

FILE NO. _____

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against JAMES RANDALL BENHAM,
a Minnesota Attorney,
Registration No. 154726.

**STIPULATION FOR DISPENSING
WITH PANEL PROCEEDINGS,
FOR FILING PETITION FOR
DISCIPLINARY ACTION,
AND FOR DISCIPLINE**

THIS STIPULATION is entered into by and between Kenneth L. Jorgensen, Director of the Office of Lawyers Professional Responsibility, hereinafter Director, and James Randall Benham, attorney, hereinafter respondent.

WHEREAS, respondent has concluded it is in respondent's best interest to enter into this stipulation,

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the undersigned as follows:

1. It is understood that respondent has the right to have charges of unprofessional conduct heard by a Lawyers Professional Responsibility Board Panel prior to the filing of a petition for disciplinary action, as set forth in the Rules on Lawyers Professional Responsibility (RLPR). Pursuant to Rule 10(a), RLPR, the parties agree to dispense with Panel proceedings under Rule 9, RLPR, and respondent agrees to the immediate filing of a petition for disciplinary action, hereinafter petition, in the Minnesota Supreme Court.

2. Respondent understands that upon the filing of this stipulation and the petition, this matter will be of public record.

3. It is understood that respondent has certain rights pursuant to Rule 14, RLPR. Respondent waives these rights, which include the right to a hearing before a referee on the petition; to have the referee make findings and conclusions and a recommended disposition; to contest such findings and conclusions; and to a hearing before the Supreme Court upon the record, briefs and arguments. Respondent hereby admits service of the petition.

4. Respondent waives the right to answer and unconditionally admits the allegations of the petition, which may be summarized as follows:

a. On September 8, 2004, respondent was adjudged guilty of a misdemeanor in United States District Court for knowingly and willfully aiding and abetting others in causing to be withheld from a medical distributor a material fact for use in determining rights to benefits and payments under a federal health care program (Medicare), in violation of 42 United States Code § 1320a-7b(a) and 18 United States Code § 2.

5. Respondent understands that based upon these admissions, this Court may impose any of the sanctions set forth in Rule 15(a)(1) - (9), RLPR, including making any disposition it deems appropriate. Respondent understands that by entering into this stipulation, the Director is not making any representations as to the sanction the Court will impose.

6. The Director and respondent join in recommending that the appropriate discipline is a public reprimand and unsupervised probation for a term commensurate with respondent's criminal probation pursuant to Rule 15, RLPR. Respondent agrees to the imposition and payment of \$900 in costs pursuant to Rule 24, RLPR.

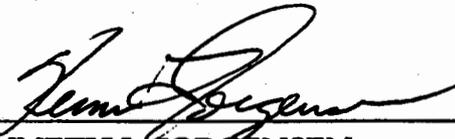
7. This stipulation is entered into by respondent freely and voluntarily, without any coercion, duress or representations by any person except as contained herein.

8. Respondent hereby acknowledges receipt of a copy of this stipulation.

9. Respondent has been advised by the undersigned counsel concerning this stipulation and these proceedings generally.

IN WITNESS WHEREOF, the parties executed this stipulation on the dates indicated below.

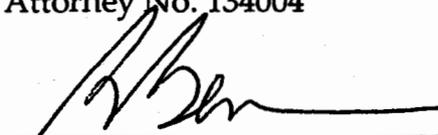
Dated: April 21, 2005.


KENNETH L. JORGENSEN
DIRECTOR OF THE OFFICE OF LAWYERS
PROFESSIONAL RESPONSIBILITY
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Dated: APRIL 21, 2005.


PATRICK R. BURNS
SENIOR ASSISTANT DIRECTOR
Attorney No. 134004

Dated: April 28, 2005.


JAMES RANDALL BENHAM
RESPONDENT
Attorney No. 154726

Dated: April 27, 2005.


WILLIAM J. WERNZ
ATTORNEY FOR RESPONDENT
Attorney No. 11599X
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DIRECTOR'S MEMORANDUM

The Director, in entering into this stipulation, is mindful of the recent stipulated disposition in *In re Moen*, 2005 WL 851936 (Minn.), where the Court ordered a suspension commensurate with the term of the lawyer's criminal probation. In recommending a public reprimand and probation in this case, the Director notes a significant point of distinction between the two cases. While *Moen* and this case both involve criminal convictions for crimes involving dishonesty, in *Moen* the lawyer was convicted of two felony counts. Here, respondent has been convicted of only a single misdemeanor offense.

There is precedent for the sanction of public reprimand in cases where an attorney has been convicted of a misdemeanor rather than a felony. In *In re Dvorak*, 554 N.W.2d 399 (Minn. 1996), it was held that a public reprimand was the appropriate sanction where the lawyer was convicted of the misdemeanor offense of filing a false tax return. In *In re West*, 499 N.W.2d 466 (Minn. 1993) and *In re Linnerooth*, 496 N.W.2d 408 (Minn. 1993), stipulations for public reprimands and probation were accepted by the Court arising out of the lawyers' misdemeanor convictions for drug possession. In light of these precedents, the nature of respondent's misconduct, and his lack of prior discipline, the Director believes that the recommended sanction is sufficient to protect the bar, the public, and the administration of justice.

K.L.J.

MEMORANDUM OF JAMES RANDALL BENHAM

Mr. Benham was convicted of the misdemeanor of knowingly and intentionally aiding and abetting others in deciding not to disclose a letter from a Medicare fiscal intermediary regarding a medical care product. Mr. Benham acknowledges that the facts necessary to this conviction must be taken as facts in this discipline proceeding. However, in determining the appropriate discipline the Court may consider circumstances surrounding the conviction. *In re Dvorak*, 554 N.W.2d 399 (Minn. 1996). Mr. Benham requests the Court's consideration of the following facts, which he believes to be undisputed.

Mr. Benham's conviction was for a misrepresentation by omission. The omission was not disclosing a material fact, namely a letter which stated in its entirety, "After careful review of your submitted brochures and monographs and a literature review, we have decided that the 'Warm-Up' therapy is investigational at this time. We will review the topic as additional studies warrant." The term "investigational" is not a Medicare term. Because the putative buyer and addressee of the letter was a governmental front organization, no one was actually deceived and no one lost money.

Misrepresentations by Minnesota lawyers that involve "any deceit" are by nature misdemeanors, at least in a litigation context. *Baker v. Ploetz*, 616 N.W.2d 263 (Minn. 2000), interpreting Minn. Stat. §§ 481.07 and 481.071. Applying this statute, the Court has imposed reprimand and probation for a misdemeanor that involves actual subversion of a criminal proceeding by "furthering a fraud on the court." *State v. Casby*, 348 N.W. 2d 736, 739 (1984); *In re Casby*, 355 N.W. 2d 704 (1984). Casby assisted her client, a criminal defendant, in impersonating a person with a more favorable criminal history.

Even a gross misdemeanor may not warrant any discipline at all. *In re Hoffman*, 379 N.W.2d 514 (Minn. 1986). Hoffman was convicted of fleeing a police officer in a motor vehicle. The Court took as mitigating a factor that is also important here: "The sanctions imposed on Hoffman by the criminal justice system, including a fine and a criminal record, are an appropriate punishment for his actions." *Id.*

Mr. Benham has practiced law for approximately twenty years without blemish, other than this matter.

For these reasons, and the reasons stated in the Director's Memorandum, Mr. Benham submits that the discipline recommended in the Stipulation is appropriate.