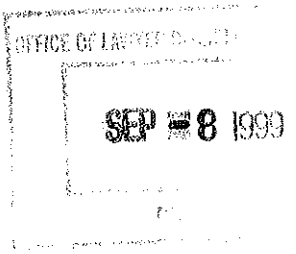
STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd day of September, 1999, the following order was made and entered:



Lawyer Disciplinary Board,
Complainant

vs.) No. 24287

James W. Keenan, an active member of
The West Virginia State Bar, Respondent

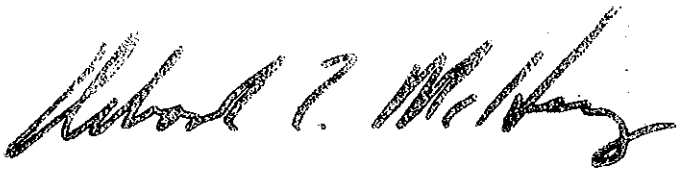
On a former day, to-wit, July 15, 1999, came the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, by Cheryl Lynne Henderson, its chairperson, pursuant to Rule 3.10 of the Rules of Lawyer Disciplinary Procedure, and presented to the Court its written recommended disposition recommending that the charge against the respondent, James W. Keenan, an active member of The West Virginia State Bar, be dismissed, with prejudice. Thereafter, on the 19th day of July, 1999, came the Office of Disciplinary Counsel, by Amie L. Johnson, Lawyer Disciplinary Counsel, pursuant to Rule 3.11 of the Rules of Lawyer Disciplinary Procedure, and presented to the Court its written consent thereto. Finally, on the 22nd day of July, 1999, came the respondent, James W. Keenan, by McQueen, Harmon & Potter, and James D. McQueen, Jr., his attorneys, pursuant to Rule 3.11 of the Rules of Lawyer Disciplinary Procedure, and presented to the Court his written consent thereto.

Upon consideratin whereof, the Court is of opinion to and doth hereby adopt the written recommended disposition of the Hearing Panel Subcommittee of the Lawyer Disciplinary Board in the above-captioned proceeding. It is therefore ordered that

the charge against the respondent be, and it hereby is, dismissed, with prejudice. Judge Risovich sitting by temporary assignment.

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

A True Copy



Attest:_____
Clerk, Supreme Court of Appeals

BEFORE THE LAWYER DISCIPLINARY BOARD
STATE OF WEST VIRGINIA

Re: JAMES W. KEENAN, an active member of The West Virginia State Bar

I.D. Nos.: 96-01-019, 96-02-147, 96-02-424, 96-02-425, 96-02-429, 97-01-099, 97-02-237 & 97-02-238

Bar No.: 1985

STATEMENT OF CHARGES

YOU ARE HEREBY notified that a Hearing Panel Subcommittee of the Lawyer Disciplinary Board will hold a hearing pursuant to Rules 3.3 through 3.16 of the Rules of Lawyer Disciplinary Procedure upon the following charges against you:

COUNT I

I.D. No. 96-01-019

1. James W. Keenan (hereinafter Respondent) is a lawyer practicing in Fayetteville, Fayette 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. Respondent was admitted to The West Virginia State Bar on January 8, 1980.

2. Johnny D. Ward wished to bring a medical malpractice action and retained an attorney to file suit and represent him in the matter. Five days before the statute of limitations was to run the attorney told Mr. Ward that he decided not to handle the case. Mr. Ward thus had only three working days to retain other counsel.

3. Mr. Ward contacted Respondent who agreed to file suit. However, Respondent advised Mr. Ward that he did not practice medical malpractice law but that he would contact a more experienced attorney to handle the case after filing suit.

4. Respondent did, in fact, file Mr. Ward's suit on March 23, 1995, in the Circuit Court of Fayette County. Thereafter, Mr. Ward made several telephone calls to Respondent regarding the status of his case. Each time, Respondent advised that he was working on locating an attorney to handle the matter.

5. Approximately three months after suit was filed, Mr. Ward met with Respondent. According to Mr. Ward, Respondent asked him at that time "if it was okay with me, he would handle [the suit] himself." Mr. Ward agreed.

6. Following that meeting, Mr. Ward called Respondent on several occasions to discuss the status of the case. Respondent never returned any of these calls. Mr. Ward then went to Respondent's office and managed to catch him in. According to Mr. Ward, Respondent advised him that the defendants had not contacted him about a settlement so he would obtain a trial date.

7. Following this meeting, Mr. Ward again made several attempts to contact Respondent about the status of his case. Respondent never returned any of these calls. Mr. Ward then called and advised that he was terminating Respondent's representation and that he would retain another attorney. Only then did Mr. Ward learn that his case had been dismissed for failure to perfect service of process within 180 days.

8. In January 1996, Mr. Ward filed an ethics complaint against Respondent. A copy of the complaint was sent to Respondent on January 29, 1996. Respondent did not timely reply to the request for information. On February 22, 1996, Respondent sent a letter acknowledging receipt of

the ethics complaint and promising to send his "verified response within the next few days." On March 25, 1996, Disciplinary Counsel sent Respondent a second request to respond to the ethics complaint.

9. By letter dated April 5, 1996, Respondent replied: "I believe I did indeed inform Mr. Ward that I would consult with Mark Moreland or perhaps others in hopes of finding an attorney who could competently pursue the claim. I have been unable to find an attorney who is interested in the case, and the matter has been dismissed under the 180 day rule. . . . I have a copy of Mr. Ward's file, and I will forward a copy of it in its entirety to you within the next two weeks." Respondent's reply was not verified.

10. By letter dated April 5, 1996, Disciplinary Counsel asked Respondent to verify his response. Although Respondent promised to forward the file by the end of April, he did not do so. On July 8, 1996, Disciplinary Counsel sent Respondent a letter asking him to please forward Mr. Ward's file to him as soon as possible. She also requested that he immediately send a verification of his response to the ethics complaint. Respondent never sent the verified response.

11. On March 13, 1998, Disciplinary Counsel contacted the Fayette County Clerk's Office. According to the Clerk, Mr. Ward's case was dismissed in October 1995 for failure to perfect service of process within 180 days as required by Rule 4(l) of the West Virginia Rules of Civil Procedure. The Clerk also indicated that no further action has been taken on the case since that time. Further, the case is now time barred according to *Davis v. Kidd*, 190 W. Va. 205, 479 S.E.2d 866 (1996) which provides that a plaintiff whose case is dismissed pursuant to Rule 4(l) can only avoid the consequences of dismissal if he can timely show good cause for not having effected service

or he refiles the action before any time defenses arise and timely effects service under the new complaint.

12. Respondent violated Rule 1.3 of the Rules of Professional Conduct which provides:

Rule 1.3. Diligence.
A lawyer shall act with reasonable diligence and promptness in representing a client.

13. Respondent violated Rule 1.4(a) of the Rules of Professional Conduct which provides:

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.

14. Respondent violated Rule 1.16(d) of the Rules of Professional Conduct which provides:

Rule 1.16. Declining or terminating representation.
(d) Upon termination of 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 other law.

15. Respondent violated Rule 8.1(b) of the Rules of Professional Conduct which provides:

Rule 8.1. Bar admission and disciplinary matters.
An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not: . . .
(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

COUNT II

I.D. No. 96-02-147

16. Paragraph No. 1 of Count I set forth above is realleged and reincorporated herein by reference.

17. On October 18, 1995, Cecil A Hill retained Respondent to represent him in his divorce. Mr. Hill paid Respondent a $2500.00 retainer. According to Mr. Hill, Respondent advised him during the initial meeting that he charged an hourly fee of $125.00 per hour. Respondent did not reduce the terms of the representation to writing.

18. Shortly after the initial meeting, Respondent prepared and filed several documents in connection with Mr. Hill's divorce including the initial Complaint, Motion for Pendente Lite Relief, Response to Family Violence Petition, and Appeal of the Family Violence Temporary Protective Order.

19. In December 1995, Mr. Hill reconciled with his wife. Thereafter, Mr. Hill called Respondent on several occasions and left messages with his secretary indicating that he: (a) wished to drop the divorce; (b) terminate Respondent's representation; (c) wanted an itemized accounting of his fee and the return of any unearned portion; and (d) wanted to speak with him about the matter. Respondent never returned any of Mr. Hill's telephone calls.

20. On January 17, 1996, Mr. Hill sent Respondent a certified letter indicating his desire to drop the divorce and asking for an itemized accounting of his fee and the return of any unearned portion.

21. By letter dated January 26, 1996, Respondent stated: "Apparently, you are unmindful or wish to ignore the understanding of my contract of engagement to the effect that the retainer was

nonrefundable. I took great pains to explain to you that the retainer would be nonrefundable and therefore, your request for a refund is denied."

22. On April 8, 1996, Mr. Hill filed an ethics complaint against Respondent. In his August 21, 1996 reply to the ethics complaint, Respondent reiterated that he had advised Respondent at their initial meeting that the $2500.00 retainer was non-refundable. According to Respondent, his comment to Mr. Hill that he charged $125.00 per hour was, in fact, an explanation of the amount that would be charged once the retainer had been exhausted. He also estimated that he worked approximately ten hours on Mr. Hill's case.

23. Respondent violated Rules 1.5(a) and (b) of the Rules of Professional Conduct which provide:

> **Rule 1.5. Fees.**
> (a) A lawyer's fee shall be reasonable. The factors to be considered 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 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 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; and
> (8) whether the fee is fixed or contingent.
> (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

24. An aggravating factor to the charge contained in Paragraph No. 23 as set forth above is that in the February 1993 of the *West Virginia Lawyer Magazine* all lawyers were advised in a *Did You Know* that "regardless of a contractual arrangement, written or oral, which designates a retainer

fee as nonrefundable, said fee remains subject to examination in light of the reasonableness standard set forth in Rule 1.5. Failure or refusal to refund a fee which has not been earned, even if initially designated as a nonrefundable retainer, is a violation of Rule 1.5."

25. By failing to provide an accounting, Respondent violated Rule 1.15(b) of the Rules of Professional Conduct, which provides, in pertinent part: [U]pon request by a client . . . [a lawyer] shall promptly render a full accounting regarding such property.

26. Respondent violated Rule 1.16(d) of the Rules of Professional Conduct which is previously set forth in Paragraph No. 14 above and is realleged and reincorporated herein by reference.

COUNT III

I.D. No. 96-02-424

27. Paragraph No. 1 of Count I set forth above is realleged and reincorporated herein by reference.

28. On September 8, 1995, Hewitt Grasty and a co-defendant were arrested and charged with three counts of aggravated robbery. Respondent was appointed to represent Mr. Grasty by the Circuit Court of Fayette County on September 20, 1995.

29. A preliminary hearing was held in Magistrate Court on October 10, 1995. Respondent met with Mr. Grasty prior to the hearing and discussed the case. At the hearing, the Magistrate found probable cause and bound Mr. Grasty over to the next term of the grand jury.

30. On January 16, 1996, Mr. Grasty was indicted on three counts of aggravated robbery. Arraignment was originally scheduled for January 26, 1996, but was continued after Respondent did not appear for the hearing.

31. On February 2, 1996, Respondent met with Mr. Grasty prior to his arraignment. During arraignment, Complainant pled not guilty, and trial was set for March 14, 1996. Immediately following arraignment, Complainant prepared a Motion for Discovery, Motion to Require the State to Disclose To Whom Any Promises of Leniency Have Been Made, Motion for Bill of Particulars, Motion for Jury Trial, and a Request for Notice of Intent to Use W. Va. Crim. Pro. Rule 12(D)(2) Evidence and served them upon the State.

32. Respondent received the State's Responses to his various Motions on February 15, 1996. Two days later, Respondent spent considerable time reviewing the Responses. Sometime after February 20, 1996, Respondent received a written plea offer from the State in which it agreed to dismiss two of the aggravated robbery counts if Mr. Grasty pled guilty to the remaining count and cooperated in the case against the co-defendant.

33. On March 11, 1996, Respondent met with Mr. Grasty prior to a hearing on the admissibility of a taped statement given to police shortly before his arrest. Later that same evening Respondent met with Mr. Grasty at the South Central Regional Jail to discuss the case and the proposed plea.

34. On March 12, 1996, Respondent spent the morning reviewing the file and preparing plea documents. The file also indicates that Respondent spoke to Mr. Grasty's sister via telephone. Later that day, Respondent met with Mr. Grasty at the South Central Regional Jail, discussed the plea with him and went over various plea documents. A notation in Respondent's file indicated that Mr. Grasty agreed to accept the plea at that time.

35. On March 13, 1996, Mr. Grasty had second thoughts about pleading guilty. Respondent then traveled to the South Central Regional Jail and discussed the case with Mr. Grasty. Following the discussion, Respondent again agreed to plead guilty.

36. On March 14, 1996, Respondent met with Mr. Grasty and discussed the proposed plea. Immediately following that conference, Mr. Grasty entered both his written and oral pleas of guilty. During the hearing, Mr. Grasty indicated his complete satisfaction with Respondent's representation to the Court. On May 2, 1996, Mr. Grasty was sentenced to 40 years in the State Penitentiary.

37. On September 23, 1996, Complainant filed an ethics complaint alleging that Respondent violated various Rules of the Rules of Professional Conduct.

38. On December 5, 1996, Disciplinary Counsel sent a copy of the Complaint to Respondent and asked him to reply to the allegations within ten days. Respondent failed to timely respond to the Complaint. On March 3, 1997, Disciplinary Counsel sent a second request asking Respondent to reply to the Complaint. Respondent submitted his reply on March 13, 1997.

39. The Investigative Panel found that Respondent did not violate the Rules of Professional Conduct with respect to his representation of Mr. Grasty.

40. Respondent violated Rule 8.1(b) of the Rules of Professional Conduct which is previously set forth in Paragraph No. 16 above and is realleged and reincorporated herein by reference.

COUNT IV

I.D. No. 96-02-425

41. Paragraph No. 1 of Count I set forth above is realleged and reincorporated herein by reference.

42. In February 1995, Woodrow W. Blackwell retained Respondent to represent him in an action to modify his child support payments and paid a retainer of $750.00. The terms of the representation were never reduced to writing by Respondent. However, Mr. Blackwell memorialized them in a letter dated February 17, 1995.

43. A Petition to Modify was filed in the Circuit Court of Fayette County on February 25, 1995. In addition to requesting a reduction of child support payments, the Petition also asked for a declaratory judgment as to the ownership, administration and subsequent disposition of the college education funds set aside in trust for his children.

44. A hearing was held on June 8, 1995, and as a result of the evidence adduced the Circuit Court of Fayette County lowered Mr. Blackwell's child support payments based on the Nelson formula to $187.00 a month from May 1, 1995, through July 31, 1995, and to $100.00 effective August 1, 1995. The Court also ordered Mr. Blackwell to undergo an evaluation by the Social Security Administration ("SSA") to determine if he was completely disabled.

45. According to Mr. Blackwell, Respondent advised him at that time that any future action that needed to be taken as a result of the SSA evaluation would be covered by the original $750.00 fee. This understanding was not reduced to writing by either party.

46. Another hearing was held on August 3, 1995, pertaining to the remaining proposed modifications. Mr. Blackwell, his ex-wife and their respective attorneys were present for the hearing

and informed the judge of an agreed upon settlement concerning all modification issues. The agreed upon modifications were reduced to Final Order dated December 4, 1995, and included two burial crypts that Mr. Blackwell asked Respondent to address with the Court subsequent to the June 8 hearing.

47. In December 1995, Mr. Blackwell asked Respondent to file a second Petition to Modify Child Support Payments based upon a recent ruling by the SSA rendering him totally disabled. Respondent agreed to represent Mr. Blackwell in the matter but did not request any additional fee. The second Petition was filed by Respondent on December 26, 1995. Thereafter, Respondent took no more action on the second Petition.

48. Between March 1 and April 26, 1996, Mr. Blackwell wrote three letters to Respondent asking for a status report. Respondent did not reply to any of these letters. Mr. Blackwell also called Respondent on the telephone on March 17, 1996, to discuss the status of his case. Respondent was unavailable at that time to talk to Mr. Blackwell and never returned the call.

49. By letter dated July 1, 1996, Mr. Blackwell asked Respondent to schedule a Court hearing on the second Petition and to notify him of such by the end of the month. When Respondent failed to comply with this request, Mr. Blackwell terminated his services by letter dated July 18, 1996. In the letter, Mr. Blackwell asked Respondent to refund the initial $750.00 fee plus $50.00 for telephone calls and postage expended in trying to get Respondent to "do [his] job." Respondent did not reply to this letter. Complaint then represented himself *pro se* through the resolution of the second Petition.

50. On September 26, 1996, Complainant filed an ethics complaint alleging that Respondent violated several Rules of Professional Conduct. On December 5, 1996, Disciplinary

Counsel sent a copy of the Complaint to Respondent and asked him to reply to the allegations within ten days. Respondent failed to reply.

51. On March 3, 1997, Disciplinary Counsel sent a second letter asking him to reply to the allegations. By letter dated March 12, 1997, Respondent advised Disciplinary Counsel that he had successfully prosecuted the first Petition and filed the Second Petition. Respondent further indicated that he "was never paid for that additional work," that he had "not billed . . . for any work done" on the second petition and that he "owed [Mr. Blackwell] no fee."

52. Respondent violated Rule 1.3 of the Rules of Professional Conduct which is previously set forth in Paragraph No. 12 above and is realleged and reincorporated herein by reference.

53. Respondent violated Rule 1.4(a) of the Rules of Professional Conduct which is previously set forth in Paragraph No. 13 above and is realleged and reincorporated herein by reference.

54. By failing to file a motion to withdraw, Respondent violated Rule 1.16(d) of the Rules of Professional Conduct which is previously set forth in Paragraph No. 14 above and is realleged and reincorporated herein by reference.

55. Respondent violated Rule 8.1(b) of the Rules of Professional Conduct which is previously set forth in Paragraph No. 15 above and is realleged and reincorporated herein by reference.

COUNT V

I.D. NO. 96-02-429

56. Paragraph No. 1 of Count 1 set forth above is realleged and reincorporated herein by reference.

57. In September 1995, James R. Sterling retained Respondent to represent him in his divorce. Mr. Sterling paid the Respondent a retainer at their initial meeting. A hearing was held on January 11, 1996, before the Family Law Master of Kanawha County. Despite appropriate service of process, Mr. Sterling's wife failed to attend the hearing or contest the divorce. The Family Law Master then granted the divorce based upon the ground of cruelty. Respondent was to prepare the Final Divorce Decree.

58. When Mr. Sterling had not received his final divorce decree by June 1996, he went to the Courthouse and learned that it had not been entered. Between June and October 1996, Mr. Sterling called Respondent's office on several occasions and spoke with Respondent or his secretary. According to Mr. Sterling, the two advised him each time that they could not locate the Decree.

59. In early November 1996, Mr. Sterling called again and spoke with Respondent's secretary who advised him that the document had been found, that it would be filed next week and that she would put a copy of it in the mail to him. Respondent did not file the document in the stated time.

60. On December 3, 1996, Mr. Sterling filed an ethics complaint against Respondent. Disciplinary Counsel sent a copy of the Complaint to Respondent on December 9, 1996, and asked him to reply to the allegations within ten days. Respondent did not respond to the request.

61. On March 3, 1997, Disciplinary Counsel sent a second request for a response to the allegations contained in the Complaint. Respondent replied on March 12, 1997. Respondent stated that he had previously prepared the Final Divorce Decree, left it in the Family Law Master's Office for signature and that it must have been misplaced.

62. According to Respondent, he then had to obtain a copy of the final hearing tape and construct another divorce decree because he "do[es] not keep copies of no-fault uncontested divorces." A letter accompanying a copy of the reconstructed Final Divorce Decree indicates that it was sent to the Family Law Master March 12, 1997, the same date on which Respondent replied to the ethics complaint.

63. Respondent violated Rule 1.3 of the Rules of Professional Conduct which is previously set forth in Paragraph No. 12 above and is realleged and reincorporated herein by reference.

64. Respondent violated Rule 8.1(b) of the Rules of Professional Conduct which is set forth in Paragraph No. 15 above and is realleged and reincorporated herein by reference.

COUNT VI

I.D. No. 97-01-099

65. Luther C. Cook was involved in a car accident and retained Respondent to represent him in a civil action brought against the other driver. Trial was held on July 18, 1996, in the Circuit Court of Fayette County. A jury found Mr. Cook 49% negligent and the other driver 51% negligent. Mr. Cook was therefore awarded $707.39.

66. On March 20, 1997, Mr. Cook filed an ethics complaint against Respondent and Clinton Gallaher, IV, the other driver's attorney. Mr. Cook had not yet received his judgment and believed that the two men had failed to timely conclude the case.

67. Immediately following the trial, an issue arose as to whether Mr. Cook would have to pay a portion of the court costs since he was adjudged 49% negligent. Mr. Gallaher believed court costs had nothing to do with whether Respondent should receive his judgment, so Mr. Gallaher prepared a judgment Order shortly after the trial and sent it to Respondent for his signature on June 26, 1996. The proposed Order called for Mr. Cook to receive $707.39. There was no mention of court costs.

68. Mr. Gallaher never received the Order back from Respondent and did not realize there was a problem until he received the ethics complaint. Mr. Gallaher then contacted Respondent, and either prepared another Order and sent it to Respondent for signature, or Respondent located the original prepared order. The Order was entered on April 15, 1997. Mr. Cook received a check from the other driver's insurance company on or about May 20, 1997, for the amount of judgment. The order which was entered makes no mention of court costs.

69. Meanwhile, Disciplinary Counsel forwarded a copy of the ethics complaint to Respondent on April 4, 1997, and asked him to reply to the allegations contained therein within ten days. Respondent did not reply to this request for information. Disciplinary Counsel then sent a second request for information on May 15, 1997. Respondent again did not reply to this request. By letter dated June 18, 1997, Disciplinary Counsel sent a third request for information.

70. In Respondent's reply dated June 19, 1997, he made no mention of Mr. Gallaher's June 26, 1996 proposed judgment Order. Respondent blamed the delay on the issue of court costs and the failure to have a resolution thereof.

71. Respondent violated Rule 1.3 of the Rules of Professional Conduct which is set forth in Paragraph No. 12 above and is realleged and reincorporated herein by reference.

72. Respondent violated Rule 8.1(b) of the Rules of Professional Conduct which is set forth in Paragraph No. 15 above and is realleged and reincorporated herein by reference.

COUNT VII

I.D. No. 97-02-237

73. Diana L. Jackson retained Respondent to represent her in a divorce action. Complainant sought the divorce on the grounds of adultery and physical abuse. On August 8, 1996, the day of the final hearing, Respondent did not subpoena any of the witnesses requested by Ms. Jackson.

74. Instead, the parties attempted to work out an agreed disposition. During negotiations, Respondent advised Ms. Jackson that if she agreed to give up any claim to alimony she would receive the deed to the house, a share in her husband's pension, payment of all past due cable bills and reimbursement of her attorney fees. Complainant accepted the settlement offer.

75. In November 1996, Ms. Jackson went to Respondent's office to review the final divorce decree. She was surprised to see that the divorce was granted based on the ground of irreconcilable differences and not adultery and physical abuse as she had requested. There was also no mention of her receiving a share of her ex-husband's pension. According to Ms. Jackson,

Respondent advised at that time that since she was divorcing her husband, she had no right to any share in his pension.

76. Between November 1996 and June 1997, Respondent only received $150.00 of the $725 her husband owed her in attorney fees and past due cable bills. She never received the deed to the house.

77. On June 2, 1997, Ms. Jackson filed an ethics complaint against Respondent. On June 27, 1997, Disciplinary Counsel sent a copy of the complaint to Respondent and asked him to reply to the allegations within ten days. Respondent did not do so. Disciplinary Counsel sent a second request for information on September 10, 1997.

78. By letter dated September 23, 1997, Respondent replied that he accurately communicated the settlement offer to Ms. Jackson, that he did not coerce her into accepting the agreement and that she accepted the proposal of her on volition. With respect to the divorce being finalized on the ground of irreconcilable differences, Respondent stated that he had explained to Ms. Jackson on numerous occasions that "the allegation and admission of irreconcilable differences does not, as a matter of law, preclude anyone from arguing inequitable conduct, including adultery, as a consideration of divorce."

79. Respondent also stated that the responsibility for preparing the deed rested with the ex-husband's attorney, Steven Vickers. Mr. Vickers died before the deed could be prepared. At a June 27, 1997 meeting with Ms. Jackson, Respondent advised that he would be willing prepare the deed but that he had not been instructed to do so. He also advised her that his duty of representation ended with the entry of the Final Divorce Decree and that he was under no duty to collect the

overdue attorney fees and cable bills unless she retained him to do so. Respondent did not address the issue of the pension.

80. According to Ms. Jackson, she had a discussion with Respondent following the filing of her ethics complaint. It is unclear if this occurred at the June 27, 1997 meeting or if it was a subsequent meeting. During this discussion, Respondent told Ms. Jackson that if she would get Disciplinary Counsel "off his back" he would get her deed and collect the attorney fees and the back cable bills.

81. By early January 1998, Ms. Jackson had received the deed to her house. On January 9, 1998, Respondent sent a letter to the ex-husband stating: "[T]he Decree has not been fulfilled in that you still owe Ms. Jackson the sum of $350.00 on the attorney fees and $250.00 for cable that she paid on your debt after the divorce. I urge you to preclude the need for any additional litigation and expense by forwarding to me a check in the amount of $575.00 made payable to Ms. Jackson for me to forward to her." The letter did not specify any time frame for payment.

82. On January 16, 1998, Ms. Jackson sent a letter to Respondent asking him to write the ex-husband another letter demanding payment within a specified time frame and to set a specific hearing date to address the issue of enforcement of the Decree. On January 23, 1998, Respondent wrote Ms. Jackson and advised, "I have no obligation to take action to enforce the terms and conditions of your decree; the letter I wrote to Mr. Jackson simply set forth your position as communicated to me. Any further action will be undertaken by me only if I am hired for that specific purpose."

83. Respondent violated Rule 1.2(a) of the Rules of Professional Conduct which provides:

Rule 1.2. Scope of Representation.

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e) and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

84. Respondent violated Rule 8.1(b) of the Rules of Professional Conduct which is previously set forth in Paragraph No. 15 above and is realleged and reincorporated herein by reference.

COUNT VIII

I.D. No. 97-02-238

85. Paragraph No. 1 of Count I set forth above is realleged and reincorporated herein by reference.

86. Respondent represented Kathryn Jean Powers with respect to her original divorce, which was granted on September 26, 1994.

87. Ms. Powers's ex-husband, Christoper A. Guevara, had been ordered to make monthly alimony payments for three years in the sum of $100. He had also been ordered to pay $1,200 to Ms. Powers as her share in his retirement.

88. Ms. Powers remarried, and Mr. Guevara ceased making alimony payments, although the divorce decree did not specify that alimony would terminate during the three-year period if she remarried. He also had not paid Ms. Powers the $1,200 and had not applied it to certain marital debts. He had instead filed for bankruptcy.

89. Ms. Power consulted Respondent in January 1996 on these two matters. He agreed to file a contempt petition with respect to the alimony and to look into the retirement payment issue. He requested and received a fee of $500.

90. Respondent failed to file an action for contempt in the Circuit Court of Fayette County. Mr. Guevara filed a petition to modify on July 10, 1996. A hearing was held before the Family Law Master on August 20, 1996, but the Family Law Master would not hear the issue of contempt.

91. Ms. Powers understood from Respondent that a hearing for contempt had been scheduled before the Circuit Court in November, 1996 and then December, 1996. She understood that both had been cancelled by Respondent.

92. Between December 1996 and May 1997, Ms. Powers called Respondent's office on several occasions and asked to speak to him about the matter. Respondent did not return any of her telephone calls. Ms. Powers also made several unsuccessful attempts to schedule an appointment with Respondent.

93. On March 11, 1997, Ms. Powers sent a certified letter to Respondent asking him to either reschedule a contempt hearing or refund her money. Respondentreceived the letter on March 14, 1997, but never sent a reply or responded to it in any manner.

94. On June 3, 1997, Ms. Powers filed an ethics complaint against Respondent. On June 27, 1997, Disciplinary Counsel sent a copy of the complaint to Respondent and asked him to reply to the allegations within ten days. Respondent did not reply.

95. On September 10, 1997, Disciplinary Counsel sent a second letter to Respondent asking him to reply to the Complaint.

96. The Family Law Master did not send a notice of recommended order until September 18, 1997. Respondent filed exceptions to the recommended order on September 26, 1997. A hearing was scheduled for October 17, 1997. The Circuit Court terminated Mr. Guevara's support obligation effective August 20, 1996.

97. Mr. Guevara still owed Ms. Powers approximately $800 in alimony payments due prior to August 20, 1996. Respondent would not assist her in collecting this amount.

98. Respondent also refused to look into the retirement payment issue. Ms. Powers relayed an offer from another local attorney to discuss the bankruptcy aspect of this issue with Respondent, but Respondent did not contact the attorney.

99. On September 23, 1997, Respondent filed his response to Ms. Powers's ethics complaint. Respondent did not explain that a contempt petition had never been filed or addressed the issue of scheduling hearings or responding to Ms. Powers's communications. Instead, he stated that: (a) he had received the Notice of Recommended Order on or about September 17, 1997; (b) he had conferred with Complainant and filed her exceptions to the recommended Order and Motion for Decretal Judgment on September 22, 1997; and (c) the matter was scheduled for hearing on October 2, 1997. By letter dated October 20, 1997, Respondent informed Disciplinary Counsel that the hearing had taken place as scheduled, and the Circuit Court had rendered a decision.

100. Respondent violated Rule 1.2(a) of the Rules of Professional Conduct which is set forth in Paragraph No. 83 above and is realleged and reincorporated herein by reference.

101. Respondent violated Rule 1.3 of the Rules of Professional Conduct which is set forth in Paragraph No. 12 above and is realleged and reincorporated herein by reference.

102. Respondent violated Rule 1.4(a) of the Rules of Professional Conduct which is set forth in Paragraph No. 13 above and is realleged and reincorporated herein by reference.

103. Respondent violated Rule 8.1(b) of the Rules of Professional Conduct which is set forth in Paragraph No. 15 above and is realleged and reincorporated herein by reference.

* * *

AGGRAVATING FACTORS

104. An aggravating factor to Counts I, IV, V, VI and VIII as set forth above is that Respondent was previously admonished in the complaint of Terry Ward on October 10, 1994, I.D. No. 88-02-120, for violating DR 6-101(A)(2) and (3) of the Code of Professional Responsibility and Rules 1.3 and 1.4(a) of the Rules of Professional Conduct.

105. An aggravating factor to Counts I, IV, V, VI and VIII as set forth above is that Respondent was admonished for violating Rules 1.3, 1.4 and 3.1 in the complaint of Virginia G. Minter on February 10, 1996, I.D. No. 94-02-055.

106. An aggravating factor to Counts I, III, IV, V, VI, VII and VIII as set forth above is that Respondent was previously warned not to neglect cases and to answer ethics complaints in a timely manner in the complaint of Cherita A. Hotelling on September 10, 1994, I.D. No. 93-02-455.

107. An aggravating factor to Counts I, IV, V, VI and VIII as set forth above is that Respondent was, in effect, cautioned on September 10, 1994 not to neglect cases in the complaints of Billy J. Cook, I.D. No. 94-02-032, and Gary M. Summers, I.D. No. 94-02-264.

108. An aggravating factor to Counts I, II and IV as set forth above is that Respondent was cautioned to use written engagement and disengagement letters concerning his scope of representation on October 19, 1996 in the complaint of Kenneth A. Culp, I.D. No. 96-03-010.

* * * * *

Pursuant to Rule 2.9(d) of the Rules of Lawyer Disciplinary Procedure, the Investigative Panel has found that probable cause exists to formally charge you with a violation of the Rules of Professional Conduct and has issued a Statement of Charges. As provided by Rules 2.10 through 2.13 of the Rules of Lawyer Disciplinary Procedure, you have the right to file a verified written response to the foregoing charges within 30 days of service of this Statement of Charges by the Supreme Court of Appeals of West Virginia. Failure to file a response shall be deemed an admission of the factual allegations contained herein.

DATED this 26th day of May, 1998.

Paul M. Friedberg, Chairperson
Investigative Panel
Lawyer Disciplinary Board

BEFORE THE LAWYER DISCIPLINARY BOARD
HEARING PANEL

In re: James W. Keenan, a member of The West Virginia State Bar

I.D. No. 95-02-442
Sup. Ct. No. 24287

FINDINGS OF FACT
CONCLUSIONS OF LAW
&
RECOMMENDED DECISION

On December 17 and 18, 1998, the Hearing Panel Subcommittee heard evidence in the above matter, and the following is its Findings of Fact, Conclusions of Law, and Recommended Decision:

FINDINGS OF FACT

1. James W. Keenan, hereinafter "the Respondent," is a lawyer practicing in Fayetteville, Fayette County, and Charleston, Kanawha 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. Respondent was admitted to the West Virginia State Bar on January 8, 1980.

2. From May 2, 1995 to November 30, 1995, the Respondent represented Helen O'Dell, hereinafter "the Complainant," in a divorce action.

3. Until the October 5, 1995 incident which is the focus of these disciplinary charges, Mr.O'Dell was satisfied with the manner in which Respondent was handling her case. Mrs. O'Dell testified that prior to October 5, 1995, during meetings with Respondent. Respondent told her she had nice legs, that she was a nice looking woman and that she was a nice looking

woman and that she shouldn't be alone. Mrs. O'Dell testified that prior to October 5, 1995, Respondent had not touched her in a way which she thought was in appropriate.

4. That on October 5, 1995, the Complainant went to Respondent's law office, she did not have an appointment. When she entered the front door of Respondent's office, he was coming out of his inner office and rounded his arms and said "come on in, honey, I've been waiting for you." It is alleged that when Complainant got up to leave, Respondent grabbed her and kissed her. He then pushed her against the wall behind his office door and began to pull at her jacket and blouse. He opened her blouse and fondled her breast. It is alleged that Complainant tried to get away, but initially could not and that she finally freed herself, opened the door and left quickly. Respondent denied these allegations. Respondent wrote to Sherri Goodman that Mrs. O'Dell initiated a kiss on the mouth and embraced him. Respondent also told Ms. Goodman that Complainant smiled and winked at him and made a comment about not taking advantage of an old woman.

5. Complaint denies that she initiated any kiss or embrace, that she winked or made the comment about being old. Mrs. O'Dell testified that after the altercation, there were also bruises on her left arm, from elbow to shoulder and on her right wrist.

6. On December 5, 1995, Respondent received a letter of discharge from J. Steven Hunter dated November 30, 1995, which letter was also signed by Complainant.

7. Respondent is charged with violating Rule 8.4(g) of the Rules of Professional Conduct, which provides:

> **Rule 8.4. Misconduct.** It is professional misconduct for a lawyer to:
> (g) have sexual relations with a client whom the lawyer personally represents during the legal representation unless a consensual sexual relationship existed between them at the commencement of the lawyer/client relationship. For purposes of this rule, "sexual relations" means sexual intercourse or any touching of the sexual or other intimate parts

of a client or causing such client to touch the sexual or other intimate parts of a lawyer for the purpose of arousing and gratifying the sexual desire of either party or as a means of abuse.

8. Respondent denies any violation of Rule 8.4(g).

9. Respondent alleges affirmatively that:

(a) any contact which occurred between Complainant and Respondent was voluntarily initiated by her, unwelcomed by him and constituted an offensive and surprising touching of him;

(b) that any contact which occurred between Complainant and Respondent was unanticipated and neither encouraged, welcomed, nor suggested by Respondent;

(c) that any contact which occurred between Complainant and Respondent was a calculated and devious act initiated by her to cover up a fraudulent concealment of marital assets which Respondent advised her had to be disclosed and to justify a change of counsel to facilitate the advancement of her fraudulent scheme in her domestic relations action;

(d) that the said fraudulent conduct was aggravated and compounded by Complainant's retaliatory motive, her own psychiatric, psychological or drug related disorder or condition, and her desire to establish a basis for a civil claim for further pecuniary gain; and

(e) that said fraudulent scheme was perpetrated throughout the remainder of her domestic relations action by giving false testimony and otherwise concealing marital assets on the record in that proceeding.

10. Respondent also affirmatively alleges that throughout his life there is no history, pattern or practice of sexual misconduct which involves the use of force, non-consensual contact or physically aggressive behavior with female clients, specifically and women generally, and Respondent categorically denies that any such conduct occurred in this instance.

11 On October 17, 1998, the parties by their respective counsel, submitted a document entitled Agreed Stipulation of Disposition which was signed by both counsel and by the Respondent and submitted to the Panel for consideration. At that time and thereafter, the panel declined to accept the same for reasons appearing on the record.

12. On December 17 and 18, 1999, an evidentiary hearing was held, at which the following witnesses appeared and gave testimony:

Philip Jarvis, M.D.
Margaret Jarvis
Helen O'Dell
J. Steven Hunter, Esquire
Judge Zane Summerfield
Doris Ann Bigley
Robert S. Sims
James W. Keenan, Esquire
Cynthia Stanton, Esquire
Steven Dreyer, Ph.D.
Gregory A. Tucker, Esquire
Charles Moses
Billie C. McCallister
Hattie Matthews
Connie Kessler
Graydon C. Ooten, Jr., Esquire

CONCLUSIONS OF LAW

1. In order to recommend the imposition of discipline of any lawyer, the allegations of the formal charge must be proved by clear and convincing evidence. Rule 3.7, RLDP.

2. In order to meet her burden of proof under Rule 8.4(g), Disciplinary Counsel must clearly and convincingly prove that Respondent had "sexual relations" with Complainant, as that term is defined within the body of the Rule, meaning that she must prove that he touched the sexual or other intimate parts of Respondent for the purpose of arousing or gratifying the sexual desire of either party or as a means of abuse.

3. The evidence as to what occurred on October 5, 1995 in Respondent's private office between Respondent and Complainant is directly in conflict, essentially a "He said, She said" situation in which the only direct evidence derives from the Respondent and the Complainant's competing versions of the events of that day.

4. Circumstantially, both parties have presented relatively credible evidence by way of "before the fact" witnesses which tends to support their competing contentions.

(a) Respondent presents the testimony of Hattie Matthews, Billie McCallister, and Connie Kessler, who were all present in his office in his reception area when Complainant arrived at and departed from his office. These witnesses offer consistent observations of both Respondent and Complainant which support Respondent's version of what occurred.

(b) Disciplinary Counsel presents the testimony of Doris Ann Bigley and Robin Simms, a niece who lived with Complainant at the time and a close friend, respectively, who testified to their observations of bruises at various times within a period stretching from the day of the incident until the date that Complainant went to the office of her subsequent lawyer,

Steven Hunter, of Lewisburg. Their testimony would tend to support the occurrence of some type of violent or forceful behavior, but they are less independent as witnesses, and Ms. Bigley admits that she has very strong feelings about sexual abuse in that she is a victim herself. Importantly, neither of the medical or counseling personnel who had an opportunity to see Complainant after the alleged event testified to any observation of bruises, and, although Complainant stated that she talked to her other private lawyer, who happens to be a prosecuting attorney, within days of the incident, neither she nor anyone else advising her took any steps to preserve evidence of the bruises or to provide verification of them by photographic evidence.

5. Circumstantially, Respondent presents relatively credible evidence of motive on the part of the Complainant, by pointing out that she was concealing a large amount of cash, initially to defraud a judgment creditor in conspiracy with her then husband, and then to hide all or part of the money from her husband during the divorce proceeding which gave rise to Respondent's representation of her. There is no dispute that Complainant and her husband had a large sum of money that they were hiding in a cash box in their home, that Complainant absconded with that money when she separated from her husband, that Complainant did not list that cash on her asset disclosure forms that are required to be filed in divorce proceedings, and that her husband and his lawyer litigated about the allegedly missing cash, long after the termination of Respondent's representation. It is also undisputed that the initial motive for concealing the cash, by both Complainant and her husband, was to defraud a judgment creditor by reason of a wrongful death suit for which they were underinsured. Also, Respondent's secretary, Connie Kessler, testified that Complainant was upset when she learned that the Asset Disclosure Form had been filed, though erroneously, in the office of the Circuit Clerk of Fayette County. Respondent's own doctor and therapist, Dr. and Mrs. Jarvis, both of whom are friends of Complainants, confirm

that as the wife of a violent alcoholic for more than 13 years, she had become pathologically affected to the extent that she could exhibit tendencies toward manipulative behavior, perhaps unconsciously, as a defense mechanism. It is the conclusion of the panel that, on balance, the evidence regarding motive or credibility of Complainant tends to preponderate in favor of the Respondent.

6. Circumstantially, and by way of character evidence, the evidence of motive on the part of the Respondent, to commit such an obviously forceful and violent act of aggression as alleged by Complainant, is very weak, if not non-existent. Judge Summerfield, Deputy Sheriff Moses, Attorney Gregory Tucker, Attorney Cynthia Stanton,; and Graydon Ooten, as well as Respondent's secretary, Connie Kessler, all support the profile established by expert witness Dr. Steven Dreyer, to the effect that Respondent may have been a womanizer, a seducer, or a flirtatious person, at worst, but he was not a violent, abusive, or forceful person who had a track record of such conduct either before or after this incident.

7. Disciplinary Counsel attempted to argue and cross-examine Respondent about other alleged incidents, but the panel did not hear any direct or circumstantial evidence to support a tendency toward aggressive, forceful, or violent attacks on women. Even the Complainant herself admitted that up until the moment of improper "sexual" contact in Respondent's private office, his behavior toward her was appropriate, notwithstanding that at the hearing she testified, inconsistently with her deposition, that he made certain statements to her that she now considers to be inappropriate.

8. Moreover, as described by Dr. Dreyer, a person prone to sexual assault or abuse, tends to carefully choose his time, his place, and his victim. As this expert testified, the incident described by Complainant just does not fit the usual picture, particularly considering the

environment of Respondent's office on the date in question and the unanticipated arrival of Complainant, coupled with Respondent's heavy schedule for that afternoon, including a planned court appearance. Overwhelmingly, the evidence simply does not support Disciplinary Counsel's contention that Respondent had either the motive or the propensity or much of an opportunity to commit a series of acts such as Complainant describes.

9. Based upon the foregoing findings and conclusions, this Panel finds that Disciplinary Counsel has not met her burden to prove by clear and convincing evidence the charge that Respondent is guilty of a violations of Rule 8.4(g).

RECOMMENDATION

Accordingly, it is the considered judgment and the recommendation of this Sub-committee of the Hearings Panel that the charge against Respondent, James W. Keenan, be dismissed, with prejudice.

Hearings Panel SubCommittee

Cheryl Lynne Henderson, Chairperson
June 30, 1999

David Romano, Member
June 30, 1999

Dr. Antonio Jones, Member
June 30, 1999