

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of November, 1996, the following order was made and entered:

Lawyer Disciplinary Board,
Complainant

vs.) No. 22447

Richard Engram, Jr., a suspended member
of The West Virginia State Bar,
Respondent

On a former day, to-wit, August 29, 1996, came the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, by Elisabeth H. Rose, 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: (1) that respondent, Richard Engram, Jr., a suspended member of The West Virginia State Bar, be indefinitely suspended; (2) that he cannot petition for reinstatement of his license to practice law in the State of West Virginia for at least three years, even if the United States District Court for the Southern District of West Virginia should reinstate his license before that period of time; and (3) that respondent present proof of his rehabilitation within the meaning set forth in In Re: Brown, W. Va. 226, 273 S.E.2d 567 (1980), in his petition for reinstatement, for violating Rules 1.3, 1.16(d) and 8.1(b), Rules of Professional Conduct, and Rule 3.20(b), Rules of Lawyer Disciplinary Procedure.

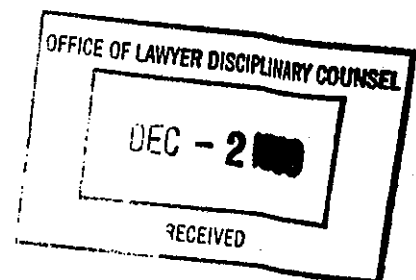
Upon consideration whereof, the Court is of opinion to and doth hereby accept the written recommended disposition. It is therefore ordered that the respondent, Richard Engram, Jr., a suspended member of The West Virginia State Bar: (1) be, and here

hereby is, indefinitely suspended; (2) he cannot petition for reinstatement of his license to practice law in the State of West Virginia for at least three years, even if the United States District Court for the Southern District of West Virginia should reinstate his license before that period of time; and (3) respondent shall present proof of his rehabilitation within the meaning set forth in In Re: Brown, W. Va. 226, 273 S.E.2d 567 (1980), in his petition for reinstatement.

Service of an attested copy of this order shall constitute sufficient notice of the contents herein.

A True Copy

Attest: *Cecilia Bowling*
Interim Clerk, Supreme Court of Appeals



FILE COPY

BEFORE THE LAWYER DISCIPLINARY BOARD
STATE OF WEST VIRGINIA

AUG 29 1996

Re: *Richard Engram, Jr.*, a suspended member of
The West Virginia State Bar

ANCIL G. RAMEY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA
93-01-429 &
93-01-140
SUP. CT. NO. 22447

HEARING PANEL SUBCOMMITTEE REPORT

There are two matters pending before this Hearing Panel Subcommittee with respect to Richard Engram, Jr. (hereinafter Respondent), a suspended member of The West Virginia State Bar.¹ The first is an action to impose reciprocal discipline (I.D. No. 93-01-429). The second is a Statement of Charges unrelated to the facts underlying the reciprocal discipline action (I.D. No. 93-01-140).

On January 17, 1996, the Office of Disciplinary Counsel, by Sherri D. Goodman, filed a "Report to the Hearing Panel Subcommittee", which requested that reciprocal discipline be imposed in I.D. No. 93-01-429 and moved that the Statement of Charges be admitted in I.D. No. 93-01-140, pursuant to Rule 2.13 of the Rules of Lawyer Disciplinary Procedure, since Respondent did not file an answer.

I. RECIPROCAL DISCIPLINE -- I.D. No. 93-01-429

A. Procedural Background

By Order of Judgment in Contempt Proceedings entered December 28, 1990, and by Memorandum Opinion entered the same date, the United States District Court for the Southern District of West Virginia barred Respondent from practicing law in the District Court, including all divisions thereof until Respondent is ordered reinstated by order of a judge or panel of judges of the United States District Court for the Southern District of West Virginia. *Loretta Howard, Administratrix v. National Labor Relations Board*, Civil Action No. 3:88-0424 (S.D. W. Va. December 28, 1990). (See

¹ Respondent was administratively suspended pursuant to an Order entered February 10, 1993, by the West Virginia Supreme Court in Case No. 2184. (See Exhibit 12, submitted by the Office of Disciplinary Counsel with its "Report to Hearing Panel Subcommittee".)

Exhibits 1 and 2.) These Orders also granted a stay of judgment until the appellate process was completed. By Order entered November 12, 1992, the stay was lifted following the Fourth Circuit Court of Appeals' affirmance. (See Exhibit 3.) The record does not show any petition by Respondent to be reinstated.

Based upon the above Orders, the Hearing Panel Subcommittee recommends to the Supreme Court of Appeals that Respondent's license to practice law be suspended indefinitely pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure.

Respondent did not inform the Office of Disciplinary Counsel of the discipline imposed by the U.S. District Court for the Southern District of West Virginia in violation of Rule 3.20(a) of the Rules of the Lawyer Disciplinary Procedure and its predecessor, Article VI, Section 28-A(b) of the West Virginia State Bar By-Laws. The United States District Court notified Chief Lawyer Disciplinary Counsel, Sherri D. Goodman, by letter dated November 30, 1993, of its disciplinary proceedings. (See *Exhibit 4.*)

By letter dated June 13, 1994, Respondent was informed by the Chairperson of the Hearing Panel Subcommittee that if Respondent wished to challenge the sanction of suspension of his law license for the same period of time as he is suspended from the U.S. District Court for the Southern District of West Virginia, he must request a hearing and file with the Office of Disciplinary Counsel a full record of the disciplinary proceedings which resulted in the disciplinary Order. (See *Exhibit 5.*) The address listed on Exhibit 5 is the most current address The West Virginia State Bar had for Respondent. No response was ever received.

B. Statement of Facts

The Order of suspension arises out of an earlier Order of Civil Contempt issued in 1988. Respondent refused to purge himself of this contempt, leading the District Court to suspend him. The facts set forth below are taken from the original Order of Contempt, entered July 8, 1988. (See *Exhibit 6.*)

Respondent represented Loretta Howard in *Loretta Howard, Administratrix of the Estate of Lorenzo C. Howard v. Jim R. Milam, et al.*, United States District Court for the Southern District of

² All exhibits were submitted by the Office of Disciplinary Counsel in its "Report to Hearing Panel Subcommittee".

West Virginia, Civil Action No. 3:84-3526, in which the National Labor Relations Board "NLRB" intervened.

In *Howard v. Milam*, the plaintiff sought damages for the wrongful death of her husband, Lorenzo C. Howard, as a result of the injuries sustained by him on February 10, 1984, while he was employed as a trainee by Tall Timber Coal Company in Pike County, Kentucky. The plaintiff alleged that Mr. Howard's death was the result of the willful, wanton, intentional, reckless and grossly negligent operation of a continuous miner by the defendant.

To defeat pending motions to dismiss, the plaintiff filed certain National Labor Relations Board documents alleged by the NLRB to be "privileged communication not subject to disclosure," which led the NLRB to seek intervention. Plaintiff had submitted these documents to support her theory of the "single employer" doctrine to provide diversity jurisdiction. On June 15, 1985, the NLRB filed interrogatories seeking to ascertain how plaintiff obtained the documents. The interrogatories which Respondent and plaintiff refused to answer are set forth below:

1. Did Loretta Howard or Richard Engram, Jr. receive from Irma B. Dillard a copy of the National Labor Relations Board Advice Memorandum captioned A.T. Massey Coal Co., Inc., et al., Case 9-CA-21448-1 through 9, 9-CA-21449-1 through 4, 9-CA-21450-1 through 9, issued April 23, 1985?
2. If the answer to interrogatory No. 1 is yes, set forth in detail when and under what circumstances did Loretta Howard or Richard Engram, Jr. receive from Irma B. Dillard the aforementioned memorandum?
3. When did Loretta Howard or Richard Engram, Jr. first become aware that the National Labor Relations Board would not authorize her/his possession or use of the document in question?
4. Did Loretta Howard or Richard Engram, Jr. instruct, advise or agree to Irma B. Dillard's concealment from the National Labor Relations Board of her intent to convey a copy of the aforementioned memorandum to either Loretta Howard or Richard Engram?
5. Did Loretta Howard or Richard Engram, Jr. use Irma B. Dillard to obtain the document in question because she/he knew that the National Labor Relations Board would not authorize Loretta Howard or Mr. Engram's possession or use of the document?
6. If Loretta Howard or Richard Engram, Jr. do not admit that the memorandum was obtained from Irma B. Dillard, state the name, address and telephone number of the person or persons from who plaintiff and/or Richard Engram obtained it, and describe in detail when and under what circumstances it was obtained?

7. Please answer interrogatories 4 and 5 in reference to the individual or individuals and circumstances described in your answer to the preceding interrogatory (No. 6)?

On December 11, 1985, the Court ordered Respondent to answer the interrogatories within 45 days. Respondent did not comply, and the NLRB filed a motion to compel plaintiff's counsel to answer. On March 3, 1986, Respondent filed objections to the interrogatories. The U.S. Magistrate deemed the objections untimely and ordered Respondent to answer the interrogatories within 10 days. Upon Respondent's appeal of this Order, the District Court, at a hearing on July 7, 1986, affirmed the Magistrate's ruling and ordered Respondent to "factually answer" the interrogatories no later than July 14, 1986. On July 14, 1986, Respondent filed objections to the interrogatories, though they were captioned "Answers." The NLRB filed a motion for an order to show cause why Respondent should not be held in contempt.

At a hearing before the District Court on August 16, 1986, on the contempt motion, Respondent failed to show a factual basis for his assertion that there was an attorney-client privilege, and he declined to present evidence *in camera*. Respondent's belated offer to withdraw the NLRB documents and substitute an opinion holding that an affiliate can bind its parent corporation was not found by the Court to be relevant to the contempt issue. The Court directed counsel to file legal memoranda with regard to his motion to reconsider the NLRB's intervention. Respondent moved to recuse the Judge, which was denied. He then moved to "transfer the action to another Judge" which was also denied. Respondent's appeal to the Fourth Circuit Court of Appeals was treated as a Petition For Writ of Mandamus and was denied. A petition for rehearing was also denied. The District Court denied plaintiff's renewed motion to dismiss, which it found to be an attempt to avoid contempt.

Because Respondent waived his right to file objections by not timely filing his response and because he thereafter never answered interrogatories, the District Court held Respondent in contempt and ordered Respondent to pay reasonable expenses incurred as a result of Respondent's refusal to obey the Court's Orders. The District Court's Order was upheld by an unpublished opinion of the Fourth Circuit Court of Appeals entered May 10, 1990 in *Howard v. Milam*, No. 88-2966. (See Exhibit 7.)

On March 29, 1988, during the pendency of *Howard v. Milam*, plaintiff filed a civil action against the NLRB pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B). On or about

June 29, 1988, the NLRB served its "First Interrogatories" upon plaintiff which were in substance the same interrogatories that plaintiff and Respondent refused to answer in *Howard v. Milam*. Plaintiff's motion for a protective order was denied and the NLRB's motion to compel plaintiff to answer was granted by the Magistrate. Plaintiff was ordered to answer the interrogatories within 15 days of the Order entered October 18, 1988. Plaintiff filed a motion to alter, amend or modify the Order, which was denied on October 31, 1988. By Order entered November 10, 1988, the District Court affirmed the Magistrate's Order and ordered plaintiff to answer the interrogatories within 15 days. The Fourth Circuit Court of Appeals denied plaintiff's appeal by Order entered February 1, 1989 (No. 88-2967).

At a hearing on November 5, 1990 before the District Court, the plaintiff, the Respondent and the NLRB, by counsel, appeared. The District Court asked the plaintiff each interrogatory to which she replied that she did not know anything about the interrogatory. The Court commented in a footnote about its disbelief of plaintiff's statements. The Respondent stated, "I have no further comment, Your Honor. We went through this before and I told you my arguments." The Court found that both the plaintiff and Respondent refused to answer the interrogatories and refused to state whether either of them knew any facts or information which would enable them to respond. The only reason advanced by Respondent for not answering was that Respondent and plaintiff "had no obligation to answer them [the interrogatories] because the NLRB had not furnished him some documents that he had, informally and not by way of formal discovery, requested by the NLRB to furnish in the case." The Court heard further argument in the contempt proceeding on December 14, 1990. The Court found that Respondent and plaintiff:

... contumaciously refused to answer the interrogatories involved and that each of them did so in bad faith and callous disregard for the authority of this court and contrary to the Federal Rules of Civil Procedure; that their failure to do so has and will continue to cause prejudice to the NLRB; that if litigants and their counsel are permitted so to behave with impunity, the administration of justice will be flouted, wherefore there is a need to impose sanctions here to deter like behavior by other litigants and counsel; and that no sanctions or measures less stringent than those imposed against Howard and Engram below will effectively suffice to cause the interrogatories here to be answered.

The Court ordered dismissal of the action as a sanction against plaintiff. The Court sanctioned Respondent by barring him from practicing law in the U.S. District Court for the Southern District of West Virginia until he is reinstated by a judge or panel of judges of the District Court.

The Order entered November 12, 1992 (*See Exhibit 3*) recites that the District Court's opinion was affirmed by the Fourth Circuit *In Re Engram*, No. 91-1722 (4th Cir. June 2, 1992). All appellate proceedings had been concluded and the time for further request for appellate relief had passed. Plaintiff and Respondent did not purge themselves of civil contempt and the stay of judgment was terminated.

C. Conclusions of Law

The Hearing Panel Subcommittee finds that Respondent violated Article VI, Section 28-A of the State Bar By-Laws, in effect until July 1, 1994, and its successor regulations, Rule 3.20 of the Rules of Lawyer Disciplinary Counsel, by not reporting the discipline imposed upon him to the Office of Disciplinary Counsel. The failure to report constitutes an aggravating factor pursuant to Rule 3.20(b).

Rule 3.20(e) provides that the Hearing Panel Subcommittee shall recommend that the same discipline be imposed as was imposed by the foreign jurisdiction unless it is determined by the Hearing Panel Subcommittee that:

- (1) the procedure followed in the foreign jurisdiction did not comport with the requirements of due process of law;
- (2) the proof upon which the foreign jurisdiction based its determination of misconduct is so infirm that the Supreme Court of Appeals cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction;
- (3) the imposition by the Supreme Court of Appeals of the same discipline imposed in the foreign jurisdiction would result in grave injustice; or
- (4) the misconduct proved warrants that a substantially different type of discipline be imposed by the Supreme Court of Appeals.

The disciplinary procedure followed in the United States District Court and the Fourth Circuit Court of Appeals comports with the requirements of the process of law, as previously found by the Supreme Court of Appeals of West Virginia. *Committee on Legal Ethics v. Geary M. Battistelli*, 185 W. Va. 109, 405 S.E.2d 242 (1991) and *Lawyer Disciplinary Board v. Edward Kohout*, No. 22629 (W. Va. 4/14/95).

The Orders, which were affirmed on appeal, provide sufficient proof. The same discipline imposed by the Supreme Court would not result in a grave injustice. An indefinite suspension is warranted by the facts. In addition, the fact that Respondent did not inform this jurisdiction of the

discipline is an aggravating circumstance, rendering the severe sanction of an indefinite suspension even more appropriate.

II. STATEMENT OF CHARGES -- I.D. No. 93-01-140

A. Procedural Background

On July 16, 1994, the Investigative Panel found probable cause to believe that ethics violations had occurred with respect to a complaint filed by Bill E. Salyers. (See *Exhibit 8*.) A Statement of Charges was signed on July 16, 1994 (see *Exhibit 9*) and forwarded to the Supreme Court of Appeals for service on August 3, 1994. (See *Exhibit 10*.) A copy of the statement of charges was enclosed with Respondent's copy of the forwarding letter. This mailing was not returned. Pursuant to Rule 2.11 of the Rules of Lawyer Disciplinary Procedure, the Clerk of the Supreme Court attempted service by certified mail which came back unclaimed. Disciplinary Counsel confirmed that the address known to the Clerk and to the Office of Disciplinary is correct. (See *Exhibit 11*.)

Pursuant to Rule 2.13, the failure to file a response to the complaint shall be deemed an admission to the factual allegations.

B. Findings of Fact

The Statement of Charges alleges that Bill E. Salyers retained Respondent to represent him in a divorce action and paid the lawyer a \$500.00 retainer plus court cost of \$120.00 on January 16, 1990. Respondent did not file the divorce action. He moved out-of-state without notifying his client and without refunding any portion of the fee or court cost.

Respondent was sent a copy of the ethics complaint on April 28, 1993 and June 10, 1993. He did not respond.

C. Conclusions of Law

The Hearing Panel Subcommittee finds that Respondent violated Rules 1.3, 1.16(d) and 8.1(b) of the Rules of Professional Conduct, which state:

Rule 1.3. Diligence.

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

Rule 1.16. Declining or Terminating Representation.

* * *

(d) Upon termination of the representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and

property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

Rule 8.1. Bar Admission and Disciplinary Matters.

An applicant for admission to the bar, or a lawyer . . . in connection with a disciplinary matter, shall not:

(b) fail to disclose . . . or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority,

D. Recommended Discipline

Taking into consideration the reciprocal discipline of an indefinite suspension which will be imposed in I.D. No. 93-01-429, the Hearing Panel Subcommittee recommends to the Supreme Court that the following sanction for the ethical misconduct pertaining to I.D. No. 93-01-140: Respondent is to be indefinitely suspended; he cannot petition for reinstatement for at least three (3) years, even if the United States District Court for the Southern District of West Virginia should reinstate Respondent before that time. In order to be reinstated, Respondent must prove that he has been rehabilitated within the meaning set forth in *In re Brown*, 166 W. Va. 226, 273 S.E.2d 567 (1980).

Elisabeth Rose

Elisabeth Rose, Chairperson
Hearing Panel Subcommittee
Lawyer Disciplinary Board

Date: *Aug. 16, 1996*

Edward M. Kowal

Edward M. Kowal, Esquire
Hearing Panel Subcommittee
Lawyer Disciplinary Board

Date: *8/19/96.*

Debra K. Sullivan

Debra K. Sullivan
Hearing Panel Subcommittee
Lawyer Disciplinary Board

Date: *8/23/96*