

ORIGINAL

BEFORE THE BOARD OF COMMISSIONERS  
ON  
GRIEVANCES AND DISCIPLINE  
OF  
THE SUPREME COURT OF OHIO

In Re: : **09-1522**

Complaint against : Case No. 08-036

Michelle A. Smithern : Findings of Fact,  
Attorney Reg. No. 0032850 : Conclusions of Law and  
 : Recommendation of the  
 : Board of Commissioners on  
 : Grievances and Discipline of  
 : the Supreme Court of Ohio

Respondent :  
Akron Bar Association :  
Relator :  
**FILED**  
AUG 24 2009 :  
CLERK OF COURT  
SUPREME COURT OF OHIO

This matter was heard on May 15, 2009, in Akron, Ohio before a panel consisting of members Judge Arlene Singer of Toledo, Martha L. Butler of Columbus, and Joseph L. Wittenberg of Toledo, Chair of the panel. None of the panel members resides in the appellate district from which this matter arose or served as members of the probable cause panel in this case. Relator was represented by Nathan A. Ray and Vincent J. Alfera. Respondent was represented by Charles E. Grisi. Respondent was present at the hearing.

**INTRODUCTION**

Respondent graduated from the University of Akron Law School and was licensed to practice law in 1986. While in law school, Respondent worked full time as a legal secretary and in her third year of law school, started working for the law firm of Buckingham, Doolittle & Burroughs (Buckingham). Respondent clerked full time for Buckingham while in law school and began working with Buckingham as an attorney in 1986. At the time of her termination

from Buckingham, she was a shareholder/partner in the firm.

In her early years at Buckingham, Respondent practiced primarily litigation law. She basically did defense work for insurance companies, product liability cases, personal injury claims, and other type cases. Eventually as Respondent became a more senior associate, she started handling domestic relation cases and that then became her area of expertise at the law firm.

Between 2004 and 2006, Respondent converted to her own use approximately \$108,000 of funds that belonged to Buckingham.

In July 2007, Respondent was indicted by the Summit County Grand Jury for one count of aggravated theft, a felony of the third degree.

The indictment set forth that, from on or about June 2004 through on or about November 2006, Respondent deprived Buckingham, Doolittle & Burroughs of U.S. currency in an amount in excess of \$100,000. On July 19, 2007, Respondent entered a plea of not guilty. On July 29, 2008, Respondent entered a plea of guilty to a lesser charge of theft, a felony of the fourth degree. On October 23, 2008, Respondent was sentenced to twelve months of incarceration which was suspended, and she was placed on five years of probation.

During the times of the thefts, Respondent was a partner at Buckingham. Clients would retain Respondent for legal representation, at which time they would pay her a retainer. The checks that were payable to Respondent individually were converted by Respondent to her own use when she needed money and were not deposited into Buckingham's IOLTA account. Respondent would endorse the checks to herself and place them into her own personal account. There are thirty-three separate allegations in the complaint where Respondent took

funds from clients and misappropriated them for her personal use.

A thirty-three count complaint was filed against Respondent by the Akron Bar Association. At the hearing count twenty-five was withdrawn by Relator and of the remaining thirty-two counts, each count alleged violations of the following disciplinary rules:

1. DR 1-102(A)(4) [conduct involving dishonesty, fraud, deceit, or misrepresentation];
2. DR 1-102(A)(6) [conduct that adversely reflects on the lawyer's fitness to practice law];
3. DR 7-101(A)(3) [intentional prejudice or damage to a client during the course of the professional relationship];
4. DR 9-102(A) and (B)(3) [preserving the identity of funds of a client].

The panel unanimously found that the evidence presented by Relator as to a violation of DR 7-101(A)(3) alleged in all thirty-two counts was not clear and convincing and therefore the violation of DR 7-101(A)(3) in all thirty-two counts was unanimously dismissed.<sup>1</sup>

#### **Findings of Fact as to Counts 1 through 33**

In her answer, Respondent admitted to every rule violation alleged in all thirty-two counts of Relator's complaint with the exception of DR 7-101(A)(3), which as previously noted, the panel unanimously dismissed. At the hearing Respondent admitted she stole money from Buckingham. (Tr. 87)

#### **Conclusions of Law**

Based on Respondent's admission to Relator's complaint and Respondent's

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<sup>1</sup> Pursuant to Gov. Bar-R. V(6)(H), the panel unanimously dismissed all alleged violations of DR 7-101(A)(3).

testimony at the hearing, the panel finds by clear and convincing evidence that Respondent with respect to all thirty-two counts of the complaint, violated the following disciplinary rules:

1. DR 1-102(A)(4) [conduct involving dishonesty, fraud, deceit or misrepresentation];
2. DR 1-102(A)(6) [conduct that adversely reflects on the lawyer's fitness to practice law];
3. DR 9-102(A) and (B)(3) [preserving the identity of funds of a client].

### **Mitigation and Aggravation**

Respondent was admitted to practice law in the State of Ohio in 1986 and has no prior disciplinary record. She has cooperated throughout these proceedings.

A licensed Psychologist, Karen T. Cimini, Ph.D., testified that she began seeing Respondent in December 2006 and has continued to see her over thirty-one times. (Tr. 33) She testified that Respondent was a workaholic in that she became fiercely competitive. She was working many hours a day, seven days a week, and immersed herself in whatever she did. (Tr. 34) The primary diagnosis by Dr. Cimini was that Respondent suffers from a gambling addiction. In addition, she was using alcohol in excess. The alcohol addiction became interactive with the gambling addiction. (Tr. 36)

Dr. Cimini recommended that Respondent get an independent assessment at an institution known as Glenbeigh and treatment if necessary. Glenbeigh is a recognized, certified hospital, which provides inpatient and outpatient treatment for different kinds of addictions. Respondent did go to Glenbeigh, which is located in Cleveland. After Respondent's experience at Glenbeigh, Dr. Cimini testified that Respondent understood her gambling addiction. In addition, she understood she had an alcohol addiction.

Dr. Cimini testified that she believes the gambling and alcohol addictions were the cause

of Respondent's stealing money from Buckingham. (Tr. 45) It is Dr. Cimini's opinion that Respondent can overcome her addictions with continued treatment.

Respondent has been attending meetings since February 2008 regarding her alcohol addiction and since January 2007 has been attending meetings regarding her gambling addiction. (Tr. 48)

At the present time Respondent works as a waitress at a restaurant in Cleveland, Ohio approximately 12 hours a day. Respondent had been the primary breadwinner for the family. Her husband is a high school football coach and she has two children in high school and a child in college. Her home is currently in foreclosure. (Tr. 43)

Character letters were written on behalf of Respondent by Judge Carol J. Dezso of the Domestic Relations Division of the Summit Court of Common Pleas, Attorney Wayne M. Jones of Akron, Ohio, and Attorney Frank G. Mazgaj of Akron, Ohio. The character letters are attached to this report.

Respondent did enter into a settlement agreement with Federal Insurance Company whereby she agreed to pay all funds back she stole. Federal Insurance Company is the company that insures Buckingham. Attached to this report is a copy of the settlement agreement.

#### **Sanction**

In determining the appropriate sanction, this panel gave consideration to the guidelines for mitigation and aggravation.

Relator recommends that Respondent receive an indefinite suspension, and that the indefinite suspension be retroactive from October 23, 2008, which is the date of her sentencing on the fourth degree felony.

Respondent urges that she be given a two year suspension with eighteen months suspended and receive credit from the date of her interim suspension, which was February 17, 2009.

From the beginning, Respondent has acknowledged the wrongfulness of her actions and has been cooperative with her former law firm, Relator, and the Akron Police Department. Respondent voluntarily ceased the practice of law on November 3, 2006, when she was terminated from Buckingham. The panel recommends that Respondent be given an indefinite suspension with credit from the date of her interim suspension on February 17, 2009, and before she can be readmitted to the practice of law, the following conditions must be complied with:

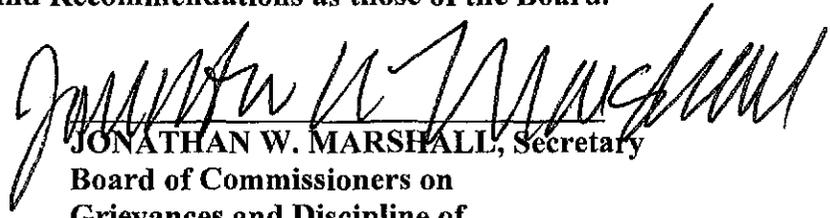
1. Respondent must enter into a contract with OLAP and be in compliance with any requirements required by OLAP;
2. Respondent must be in compliance with all terms of her probation in the criminal case;
3. Respondent must be in compliance with the settlement agreement between her and Federal Insurance Company and stay current on her payments of restitution;
4. There must be prognosis from a qualified healthcare professional or alcohol/substance abuse counselor that Respondent will be able to return to competent, ethical professional practice of law.

### **BOARD RECOMMENDATION**

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on August 14, 2009. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that Respondent, Michelle A. Smithern, be indefinitely suspended retroactive to the date of her interim suspension upon the conditions contained in the panel report. The Board

further recommends that the cost of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.**

A handwritten signature in black ink, appearing to read "Jonathan W. Marshall", is written over a horizontal line.

**JONATHAN W. MARSHALL, Secretary  
Board of Commissioners on  
Grievances and Discipline of  
the Supreme Court of Ohio**

**ROETZEL & ANDRESS**  
A LEGAL PROFESSIONAL ASSOCIATION

222 SOUTH MAIN STREET  
AKRON, OH 44308  
330.849.6682 DIRECT  
330.376.2700 MAIN  
330.376.4577 FAX  
wjones@ralaw.com

September 3, 2008

To Whom It May Concern:

I have known Michelle Smithern for nearly 30 years. During that time, I have had an opportunity to observe Michelle graduate from the University of Akron, attend law school and enter private law practice at Buckingham, Doolittle, and Burroughs. I have also watched her as a mother raise her three children into fine young adults. In fact, all of her children have been excellent students and very good athletes.

Over the years, I have known many people whom Michelle has represented in domestic relations cases, as well as other cases, and her integrity and reputation in the legal community has always been stellar. In fact, I have referred her clients who were very happy with her professionalism and client care. She is an excellent lawyer and somebody that I trust. I am an attorney, in private practice at Roetzel & Andress Co., LPA, admitted to the practice of law in 1989.

What happened to Michelle over the past few years is completely out of character. I firmly believe that she was taken in by the alcohol and gambling addictions. I know that she is very sorry and embarrassed by her actions. In the conversations that I have had with Michelle since she has been charged with this offense, she has openly, honestly and readily admitted her wrongdoing to me and has tremendous remorse for what she has done. This is a situation where a really good person did a bad thing, but is willing to make it right. No client was harmed and the firm will get its money back.

I would ask the court to consider the above facts when considering her sentence on September 10<sup>th</sup>.

Very Truly Yours,

*Wayne M. Jones*  
Wayne M. Jones

Frank G. Mazgaj  
Direct Dial 330.670.7330  
Direct Fax 330.670.7450  
E-mail FMazgaj@hcplaw.net

**H  
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& POWELL, LLP  
ATTORNEYS AT LAW

3737 Embassy Parkway  
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Akron, Ohio 44334  
Office 330.670.7300  
Fax 330.670.0977

August 29, 2008

To Whom it May Concern:

I have known Michelle Smithern for almost 30 years. I have considered Michelle and her husband, Dave, to be very good friends. In addition to being very close social friends with Michelle and Dave, I worked for 12 years with Michelle at Buckingham, Doolittle & Burroughs. I had the opportunity to see first hand Michelle's passionate commitment to the practice of law and more importantly, her clients. Michelle routinely worked 60-80 hours per week handling clients' problems at all times of the day and night. I know of her spending many holidays on the telephone trying to resolve a client's problem concerning visitation rights of his/her children. Clients always came first for Michelle.

Needless to say, I was shocked at the allegations and subsequent criminal charges filed against Michelle. Since being charged, I have talked with Michelle and her husband on several occasions. I do not know to what extent any of the allegations against her are accurate. I do know that the allegations and subsequent criminal charges have been devastating to Michelle and her family from many perspectives. Michelle is humiliated and no longer is the familiar face in her community. On a regular basis, she was extremely active with sports and other activities of her children. She is obviously embarrassed by the charges.

Financially, Michelle's family is struggling. As you are aware, literally all of their assets have been depleted. They are not receiving any significant family help. They are finding it difficult to pay many of the expenses common to all of us in raising a family. Michelle's legal career is essentially over. She realizes that her ability to practice law in any capacity in the future is lost. One positive point is that Michelle's husband and children have remained supportive of her throughout this horrible ordeal. Michelle has not blamed others for the problems she has created. In talking to her, it is obvious that she wants to try and put this matter behind her and move forward so that she can try to support her husband and children. She is extremely remorseful regarding what has happened.



August 29, 2008

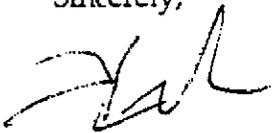
Page 2

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Michelle has a lot of good to offer society. She is an extremely bright and caring individual. Incarceration would be of no benefit to society or Michelle's family. Although there is no excuse for Michelle's alleged actions, she and her family have already suffered greatly. She desperately wants to pick up the pieces and right this terrible wrong. I respectfully ask that you give Michelle and her family that chance. I commit to the Court that I will continue to work with Michelle and her family to help them move forward.

I would be more than happy to address the Court "on the record" if it would be helpful. Thank you for your consideration.

Sincerely,



Frank G. Mazgaj

FGM/mrs

446983

## SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into this \_\_\_\_ day of \_\_\_\_\_, 2008, between Federal Insurance Company ("Federal") and Michelle A. Smithern ("Smithern"), (all collectively referred to hereinafter as the "Parties") settling all claims, controversies and disputes as well as any potential or possible claims, controversies and disputes between them arising out of the facts and circumstances relating directly or indirectly to Federal's contentions that Smithern improperly obtained monies during her employment at Buckingham, Doolittle & Burroughs, LLP (hereinafter referred to as "BDB").

**NOW THEREFORE**, in consideration of the mutual covenants contained herein, the Parties agree as follows:

1. **Warranties**

- a) The Parties warrant and represent, each to the other, that they have been fully informed and have full knowledge of the terms, conditions, and effects of this Agreement;
- b) The Parties warrant and represent, each to the other, that no promise or inducement has been offered or made except as herein set forth, and that this Agreement is executed without reliance upon any statement or representation by any other party or his agent.

2. **Consent Judgment**

As part of this Agreement, Smithern shall execute a Consent Judgment, attached hereto as Exhibit "A". The Consent Judgment will remain in full force and effect until all principal (and interest, if any) has been paid in full by Smithern, as further set forth herein.



3. **Payment to Federal**

Smithern shall pay Federal the principal sum of Ninety Two Thousand Six Hundred Seventy-Eight and 45/100 Dollars (\$92,678.45), plus interest payable at the rate of eight percent (8%) per annum, as follows:

- i) Smithern shall pay Federal monthly installments, on the 1st day of each month, beginning October 1, 2008, of not less than Five Hundred and no/100 Dollars (\$500.00) each. Smithern is allowed a five (5) day grace period for payment of each monthly payment. Should Smithern obtain employment (of any nature) wherein she is earning at least \$20,000.00 annually, her monthly payment shall immediately increase to Eight Hundred and no/100 Dollars (\$800.00);
- ii) Once Smithern has paid the total sum of \$92,678.45 (so long as she is not in default of any of her obligations contained herein), Federal will consider the Consent Judgment paid in full and shall file a satisfaction with the Court.

Each payment made shall be applied first to principal and then to any accrued interest.

No interest shall accrue so long as Smithern is not in default, as defined herein, otherwise interest shall accrue from November 3, 2006 per the Consent Judgment. Federal agrees not to execute on the Consent Judgment so long as there is no default as defined herein. If any payment required by this Agreement is not paid when due (including the grace period), then Federal may immediately execute on the Consent Judgment, at Federal's sole option without notice or demand. All payments shall be made in certified funds, money order or check only, and payable to "Federal Insurance Company". Every payment shall be timely delivered to: Andrew R. Kasle, Esq., Hazelwood & Kasle, 1310 Ohio Savings Plaza, 1801 East Ninth Street, Cleveland, Ohio 44114, or at any other place hereafter designated by Federal in writing to Smithern.

Any other payments received by Federal from and/or on Smithern's behalf shall be applied to her then unpaid balance due, including payment of Smithern's partnership share as set forth below.

**4. BDB Partnership Share**

Federal is entitled to receive payment of Smithern's full share of her partnership interest in BDB, currently valued at Twenty Seven Thousand Five Hundred and no/100 Dollars (\$27,500.00). When payment of the partnership share is received by Federal, the same shall be applied to Smithern's debt. Smithern agrees to promptly execute any and all documentation as requested by Federal for Federal to obtain payment of her partnership share from BDB.

**5. 2008 and 2009 Tax Returns**

Smithern shall pay to Federal any and all of Smithern's 2008 and 2009 federal, State of Ohio and local tax refunds amounts. Each refund payment due Federal is to be paid to Federal within fourteen (14) days of the receipt of the refund by Smithern. All tax refund monies received from Smithern shall be applied to her debt to Federal. If Smithern files a joint return, Federal is entitled to 50% of the entire joint return refund amount, if any. If Smithern files a single return (married or not married), Federal is entitled to 100% of the return refund amount.

During the pendency of this Agreement, Smithern shall timely provide Federal with a copy of each and every federal, state and local filed tax return she files, either jointly or otherwise (regardless if a refund is due or not) with the returns to be delivered to Federal within fourteen (14) days of the filing of the returns.

**6. Life Insurance**

Regarding Minnesota Life Insurance Company variable group universal life insurance policy number 0055043 (Contract No. 258466) issued to Smithern on or about January 1, 2006, and Midland National Life Insurance Company policy number 1700704721 issued to Smithern on or about June 3, 1996, (individually and collectively referred to as the "Policies"), on or before September 10, 2008, Smithern shall do the following: 1) change the primary beneficiary to show

Federal as the only named primary beneficiary on each of the Policies; 2) advise Minnesota Life Insurance Company, Midland National Life Insurance Company and Smithern's local agent(s), \_\_\_\_\_ and any other insurance agents involved with the Policies that Federal is to be provided immediate notice of: i) any attempt (by anyone) to cancel and/or terminate any of the Policies; ii) any attempt (by anyone) to change any of the Policies' primary beneficiary (after Federal is named as such); iii) any attempt (by anyone) to cash-out or otherwise dispose of any of the Policies; iv) any attempt (by anyone) to change ownership of any of the Policies; or, v) any possible lapse of any of the Policies due to unpaid premiums. Notice regarding item (v) is to be provided by Minnesota Life Insurance Company and/or Midland National Life Insurance Company to Federal at least fifteen (15) days before the actual lapse date. Federal is allowed the option-but not the obligation-of paying any of the Policies premiums due.

During the pendency of this Agreement, Smithern agrees to timely pay any and all premiums and other expenses as due on the Policies and do all other things necessary to maintain the Policies in full force and effect. Further, Smithern agrees not to: i) cancel and/or terminate the Policies; ii) remove Federal as the Policies' primary beneficiary; iii) cash-out or otherwise dispose of the Policies; or, iv) change ownership of the Policies. Semi-annually, Smithern shall provide Federal with proof of timely payment of any and all premiums and expenses concerning the Policies.

During the pendency of this Agreement, Smithern shall not purchase or maintain any policy of insurance in her name and/or for her benefit with the Chubb Group of Insurance Companies, its affiliates or subsidiaries, including but not limited to Federal.

Smithern may name the Policies' contingent beneficiaries. Federal shall only be entitled to paid under the Policies to the extent monies are owed by Smithern to Federal at the time of Smithern's death. By way of example, should Smithern owe Federal \$50,000 at the time of her

death, the first \$50,000 of insurance proceeds from these Policies shall be paid to Federal with the remainder paid to the Policies' contingent beneficiaries. In the event Federal receives payment of insurance proceeds under the Policy, any said proceeds remaining after payment of the then remaining outstanding balance due Federal pursuant to the Agreement shall be returned to Minnesota Life Insurance Company and/or Midland National Life Insurance Company, accordingly, for disbursement to any designated contingent beneficiaries.

Minnesota Life Insurance Company and Midland National Life Insurance Company are to be advised of the provisions contained herein and Smithern agrees to have written confirmations sent directly from Minnesota Life Insurance Company and Midland National Life Insurance Company to Federal's counsel acknowledging the same by October 1, 2008.

In the event Federal elects, at its sole discretion, to make any payment of premiums or other expenses due under any of the Policies, such sums shall be repaid by Smithern to Federal. The amount of monies paid by Federal towards any of the Policies will be added to the then outstanding balance due Federal from Smithern under this Agreement. Federal may, at its sole discretion and without notice, discontinue its election to make payment of premiums or other expenses due under any of the Policies.

#### **7. Default**

Smithern will be in default of this Agreement if anything listed below happens; (1) Smithern fails to do anything required under the Agreement; (2) if any of the terms and conditions set forth herein are not timely fulfilled; (3) if Federal receive actual notice of proceedings brought by or against Smithern under bankruptcy or insolvency laws, or Smithern cannot pay her debts as they fall due; (4) if any material statement or information which Smithern has given Federal to induce Federal to enter into this Agreement turns out to be false or misleading; (5) if Smithern fails to make

any payment of premiums or other expenses due under any of the Policies and/or otherwise allows the insurance coverage under the Policies to lapse; and, (6) if any payment due under this Agreement is not timely received by Federal. If there is a default, Federal may immediately execute on the Consent Judgment <sup>MS</sup> and/or foreclose upon the mortgage without notice. Failure on Federal's part to exercise any right in the event of any one default shall not constitute a waiver of such right if there is a later default.

**8. Agreement Binding**

This Agreement shall be binding upon Smithern, her heirs, personal representatives, executors, administrators, successors and assigns.

**9. Commercial Transaction**

This Agreement is made in connection with a settlement between the Parties and is not being made in connection with a consumer transaction and arises out of an obligation owed by Smithern to Federal.

**10. Pre-Payment**

Smithern shall have the right to prepay all or any portion of the indebtedness evidenced by this Agreement without premium or penalty.

**11. Waiver**

No delay on Federal's part in exercising any power or right as set forth in this Agreement and/or the Consent Judgment shall operate as a waiver of any said power or right.

**12. Change of Address/Employment**

Smithern shall keep Federal apprised of any changes in her current address and place of employment (including salary changes) by written notice to Federal within five (5) days of any such change. Every notice Smithern is required to give to Federal under this Agreement shall be

timely delivered to: Andrew R. Kastle, Esq., Hazelwood & Kastle, 1310 Ohio Savings Plaza, 1801 East Ninth Street, Cleveland, Ohio 44114, or at any other place hereafter designated by Federal in writing to Smithern.

**13. Entire Agreement**

This Agreement constitutes the entire agreement among the Parties pertaining to matters herein contained. The article headings contained herein have been inserted for convenient reference only and shall not in any way affect the construction, interpretation or meaning of the text.

If any provision herein is prohibited by Ohio law or any other jurisdiction held to be applicable, such provision shall be limited to the extent necessary so that it does not render this Agreement invalid, unlawful, or unenforceable in whole or in part under such laws; all other provisions of this Agreement shall remain in full force and effect.

**14. Liability Not Admitted**

It is understood and agreed that this Agreement is the compromise and settlement of disputed claims, that the payments herein are not made to be construed as any admission of liability by Smithern and Smithern herein denies liability therefor and intends merely to avoid litigation and buy Federal's peace.

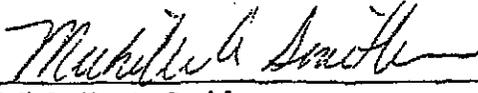
**15. Counterpart**

This Agreement may be executed in counterpart by the Parties with the copies so executed constituting one complete Agreement.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement

on the day and year above written.

Date: 9/2/08

  
\_\_\_\_\_  
Michelle A. Smithern

Federal Insurance Company

Date: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

**DOCUMENT NOT SCANNED  
PURSUANT TO SUPERINTENDENCE  
RULE 45**