert to review relevant papers to determine whether the photocopied stamp on Respondent's copy of the Answer was genuine. The expert concluded that someone had machine transferred a date stamp on a pleading filed the same day in another case which Respondent was handling for the firm. Respondent acknowledges that he did not file answer in Federal or State court and that he transferred the date stamp.

Facts Applicable to Count II

On May 20, 1992, Geneva Boniey and James Boniey, by Wellsburg Attorney Frank Cuomo, filed suit against The City of Follansbee and others seeking damages for bodily injuries Mrs. Boniey sustained on May 25, 1990, when she stepped on a municipal water company manhole cover which flipped up, causing her to fall into the manhole and sustained severe injuries. The City of Follansbee's insurance carrier, CNA Insurance Companies, assigned the suit for defense to the firm, and Respondent was assigned the file. The file was mailed to the firm on June 8, 1992.

Helen McKenzie, the Pittsburgh, Pennsylvania-based CNA Senior Claims Representative, according to her contemporaneous notes in her file diary, called Respondent on August 4, 1992, to learn the status of the case. Respondent informed Ms. McKenzie that he had filed an Answer and that if the defendants did not have all the medical information, he could file Interrogatories and a

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Facts A to Count II

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Request for Production of Documents. Contrary to Respondent's representation to Ms. McKenzie, he had not filed an Answer to the plaintiff's Complaint.

On September 23, 1992, Ms. McKenzie, according to her file notes, called Respondent about the status of the case. At that time, Respondent told her he had served Interrogatories and Request for Production of Documents. Respondent had not filed any discovery documents. In fact, since no Answer had been filed to the Complaint, upon Motion for a Default Judgment by plaintiffs, since no Answer had been filed to the Complaint, upon Motion for a Default Judgment by plaintiffs, the Circuit Court of Brooke County had awarded a default judgment on liability against defendants on August 4, 1992, more than six weeks prior to the September 23rd call. Mr. Cuomo had not served Respondent or CNA with a copy of the default judgment motion and was arguably not required to do so, since Respondent had not filed a notice of appearance or other pleading.

On October 31, 1992, Helen McKenzie wrote Respondent advising that she had not received anything to confirm that the Interrogatories and Requests had been filed and insisting that he obtain the Answers to Interrogatories as soon as possible. Respondent did not respond.

According to her file diary, Helen McKenzie called Respondent on November 17, 1992, and was advised by Respondent that he had not received the Answers to Interrogatories and that he had filed a Motion to Compel. Actually, Respondent had filed nothing, and on October 29, 1992, following a writ of inquiry on damages, the Court entered a Judgment Order for $441,167.41. Mr. Cuomo did not notify Respondent or CNA of the writ of inquiry and was arguably not required to do so since Respondent had not filed a notice of appearance or other pleading. In Respondent's opinion, the judgment amount was reasonable given the plaintiffs' damages.

On December 23, 1992, Respondent informed Helen McKenzie, according to her notes, that he had not received Answers to Interrogatories yet and that the Motion to Compel had to be reset for hearing because the Judge was in trial.

Because of what CNA perceived as a lack of diligence on Respondent's part, the insurance company had the file transferred from the firm to Steptoe & Johnson in May of 1993. Steptoe & Johnson did not file a notice of substitution of counsel or otherwise inform the Court or opposing counsel of such. When the file was transferred, it contained a cover letter to the Circuit Court of Brooke County dated June 22, 1992, forwarding an Answer in the Boniey matter, and a copy of an Answer. The cover letter purported to be typed by Misti D. Miridokis, a secretary at the firm. A copy of the letter is attached to the original Stipulation as Exhibit "B".

Respondent prepared the letter and Answer sometime after June 22, 1992 and placed them in the firm's file in order to avoid detection of failure to file an Answer when the firm conducted an internal review of Respondent's files later in the year. Neither plaintiff's counsel nor the Circuit Clerk were sent the Answer. Mr. Cuomo notified CNA of the judgment in late June or early July of 1993. The new attorney filed a motion to set aside the judgment. Respondent executed an affidavit in support of this motion which stated:

> That to the best of my knowledge and belief, the answer was placed in the United States Mail on June 22, 1992, either by my secretary or by me personally.

A copy of the affidavit is attached to the original Stipulation as Exhibit "C".

Facts Applicable to Count III

In the civil action of Baum v. Roadmaster, filed on June 5, 1992, in the Circuit Court of Marshall County, West Virginia, Respondent filed a Notice of Removal of the case to the United States District Court for the Northern District of West Virginia on July 9, 1992. Respondent did not file an Answer to the plaintiff's Complaint in Baum upon its removal to the Federal Court or thereafter on behalf of his client.

On November 9, 1992, plaintiff's counsel filed "Plaintiff's Application for Default Judgment on Issue of Liability Against Allegheny." On November 12, 1992, plaintiff's counsel sent a proposed Order to the Court granting the default judgment motion with a copy going to Respondent. Respondent did not take the opportunity to respond.

Other counsel with the firm discovered the pending default judgment motion and, on December 1, 1992, filed a motion requesting leave to file an Answer, which was granted on July 20, 1993.

Count IV

The parties jointly moved for dismissal of Count IV, and the Motion was granted.

CONCLUSIONS OF LAW

The following Conclusions of Law were stipulated by the parties and adopted by the Hearing Panel.

Count I

With respect to Respondent's representation of The Health Plan of the Upper Ohio Valley, Inc., Respondent violated Rules 1.3; 1.4(a); 3.3(a)(1) and 3.3(a)(4); and 8.4© and 8.4(d) of the Rules of Professional Conduct as set forth below:

RULE 1.3 Diligence

> A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

✡ ✡ ✡

RULE 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(4) offer evidence that the lawyer knows to be false. . . .

✡ ✡ ✡

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

© Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

Count II

Respondent violated Rule 1.3, Rule 8.4© and 8.4(d), of the Rules of Professional Conduct, as set forth above.

Count III

With respect to his representation of the defendant in Baum v. Roadmaster, Respondent violated Rule 1.3 of the Rules of Professional Conduct, as set forth above.

RECOMMENDED DISCIPLINE

At issue for purposes of recommended discipline are violations of the following Rules of Professional Conduct: Rule 1.3 (3 counts), Rule 1.4(a), Rule 3.3(a)(1)(4), Rule 8.4(c)&(d) (2 counts). That the Respondent breached his professional and ethical obligations is not in dispute. The Respondent admits the same. While the apparent willingness of the Respondent to meet the charges, admitting them, is noteworthy and his explanation for the personal and professional circumstances which lead to his conduct was offered, and considered, in mitigation, there is simply no excuse for the Respondent's conduct.

The Respondent's actions directly impacted several clients as well as judicial officers, other parties in the actions and other counsel. The Respondent's actions spanned several months, and his conduct persisted in several matters, presented in this case, contemporaneously. The Respondent exacerbated his violations, permitting his conduct to escalate in an effort to hide his actions.

The violations warrant a suspension of the Respondent's license to practice law in this State. Factors were considered in mitigation relative to the period of suspension. Factors considered include the Respondent's written statement of explanation, not excuse, and his acceptance of responsibility; written statements by members of the Bar; and, the testimony of Judge Risovich. That the Responsdent made grave errors is not disputed by any person who offered evidence in mitigation. Rather, the consistent tone of that evidence was that the Respondent has talents and abilities that can benefit the profession and, thus, the public and that, while discipline is warranted, the Respondent is "worth saving".

Upon consideration of the Stipulated Findings of Fact and Conclusions of Law, and upon consideration of the evidence and argument submitted by the respective parties relative to mitigation and discipline, and any response thereto, the Lawyer Disciplinary Board, through its appointed Hearing Panel[1], recommends that the following discipline be imposed:

> one (1) year suspension of the Respondent's license to practice law; psychiatric evaluation, with particular emphasis on the Respondent's conduct in this matter, and the underlying basis for such conduct, together with other issues deemed appropriate by the evaluator; and, counselling/psychotherapy through the period of suspension by a provider recommended by the psychiatric evaluator with a frequency of at least one session per month or more frequently if and as recommended by the provider. It is further recommended that the Respondent be required to petition for reinstatement.

Dated this the 25th day of April, 1996.

Respectfully submitted,

Claudia W. Bentley
Hearing Panel Chairperson

C. Blaine Myers
Hearing Panel Member

MB-15902

[1] Sister Mona Farthing was appointed a lay member of this Panel but was recused at her request prior to the Panel's consideration of mitigation evidence. With the parties' agreement, no other lay member was appointed.